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

COA No. 343154-III

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

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

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RESPONDENT'S RESPONSE BRIEF

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David E. McGrane, WSBA #8064  
Attorney for Respondent

McGrane & Schuerman, PLLC  
298 South Main, Suite 304  
Colville, WA 99114  
509 684-8484

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## **I. RESPONSE TO INTRODUCTION AND RELIEF REQUESTED**

After an initial TEDRA hearing, the court concluded that there were factual questions that should be determined at a trial.

After a full trial on the merits, the court admitted to probate a photocopy of a last will of the decedent. Appellants seek to have the trial courts ruling reversed on the grounds that the proof provided at trial did not meet the required burden of proof.

Appellants also argue that there were incorrect evidentiary rulings made by the trial court regarding the dead man's statute.

Respondent responds by asserting that the trial court exercised proper discretion in submitting questions of fact to a trial. Respondents further argue that the evidence in the trial record is substantial and adequate to support the court's factual findings admitting a lost will to probate. It is further asserted that the trial court made no errors in evidentiary rulings relating to the dead man's statute.

## **II. STATEMENT OF THE ISSUES AND RESPONSE TO ASSIGNMENTS OF ERRORS**

1. When the trial court concluded that there were questions of fact that still remained after the initial TEDRA hearing, did the court abuse its discretion by submitting the matter to a trial on the merits with direct testimony of witnesses and with the opportunity to cross examine?

It is submitted that the trial court did not abuse its discretion by submitting questions of fact to a trial.

2. Is there substantial evidence in the record to support the trial court's finding that there was clear, cogent and convincing evidence that the decedent executed a valid last will and testament?

It is submitted that there is ample evidence in the record that is clear, cogent and convincing to support the trial courts factual finding that the decedent did execute a will.

3. Did the court abuse its discretion by improperly admitting evidence that should have been barred by the dead man's statute?

It is submitted that no evidence was improperly admitted that should have been barred by the dead man's statute.

4. Is there substantial evidence in the record to support the trial court's finding that there was clear, cogent and convincing evidence that the photocopy of the decedent's last will and testament was authentic and adequate to prove the contents of the will?

It is submitted that there is ample evidence in the record that is clear, cogent and convincing to support the trial courts factual finding that the photocopy of the last will and testament of the Decedent was authentic and adequate to prove the contents of the will.

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

This case involves the admission to probate of a photocopy of the lost will of a decedent.

Colleen Wynecoop (the “respondent”) was a friend of Willard F. “Bill” Johnson (the “decedent”). RP111. In approximately 1985 the decedent moved into respondent’s home and he lived with her there until shortly prior to his death. RP 111.

During the last two years of his life, decedent suffered from terminal cancer. RP118-120. Respondent provided care for him on a daily basis at her residence until shortly before he died. RP 120-121. During this time decedent’s family had minimal contact with him. RP 121-122. Respondent was not paid a fee for the care services provided to decedent nor did respondent charge decedent rent. RP 150-151.

During his lifetime, respondent knew that decedent had a long term attorney-client relationship with his personal attorney Leo F. Daily of Spokane, Washington. RP 122-123. She observed that Mr. Daily handled all of the decedent’s legal affairs relating to various business interests and assets that decedent owned. RP 123. However, respondent was not present when decedent discussed estate planning matters with Daily. RP151.

Respondent had no involvement in any of decedent’s legal affairs and never engaged Mr. Daily as an attorney for her own purposes. RP123. While

decedent was residing at respondent's residence, decedent had permission to use respondent's telephone and she was aware that decedent would contact Mr. Daily by telephone from time to time. RP 123.

In early May, 1990, decedent's cancer was progressing and his health declining. Respondent was aware that the decedent was concerned about having a proper will in place. RP 124.

Prior to May 4, 1990, respondent contacted Rod and Della Burgess and made arrangements to have them come to her residence in Wellpinit at a designated time. RP 125. Rod Burgess was then the pastor of the Assembly of God Church in Wellpinit, Washington, and Della Burgess was his wife. RP 130. Since May of 1990, both Rod Burgess and Della Burgess have passed away. RP 131.

Respondent told Rod and Della Burgess that the purpose of coming to her home was to serve as witnesses to a will to be signed by decedent. RP 126. The Burgesses agreed to come to her home at the designated time. RP127.

Respondent expected that Leo Daily would also be at her house at the same designated time. RP 127.

On May 4, 1990 the two Burgesses came to respondent's home. RP 127. At the same time the Burgesses arrived, Leo Daily, decedent's Attorney,

also arrived at her residence. RP 127. Respondent knew that Mr. Daily had traveled from his law office in Spokane, Washington. RP 127-128.

Rod and Della Burgess, and Leo Daily, all went into a bedroom adjacent to the living room where decedent was in his bed. RP127-128. Decedent was bed ridden and was being cared for in the room adjacent to the living room that had its own bathroom facilities. RP 128.

Respondent stayed in the living room but when she served the group coffee respondent observed Leo Daily had legal papers out and he was reading them to the decedent in the Burgesses presence, and there was a discussion between the people in the room. RP 128-129. Later she went back into the room again to freshen their coffee and observed the Burgesses signing something. She did not see Leo Daily or decedent sign anything. RP129. The Burgesses, Daily and decedent were all in the room about 30 to 45 minutes. RP 130.

