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COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By .....

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In Re the ESTATE OF WILLARD F. JOHNSON, Deceased.

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**APPELLANTS' OPENING BRIEF**

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JOHN M. RILEY, III, WSBA #10804  
MATTHEW W. DALEY, WSBA # 36711  
WILLIAM O. ETTER, WSBA #42389  
WITHERSPOON · KELLEY  
422 West Riverside Avenue, Suite 1100  
Spokane, Washington 99201-0300  
Phone: (509) 624-5265

Counsel for the Appellants

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## I. INTRODUCTION & RELIEF REQUESTED

This appeal arises from a Stevens County Superior Court order admitting a lost will to probate. The trial court's decision to admit that lost will to probate misapplied established Washington State law and improperly relied upon evidence that was precluded by Washington's dead man's statute.

The Petitioner, Colleen Wynecoop, sought to prove the existence of a lost will, 25 years after the purported will was said to have been executed and 25 years after the putative testator, Willard F. Johnson, passed away and long after both of the purported will's witnesses had passed away.

Ms. Wynecoop presented a photocopy of the purported will and declaration testimony from two witnesses – herself and an attorney who had no involvement with the purported will's execution. However, nothing that Ms. Wynecoop presented even approaches proof by clear, cogent and convincing evidence that (i) the purported will was executed by Mr. Johnson; or (ii) the document in question was an authentic copy of the purported will. None of Ms. Wynecoop's witnesses actually witnessed the purported will's execution, and none of Ms. Wynecoop's witnesses had any knowledge regarding the purported will's testamentary scheme.

To compound the error, the trial court improperly considered Ms. Wynecoop's declaration regarding Mr. Johnson's wishes and regarding Mr. Johnson's statements. Ms. Wynecoop's declaration is exactly the type of self-serving testimony that is precluded by Washington's dead man's statute.

In short, Ms. Wynecoop failed to carry her burden to prove the execution and authenticity of the purported lost will by clear, cogent and convincing evidence, and the trial court improperly considered evidence that is barred by the dead man's statute and erred in admitting the purported lost will to probate. The Appellants, Cheryl Landstrom, Terry Johnson, Scott Johnson, Dawn Tomek and Judith Wiener, therefore, respectfully ask the Court to reverse the trial court's decision.

## **II. STATEMENT OF THE ISSUES & ASSIGNMENTS OF ERROR**

1. Unless a party makes a specific request otherwise, RCW 11.96A.100(8) requires all issues (both of fact and of law) to be resolved in an initial hearing. Neither Ms. Wynecoop nor any of the Appellants made such a request. Following the initial hearing, the trial court ruled that Ms. Wynecoop had failed to meet her burden to admit a purported "lost will" to probate. Did the trial court err in allowing Ms. Wynecoop a second opportunity to meet her evidentiary burden rather than dismissing the petition?

2. Admission of a "lost will" to probate requires the petitioner to present clear, cogent and convincing evidence of the purported will's valid execution. Ms. Wynecoop failed to produce any witness who was present when the purported will was executed. Yet the trial court made findings of fact that concluded that Ms. Wynecoop had established that a will was validly executed. CP 180-185 (Findings of Fact A, E, G, K, L, M, O & Q). Are the trial court's findings of fact erroneous, and did the trial court err in admitting the "lost will" to probate?

3. RCW 5.60.030, Washington's dead man's statute, precludes an interested party from testifying regarding any conversations or transactions with a decedent. The dead man's statute applies in lost will cases. The trial court permitted Ms. Wynecoop to offer substantial testimony regarding the circumstances surrounding the purported will's execution and regarding the claimed authenticity of Mr. Johnson's signature on the purported will. In fact, nearly all of the trial court's findings of fact are based upon testimony from Ms. Wynecoop that should have been precluded by the dead man's statute. Was the trial court's decision to allow Ms. Wynecoop's testimony in error, and were the findings of fact based upon that testimony in error?

4. Admission of a "lost will" to probate requires the petitioner to present clear, cogent and convincing evidence that the proffered document

is an authentic copy of a valid will. Ms. Wynecoop failed to produce sufficient evidence that the purported "lost will" was authentic. Yet the trial court made findings of fact that concluded that Ms. Wynecoop had proffered an authentic photocopy of a validly executed will. CP 180-185 (Findings of Fact A, B, C, E, G, J, K, L, M, N & R). Are the trial court's findings of fact erroneous, and did the trial court err in admitting the "lost will" to probate?

Did the trial court, therefore, err in admitting the "lost will" to probate?

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

#### **A. FOR 25 YEARS, MS. WYNECOOP ACKNOWLEDGED THAT MR. JOHNSON DIED INTESTATE.**

Willard F. Johnson died on June 18, 1990. CP 3. He was survived by his five children – the Appellants. CP 4. At the time of his death, Mr. Johnson was renting a room in Colleen D. Wynecoop's house. CP 21, 78.

No probate was opened upon Mr. Johnson's death. Ms. Wynecoop came forward with no will – or lost will. In fact, Ms. Wynecoop took no steps to assert a purported lost will until June 2015, when she initiated this action. CP 68; VRP 169-170. In an attempt to explain 25 years of silence, Ms. Wynecoop claimed that she did not raise the purported lost will at the

time of Mr. Johnson's death because she believed him to have "no substantial known assets." CP 6; VRP 148-149, 155-156.<sup>1</sup>

**B. MS. WYNECOOP IDENTIFIED AN OPPORTUNITY TO PROFIT FROM MR. JOHNSON'S ESTATE, AND INITIATED THIS ACTION TO CAPITALIZE ON THAT OPPORTUNITY.**

Unbeknownst to any of the Appellants, Ms. Wynecoop had claimed rights, as Mr. Johnson's purported heir, to a parcel of property in North Dakota. CP 165-170.<sup>2</sup> Ms. Wynecoop had, in 2011 (and again without any notice to the Appellants) received approximately \$32,000 from an oil and gas lease on that property. CP 165-166, 169-170. Ms. Wynecoop filed this action at the oil company tenant's insistence. CP 169-170. But for that oil company's request, the Appellants may never have been notified that Ms. Wynecoop was claiming rights as their grandmother's and their father's lawful heir.

As Mr. Johnson's natural heirs, the Appellants were notified of Ms. Wynecoop's efforts to admit the purported lost will to probate. *See* CP 68-69; RCW 11.20.070(1). That was when the Appellants first learned: (i) of

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<sup>1</sup> Despite Ms. Wynecoop's assertion that she took no prior action because she believed that Mr. Johnson died without assets, Ms. Wynecoop had (as early as 1992) claimed to be Mr. Johnson's heir and received rental income from a piece of property belonging to Mr. Johnson. CP 164-170. She did all of this without any notice to the Appellants. *Id.*

<sup>2</sup> Technically, Ms. Wynecoop claimed rights to that property as an heir of Judith Thorstad Johnson, Mr. Johnson's long-dead mother (and the Appellants' grandmother). CP 164-165.

their late father's oil and mineral rights; and (ii) that Ms. Wynecoop claimed to be their father's (and their grandmother's) heir. CP 68; *see also* VRP 166-170.

**C. THE APPELLANTS OBJECTED TO MS. WYNECOOP'S PETITION, AND THE COURT HELD A HEARING.**

On or about August 19, 2015, the Appellants filed an answer and objection to Ms. Wynecoop's petition. CP 37-40. That answer and objection disputed the validity of the purported "lost will" that Ms. Wynecoop was attempting to admit to probate. *Id.*

On September 2, 2015, the trial court conducted a hearing pursuant to Washington's Trust and Estates Dispute Resolution Act ("TEDRA"). VRP 17-81. All parties appeared through counsel, and the parties presented their arguments to the Court. *See id.*

**D. THE TRIAL COURT ISSUED A LETTER OPINION, YET REFUSED TO DENY MS. WYNECOOP'S PETITION.**

On September 17, 2015, the trial court issued a letter opinion. CP 121-23. That letter opinion held that Ms. Wynecoop had failed to meet her burden to prove the purported lost will's validity. *Id.*

Consistent with TEDRA's procedural requirements, the Appellants filed a notice of presentment and a proposed order denying Ms. Wynecoop's petition. CP 124-129. Ms. Wynecoop filed a memorandum objecting to the Appellants' notice of presentment. CP 130-143.

The noted presentment hearing occurred on October 20, 2015. VRP 82-90. The trial court refused to enter the Appellants' proposed order. *Id.* Instead, the trial court ordered an evidentiary hearing, thereby allowing Ms. Wynecoop a second opportunity to meet her burden. *See CP 151.*

**E. THE TRIAL COURT HELD AN EVIDENTIARY HEARING, AFTER WHICH MS. WYNECOOP'S PETITION WAS GRANTED.**

On March 3, 2016, the trial court held an evidentiary hearing. VRP 91-221. Ms. Wynecoop presented two witnesses: George Diana and herself. VRP 92. The Appellants called a single witness: Scott Johnson. VRP 191-197. Following that hearing, the trial court orally granted Ms. Wynecoop's petition. VRP 217-220.

On March 28, 2016, the trial court entered a written judgment entitled: "Evidentiary Hearing, Findings of Fact, Conclusions of Law and Ruling – RCW 11.20.070." CP 180-188. That judgment formally admitted Ms. Wynecoop's proffered document as the last will and testament of Willard F. Johnson. *Id.* at 187. The Appellants filed a timely notice of appeal on April 7, 2016. CP 189-201.

**IV. ARGUMENT**

**A. THE COURT OF APPEALS REVIEWS LOST WILL CASES DE NOVO.**

Washington's leading lost will case clarified that "proceedings where a will is being challenged are equitable in nature and are reviewed

de novo upon the entire record." *In re Estate of Black*, 153 Wn.2d 152, 161 (2004). In addition, it has long been settled that questions regarding the interpretation or application of statutes generally – and of the dead man's statute in specific – are reviewed de novo. *See id.*, *see also Doe v. Gonzaga University*, 143 Wn.2d 687, 699 (2001), *Folsom v. Burger King*, 135 Wn.2d 658, 666 (1998).

In this matter, the core questions are: (i) whether the trial court misapplied Washington's dead man's statute; and (ii) whether the trial court misapplied Washington's lost will statute. Both questions, and all issues related to those questions, should be reviewed de novo.

**B. THE TRIAL COURT ERRED BY ALLOWING THIS MATTER TO GO BEYOND THE INITIAL HEARING.**

TEDRA governs this action. *See* RCW 11.96A.010, RCW 11.96A.020; RCW 11.20.070. Specifically, TEDRA's procedural rules govern all estate cases – including claims to admit a lost will to probate. *Id.*

TEDRA's procedural rules provide a clear mandate to resolve cases at the initial hearing, unless the parties make a specific request otherwise. The statute states: "[u]nless requested otherwise by a party in a petition or answer, the initial hearing **must** be a hearing on the merits to resolve all

issues of fact and all issues of law." RCW 11.96A.100(8) (emphasis added).

Ms. Wynecoop's petition did not include a request for any hearing beyond the initial TEDRA hearing. CP 3-8. Likewise, the Appellants made no request for a hearing beyond the initial hearing in their response. CP 37-40. In fact, the Appellants submitted a memorandum, in advance of the initial TEDRA hearing, that identified Ms. Wynecoop's failure to meet her burden and asked the trial court to "dismiss [the] petition with prejudice and award costs and attorney's fees to the [Appellants]." CP 51. Similarly, Ms. Wynecoop's reply memorandum did not ask the trial court for any additional time or to hold any additional hearing. CP 72-77. Instead, Ms. Wynecoop asked the Court to affirmatively admit the purported will to probate. CP 77. The parties' submissions, therefore, presented a fully briefed matter and asked the trial court to decide the matter at the initial hearing.

The initial hearing occurred on September 2, 2016. VRP 16-17. At the hearing's outset, the trial court noted that the hearing was to determine whether Ms. Wynecoop's petition to admit the purported will should be granted. VRP 17-18. The trial court and the parties devoted much of the hearing to arguments regarding whether Ms. Wynecoop's declaration testimony could be admitted over the Appellants' objections

(hearsay, speculation, and dead man's statute). *See* VRP 16-81. At no point during that hearing did any party express a need for additional time to fully present his or her case. *See id.*

At the initial hearing's conclusion, the trial court noted that it would issue a written decision. VRP 81. On September 17, 2015, the trial court issued a written decision that held that Ms. Wynecoop had not met her burden to prove the execution and validity of the disputed will by clear, cogent and convincing evidence. CP 121-123.

On October 2, 2016, consistent with TEDRA's mandate that all issues must be resolved at the initial hearing, the Appellants noted an order denying Ms. Wynecoop's petition for presentment. CP 124-129. On October 20, 2016, that presentment came before the trial court. VRP 82-90. However, rather than entering an order denying Ms. Wynecoop's petition – as was required by TEDRA – the trial court noted the matter for a second hearing. *Id., see also* CP 151.

During that second hearing, Ms. Wynecoop presented essentially the same evidence that she did at the first (this time by live testimony rather than by declaration). *Compare* CP 15-20, 21-32, 78-87 *with* VRP 96-110, 110-190. Following that hearing, the trial court ruled that Ms. Wynecoop had met her burden. VRP 217-220; CP 180-188.

Washington's Courts are obliged to interpret statutes to give effect to all language in them and to render no portion meaningless or superfluous. *State v. JP*, 149 Wn.2d 444, 450 (2003). When statutes use the word "must" Washington courts have no discretion to act in a way contrary to the statute's mandatory language – the language is mandatory. *State v. Blazina*, 182 Wn.2d 827, 838 (2015). Likewise, when a statute uses the term "may" Washington courts have discretion with respect to how to proceed. *Id.* Finally, when the legislature uses both "may" and "must" in the same statute, Washington courts are obliged to interpret the two words differently, with "must" or "shall" imposing an imperative duty on the court. *Id.*

RCW 11.96.100, subparagraph 8, required the trial court to dismiss Ms. Wynecoop's petition. Neither party made a request otherwise; therefore, the initial hearing was strictly required to "be a hearing on the merits to resolve all issues of fact and all issues of law." RCW 11.96.100(8). The initial hearing did, in fact, address all issues of fact and all issues of law – the trial court simply found that Ms. Wynecoop had not met her burden. *See* VRP 16-81; CP 121-123.

The trial court erred in interpreting RCW 11.96A.100 as affording the court discretion to hold a second hearing. *See* VRP 87-88. Specifically, the trial court's interpretation of subparagraph 10 as trumping

subparagraph 8 was in error. *See id.* The trial court's interpretation improperly rendered subparagraph 8's mandatory language to be entirely meaningless and superfluous. *See JP*, 149 Wn.2d at 450.

The two provisions must be read together, giving meaning to both. Thus, if neither party makes a request for any additional hearing, RCW 11.96A.100(8) absolutely requires the initial hearing to resolve all issues – on the merits and with a final judgment. If, however, a party requests an additional hearing, RCW 11.96A.100(10) gives the trial court broad discretion regarding (i) whether to conduct such a hearing; and (ii) how to conduct it.

In this case, RCW 11.96A.100(8) absolutely required the initial TEDRA hearing in this matter to be a final hearing on the merits. The trial court properly concluded that Ms. Wynecoop failed to meet her burden at that initial hearing. However, the trial court erred by giving Ms. Wynecoop a second opportunity to do so. The Appellants respectfully ask the Court to reverse the trial court's order admitting the purported will to probate, with instructions for the trial court to enter an order denying Ms. Wynecoop's petition.

**C. THE TRIAL COURT ERRED IN ALLOWING MS. WYNECOOP TO TESTIFY IN THIS LOST WILL CASE.**

The dead man's statute applies in probate proceedings and will contests, including lost will cases. *In re Shaughnessy's Estate*, 97 Wn.2d 652, 655-56 (1982); *In re Estate of Wind*, 27 Wn.2d 421 (1927); *In re Estate of Eickoff*, 188 Wn. App. 1051, \*5 (2015, unreported). The statute prohibits a party in interest from testifying as to any transaction with or discussion or statement with a decedent. RCW 5.60.030. In a lost will case specifically, the dead man's statute bars any potential beneficiary (under the purported will) from testifying with respect to the disputed will's contents or regarding any transaction involving the disputed will. *Shaughnessy's Estate*, 97 Wn.2d at 656.

The dead man's statute applies both to statements by a decedent and transactions with a decedent. RCW 5.60.030. The "transaction" aspect of the dead man's statute is the "doing or performing of some business or the management of any affair." *Shaughnessy's Estate*, 97 Wn.2d at 656 (*quoting Estate of Wind*, 27 Wn.2d at 426) (quotations omitted). A transaction within the statute's purview has been defined in broad terms. The standard for whether a transaction occurred is if the decedent – if alive – could have contradicted the testimony from his or her

personal knowledge. *Shaughnessy's Estate*, 97 Wn.2d at 656 (citing *Estate of Wind*, 27 Wn.2d at 426).

It is beyond reasonable dispute that Ms. Wynecoop is a "party in interest" with respect to Mr. Johnson's purportedly lost will. *See* RCW 5.60.030, *see also In re Estate of Tate*, 32 Wn.2d 252, 254 (1948) (any person who would "gain or lose by a decree sustaining or revoking a will" is a person in interest). It is, therefore, beyond dispute that the dead man's statute applies to her testimony. That was not reasonably disputed before the trial court. What was disputed, and where the trial court erred, is in application of the statute. The trial court misapplied the dead man's statute and, thereby, admitted improper testimony from Ms. Wynecoop.

Ms. Wynecoop was improperly permitted to testify (both in writing and in court) regarding the execution of Mr. Johnson's purported will. CP 21-32 (First Wynecoop Affidavit); CP 78-87 (Second Wynecoop Affidavit); VRP 110-190 (Wynecoop testimony). The Appellants objected and asked the trial court to strike her testimony. VRP 20-25; CP 49-50, 63-65, 89-9,96-104. The trial court improperly admitted that testimony in violation of the dead man's statute. *See generally* VRP 25-58, 116-117 (granting a continuing objection during Ms. Wynecoop's testimony).

Ms. Wynecoop's testimony was even more self-interested than the testimony that was precluded by the State Supreme Court in *In re Shaughnessy's Estate*, 67 Wn.2d 652 (1982).<sup>3</sup> In that case, the lawyer who prepared the will was named both executor and beneficiary under the will. *Id.* at 653. The petitioner, Mr. Cronin, asked the trial court to admit a photocopy of a purportedly lost will. *Id.* The petition was supported by testimony from both of the will's witnesses and by the secretary who typed the will. *Id.* Mr. Cronin, however, was the only witness with percipient knowledge of the will's contents. *Id.* at 653-54. The State Supreme Court held that Mr. Cronin could not testify as to the will's contents; importantly, it was Mr. Cronin's status as a beneficiary (not his status as the attorney who prepared the will) that rendered him incompetent to testify. *Id.* at 655-57. Furthermore, the State Supreme Court correctly held that Mr. Cronin was flatly incompetent to testify on the subject; the Court did not parse Mr. Cronin's statements and analyze each separately. *Id.*

Ms. Wynecoop should not have been permitted to offer any substantive testimony with respect to Mr. Johnson's purported will. Each

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<sup>3</sup> In *Callighan v. Luster*, 305 W.W.2d 530 (Ky. Ct. App. 1957), the court held that two attesting witnesses were precluded from testifying in support of a lost will, pursuant to a dead man's statute, where those witnesses were also beneficiaries. If those witnesses' direct knowledge regarding the will's execution was inadmissible under the dead man's statute, Ms. Wynecoop's circumstantial knowledge should have been doubly inadmissible.

aspect of that testimony involved a transaction with Mr. Johnson – namely, the execution of his purported last will and testament. Were he alive, Mr. Johnson would have been able to dispute that the signature appearing on the document belonged to him. Were he alive, Mr. Johnson would have been able to dispute that he executed the purported will. And were he alive, Mr. Johnson would have been able to dispute that he prepared a will benefitting Ms. Wynecoop. As it stood, however, Ms. Wynecoop was permitted to testify – unchallenged and un rebutted – to each of those issues. Ms. Wynecoop should have been declared incompetent to offer any testimony with respect to the execution of Mr. Johnson's purported will. *See In re Estate of Black*, 153 Wn.2d 152, 158 n.1 (2004).

The trial court's findings of fact were based almost entirely on Ms. Wynecoop's improper testimony. CP 1870-185. Those findings of fact are each in error because Ms. Wynecoop should have never been permitted to testify. The trial court erred both in allowing Ms. Wynecoop to testify and in basing necessary findings of fact on that improper testimony.

**D. MS. WYNECOOP FAILED TO PROVE THAT ANY WILL WAS VALIDLY EXECUTED.**

Admission of a purportedly lost will to probate is governed by RCW 11.20.070, Washington's lost will statute. The statute requires that: (i) any witnesses who testify to the execution and validity of the will must put their testimony in writing and file said testimony with the clerk of the court; and (ii) the provisions of the lost will must be proved by clear, cogent and convincing evidence, **consisting at least in part of a witness to either its contents or to the authenticity of a copy of the will.** RCW 11.20.070 (emphasis added). The requirement that the petitioner prove her case by clear, cogent and convincing evidence applies both to the purported will's execution and to its contents. *In re Estate of Black*, 153 Wn.2d 152, 163 (2004).

Ms. Wynecoop's petition is supported by exactly two witnesses: retired attorney George Diana and herself. CP 15-16 (Diana Affidavit); VRP 96-109 (Diana testimony); CP 21-32 (First Wynecoop Affidavit); CP 78-87 (Second Wynecoop Affidavit); VRP 110-190 (Wynecoop testimony). The testimony that was presented by affidavit is substantively identical to that that was offered during the in-court hearing. *See generally id.* The testimony that Ms. Wynecoop proffered did not meet her burden to prove the execution and contents/authenticity of Mr.

Johnson's purported will by clear, cogent and convincing evidence. The trial court, therefore, erred by granting Ms. Wynecoop's petition to admit that purported will to probate.

Before any analysis regarding whether the disputed will's contents or authenticity was established, the petitioner must establish (by clear, cogent and convincing evidence) that a will was validly executed. Ms. Wynecoop failed to meet that burden. The trial court erred in not dismissing Ms. Wynecoop's petition on that basis.

To determine whether a purportedly lost will was properly executed, the court must look to RCW 11.12.020, Washington's general statute regarding will formation. *Estate of Black*, 153 Wn.2d at 164. Washington law requires all wills to be: (i) prepared in writing; (ii) signed by the testator (or at the testator's direction and in the testator's presence); and (iii) attested to by two witnesses (in the testator's presence and at his or her request). RCW 11.12.020(1).

To be valid, a will must be witnessed in accord with RCW 11.20.020(2). The statute allows a witness to attest to the will by subscribing his or her name to the will or by signing a statutorily proscribed affidavit. *Id.* An attestation clause is admissible evidence of a will's execution **only if it is signed and contains genuine signatures.** *Estate of Black*, 153 Wn.2d at 165. Absent the admission of signed

attestation clause that includes genuine signatures (that is, an original), execution of a will may be proved if witnesses appear in court and testify to the facts necessary to demonstrate the will's validity. *See id.* at 165-66; RCW 11.12.020(1).

***1. No Statutory Witness Testified That a Valid Will Was Executed.***

RCW 11.20.020 requires the witnesses to a will's execution to have "personal knowledge of the fact that the will was signed by the testator." *Id.* (quoting *In re Estate of Price*, 73 Wn. App 745, 751 (1994)). This statutory requirement is consistent with the general rule that a witness "may testify only to events within his or her personal knowledge." *Estate of Black*, 153 Wn.2d at 166.

The disputed will was purportedly witnessed by Rod Burgess and Della Burgess. CP 9-11. It is undisputed that Ms. Wynecoop did not present a valid original attestation clause from either Mr. Burgess or from Mrs. Burgess – only a purported photocopy was offered. *See id.* It is also undisputed that neither Mr. Burgess nor Mrs. Burgess testified in this matter – either by affidavit/declaration or by in-court testimony. VRP 131 (acknowledging that both are deceased).

The trial court's analysis of this issue was fundamentally flawed. The trial court observed that since Mr. and Mrs. Burgess are deceased,

"the remaining means of proving the provisions of the last will is authenticity." CP 185. However, before any question regarding whether the will's contents or authenticity was proven can be asked, the Court must first conclude that the petitioner established that a valid will was, in fact, executed. And Ms. Wynecoop failed to present any evidence, from any person with percipient knowledge, to show that any valid will was executed.

**2. *Mr. Diana's Testimony Did Not Establish That a Valid Will Was Executed.***

As noted above, Ms. Wynecoop presented testimony from herself and from retired attorney George Diana. Mr. Diana did not offer any evidence to show that a valid will was – in fact – executed.

Whether by affidavit or by in-court testimony, Mr. Diana's testimony was very narrow. Mr. Diana testified that he and Leo Daily shared office space. VRP 97-98. Mr. Diana testified that during that time, he became familiar with Mr. Daily's signature. VRP 100. Mr. Diana testified that the notary signature appearing on the purported will was Mr. Daily's. *Id.* Finally, Mr. Diana testified that the format and stationery appearing with the copy of the purported will are consistent with those used by Mr. Daily. VRP 101-102.

Mr. Diana did not authenticate the signatures of Mr. Johnson (the testator) or of Mr. and Mrs. Burgess (the witnesses). *See generally* VRP 96-109. With respect to the question of whether a will was validly executed, Mr. Diana offered **literally no relevant testimony**. Mr. Diana's testimony falls woefully short from RCW 11.20.070's requirement that the execution of a will be proven by the testimony of persons who have percipient knowledge regarding whether a will was executed.

3. ***Ms. Wynecoop's Testimony Did Not Establish That a Valid Will Was Executed.***

Even if Ms. Wynecoop's testimony was not barred by the dead man's statute, her testimony would be insufficient to show that a will was validly executed. Ms. Wynecoop offered substantial testimony regarding the purported execution of Mr. Johnson's will; however, none of that testimony demonstrated personal knowledge that a will was – in fact – validly executed.

Ms. Wynecoop admitted that she was not present when the purported will was executed. VRP 127-130. That admission makes the balance of her testimony regarding the purported will's execution entirely irrelevant. As a matter of law, RCW 11.20.020 requires the proponent of a will to present witnesses with personal knowledge "of the fact that the

will was signed by the testator." *In re Estate of Black*, 153 Wn.2d at 166.

Ms. Wynecoop's testimony does not meet that standard.

Separate and apart from questions regarding whether the purported will's contents or authenticity was proven by clear, cogent and convincing evidence, Ms. Wynecoop did not meet her burden to prove that a will was validly executed. That failure was fatal to Ms. Wynecoop's claim, and the trial court erred in not holding Ms. Wynecoop to her burden.

**E. MS. WYNECOOP FAILED TO ESTABLISH THE DISPUTED WILL'S CONTENTS OR AUTHENTICITY BY CLEAR, COGENT AND CONVINCING EVIDENCE.**

RCW 11.20.070's final requirement is that a disputed will's provisions be proven by clear, cogent and convincing evidence. The statute has two separate methods whereby this can be accomplished. First, the petitioner can offer proof of the will's contents. Second, the petitioner can demonstrate the authenticity of a purported copy of the disputed will.

***1. Ms. Wynecoop Acknowledged That She Could Not Prove the Disputed Will's Contents.***

Ms. Wynecoop acknowledges that neither of her witnesses can offer admissible evidence with respect to the disputed will's contents. Mr. Diana has no knowledge regarding the disputed will's contents. See VRP 103-109. And Ms. Wynecoop acknowledges that she never saw the original will and never had any knowledge regarding its contents. VRP

129-130. Thus, Ms. Wynecoop's litigation strategy was an attempt to prove that the proffered photocopy was an authentic reproduction.

**2. *Ms. Wynecoop Failed to Demonstrate the Disputed Will's Authenticity.***

RCW 11.20.070 was amended in 1994 to allow the provisions of a will to be proven by demonstrating (by clear, cogent and convincing evidence) that a proffered copy is an authentic reproduction of a valid will. Since then, no Washington case has articulated what standard applies to questions regarding authenticity. However, under any existing standard for proving authenticity, Ms. Wynecoop's evidence is wanting.

As a preliminary matter, ER 901(a)'s standard for authenticity is insufficient in lost will cases. ER 901(a) allows for a finding of authenticity on "evidence sufficient to support a finding that the matter in question is what its proponent claims." That standard is inconsistent with the mandate that lost will claims be proven by clear, cogent and convincing evidence. Regardless of what the test for authenticity is, it must carry the heightened burden of proof that applies in lost will cases.

ER 901(b) provides several options to authenticate a document. Most of them simply cannot apply to this case. Three provisions, however, could arguably apply. Ms. Wynecoop failed to meet her burden under any of them.

ER 901(b)(1) requires a witness with personal knowledge to testify. Ms. Wynecoop failed to present any witness with personal knowledge that the photocopy at issue is an accurate duplicate of a validly executed will.

ER 901(b)(2) allows for authentication by establishing the genuineness of the handwriting on a document. Setting aside the infirmities in Ms. Wynecoop's testimony, she did nothing more than identify the signatures of Mr. Johnson, Mr. Burgess and Mrs. Burgess. *See generally* VRP 110-190. And Mr. Diana identified the signature of Mr. Daily. VRP 96-109. No testimony was offered to support the authenticity of the substantive provisions within the purported will, and it is settled law that "a signature, even if sworn under penalty of perjury, does not authenticate the document." *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 367 (1998); *see also State v. Payne*, 117 Wn. App. 99 (2003) (testimony that handwriting was similar to purported author's handwriting cannot authenticate typed portions of a document).

Lastly, ER 901(b)(4) operates as a kind of catch-all; it allows a document to be authenticated by its "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." This appears to be the standard that the trial court applied in admitting the purported will to probate. See CP 186-187; VRP

218. However, the trial court's analysis improperly placed the burden on the Appellants to disprove the purported will's authenticity; the trial court ruled:

. . . I have seen forged documents before. They're usually fairly obvious, surprisingly obvious. We don't have any real good forgers around here . . . this will is – what I have here is, uh, no indication that it has been tampered with or altered. Any change in type or, uh, uneven sentences, or any, uh, problems with, uh, signatures, uh, there's just no, uh, language when you read it carefully that doesn't fit. So, uh, you know that is the, uh, 901 (b) (4), "Distinctive characteristics, appearance, substance, internal patterns," et cetera.

VRP 218. Thus, rather than requiring Ms. Wynecoop to affirmatively demonstrate some basis to conclude that the document was authentic, the trial court noted the absence of proof that the document had been doctored and regarded that as sufficient. The clear, cogent and convincing evidence burden requires far more.

The Court of Appeals' decision in *State v. Payne*, 117 Wn. App. 99 (2003), is instructive. In that case, the State attempted to admit a document from the Royal Canadian Mounted Police (the "RCMP") regarding Mr. Payne's criminal history. *Id.* at 109-10. The State offered evidence that the document was on RCMP letterhead, that the document was sent by the RCMP in response to a request for Mr. Payne's criminal history, and that the document was found in Mr. Payne's Canadian

criminal file. *Id.* at 110. The Court of Appeals held that evidence was insufficient to authenticate the document. *Id.* Critically, the Court of Appeals held that the evidence was not validly authenticated despite the fact that authenticity only had to be proven by a preponderance of the evidence. *Id.* at 108, 110.

Ms. Wynecoop presented less evidence and faced a far higher burden than did the State in *Payne*. Whereas the State presented a document that was on unique and identifiable letterhead, *Id.* at 110, Ms. Wynecoop can only show that the lawyer who prepared the document used a similar "copy" stamp and similar stationery. *Compare Id. with* VRP 96-110. Whereas the State presented direct evidence that the document was sent by the RCMP in response to a specific request, Ms. Wynecoop simply testified that she received a copy of a document in the mail. *Compare Payne*, 117 Wn. App. at 110 *with* VRP 135-137. Lastly, the State presented first-hand knowledge that the document at issue was found in Mr. Payne's criminal file; Ms. Wynecoop has no similar testimony – in fact, the evidence was that there was no indication of a will ever having been in Mr. Daily's office files. *Compare Payne*, 117 Wn. App. at 110 *with* VRP 102-103.

Ms. Wynecoop did not present any evidence of authentication other than the disputed document itself. The trial court held that a

photocopied document was an authentic reproduction of a valid will where (1) there was no testimony from anyone who ever saw the original will; (2) there was no testimony from anyone who participated in the will's preparation; and (3) there was no testimony from anyone who witnessed the will's execution. In short, the trial court simply treated a photocopy as an original. The trial court erred in admitting that disputed document as the last will and testament of Mr. Johnson.

#### **V. ATTORNEYS' FEES ON APPEAL**

RAP 18.1 allows for the recovery of attorneys' fees on appeal where the applicable law allows for an award of attorneys' fees. Washington's probate statute (Title 11 RCW) gives this court great discretion in awarding costs and attorneys' fees to parties in probate proceedings. RCW 11.96A.150. The court may, in its discretion, order the costs and fees "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 ..." RCW 11.96A.150(1).

In this case, Ms. Wynecoop subjected the Appellants to significant expense by initiating a petition to admit a lost will, which she simply could not prove. The Appellants respectfully ask the Court of Appeals to

award the Appellants all costs and attorneys' fees incurred in defense of Ms. Wynecoop's petition.

## VI. CONCLUSION

Ms. Wynecoop simply did not carry her burden to prove that a valid lost will exists. The trial court erred in a number of critical respects in analyzing Ms. Wynecoop's petition.

The trial court erred in allowing this matter to go beyond an initial hearing. TEDRA contains unambiguous and mandatory language that requires all issues to be resolved at the initial hearing unless a party makes an affirmative request otherwise.

The trial court erred in allowing Ms. Wynecoop to testify regarding the disputed will's execution. Washington's dead man's statute prohibits persons in interest from testifying with respect to discussions or transactions with a decedent. Ms. Wynecoop is certainly an interested person and the execution of Mr. Johnson's will was undeniably a relevant transaction.

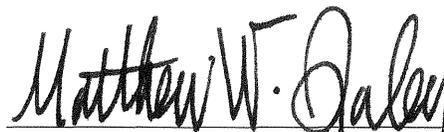
The trial court erred in holding that Ms. Wynecoop had proven, by clear, cogent and convincing evidence, that the disputed will was validly executed. Ms. Wynecoop did not present evidence from any person who witnessed the purported will's execution. That failure should have been declared fatal to Ms. Wynecoop's claim.

Finally, the trial court erred in holding that the document at question was an authentic photocopy of a valid will. Ms. Wynecoop did not present sufficient evidence to authenticate that document. The trial court improperly placed the burden on the Appellants to demonstrate some forgery within the document. That, however, is not the correct analysis.

The Appellants respectfully ask the Court to reverse the trial court's decision in each respect. Washington's lost will statute contains strict requirements to ensure that the probate process remains valid and predictable. If the trial court's decision is allowed to stand, the statutory requirements would be rendered meaningless and a photocopy would become as good as an original.

RESPECTFULLY SUBMITTED, this 7th day of November, 2016.

**WITHERSPOON · KELLEY**



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JOHN M. RILEY, III, WSBA #10804  
MATTHEW W. DALEY, WSBA # 36711  
WILLIAM O. ETTER, WSBA #42389  
Counsel for the Appellants

**CERTIFICATE OF SERVICE**

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 7th day of November, 2016, the foregoing was delivered to the following persons in the manner indicated:

<p>David E. McGrane 298 South Main, Suite 304 Colville, Washington 99114</p> <p>Email: dave@mcgranescheurman.com</p> <p>Counsel for the Appellee, Colleen D. Wynecoop</p>	<p><input type="checkbox"/> By Hand Delivery <input checked="" type="checkbox"/> By U.S. Mail <input type="checkbox"/> By Overnight Mail <input type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By Electronic Mail</p>
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LAURI PECK, legal assistant.