Prior to Daily arriving at her house on May 4, 1990, respondent did not see any legal documents that decedent had in his possession relating to his will. RP 129. Respondent had no discussions with decedent about the contents of his will. RP133.

After Daily and the two Burgesses left respondent's residence, she did not see any legal documents left in the room where the parties had been signing documents. RP132. The Burgesses took no documents. RP132-133.

Respondent received no documents. RP 134. It appeared to respondent that all documents that were prepared by Daily prior to his arrival were taken back with him in his brief case to his law office in Spokane. RP132-133. Daily never returned thereafter to respondent's residence. RP135. The respondent had no machine or copier at her residence on May 4, 1990 that could have made copies of any document. RP134.

Decedent did not leave respondent's home on that day, May 4, 1990, or on any other days thereafter until he went to the VA hospital. RP135. His condition was extremely frail, and any movement of his body could result in fractures of his bones. RP 128-129,135.

Within a week of May 4, 1990, a mailing from Leo Daily's law office was delivered to the respondent's mail box. The respondent took the mailing to decedent and opened it for him and took out the contents. The photocopy of the will (Exhibit 1) was included, which was inside a gray envelope. Exhibit 2. RP 135-136. On the envelope is printed: "Last Will and Testament" and thereon were the stamped markings of Leo Daily's law office. The grey envelope had a yellow sticky note attached to it with handwriting on it which stated: "Copy-Original in George I. Diana's vault, W430 Indiana". RP 141. The respondent read the will to the decedent. RP152. The respondent has kept the photocopy of the will (Exhibit 1) and the

gray envelop (Exhibit 2) in her possession until they were admitted as exhibits in the pending litigation.

Also included in the mailing was an original Durable Power of Attorney. Exhibit 3. RP138. The respondent was designated as the attorney in fact for the decedent and the power of attorney was signed on May 4, 1990, the same date that the will was signed. The durable power of attorney was signed by Willard F. Johnson, and was notarized by Leo Daily. The respondent recorded the original of the durable power of attorney in the land records of Stevens County on May 10, 1990. RP138.

The photocopy of the will consisted of three pages. Exhibit 1. The will contains the signature of Willard F. Johnson on the second page. It also contains the signatures of Rod and Della Burgess as witnesses to the will on the second page, and the witnesses also signed the Affidavit of Attesting Witnesses on the third page. The will and the attestation affidavit (third page) was signed and notarized by the signature of Leo Daily.

From her years being with decedent, the respondent was very familiar with the signature of Willard F. Johnson. She had seen him sign his signature hundreds of times. RP 114-117. The respondent recognized the signature of the testator on the will and testified that the signature on the will dated May 4, 1990, was that of Willard F. Johnson. RP 116-117. She also testified that

the signature on the durable power of attorney was that of Willard F. Johnson.

RP 117.

Respondent also knew Rod and Della Burgess. They are both now deceased. RP131. Rod was the pastor at a church that respondent and the decedent attended. She was baptized by them and had their signatures on her baptism certificate. Respondent testified that the witness signatures on the will (Exhibit 1) were the signatures of Rod and Della Burgess. RP 131-132.

George Diana, a Spokane attorney who shared an office with Leo Daily, testified about the photocopy of the will (Exhibit 1) which contained a "COPY" stamp in red ink on the upper right hand corner. Diana testified that the style, markings, and pattern of the photocopy of the will, and the gray envelop in which the will was enclosed were consistent with the legal work product that Leo Daily would have produced. RP101-102. Mr. Diana further testified that he was very familiar with Leo Daily's signature. As attorneys practicing in the same office he and Leo Daily would regularly act as witnesses for will signing's prepared by the other. Diana testified that the signature of the notary to the attestation affidavit on the photocopy of the will (Exhibit 1) was the signature of Leo Daily and that the signature of the notary on the durable power of attorney (Exhibit 2) was the signature of Leo Daily. RP 99-100.

Leo Daily has died. RP 109. George Diana kept some records from Leo Daily's law practice. Mr. Diana conducted a complete search of the records that he had in his possession from the law practice of Leo Daily and could not locate the original will dated March 4, 1990 signed by the decedent. RP 102-103.

When decedent signed the will and durable power of attorney on May 4, 1990, he was progressively getting weaker from his terminal cancer. However on May 4, 1990, decedent was in full control of his mental faculties. RP 142-143. Two or three weeks after May 4, 1990, decedent's urinary tract began to shut down and it was necessary to move him to the VA Hospital in Spokane for his care. After a short time at the VA Hospital, decedent was moved to the Northcrest Convalescent Center. Decedent died on June 18, 1990. RP120-121. His Certificate of Death was admitted. RP 121, Exhibit 4.

After his death, pursuant to the provisions of the May 4, 1990 will, the respondent gave to the decedent's son Terry a Cadillac automobile, a Chevrolet pickup, and a swather. RP 145. Respondent shared the will with a member of decedent's family. RP 146. There were credit card debts and no other assets to administer. RP 147. Respondent did not seek to obtain the original of the will from Leo Daily because there was nothing to probate. RP

156. Respondent was aware of some mineral rights the decedent had but at the time did not believe they were of any value. RP147-148, 156, 186.

In 1992, approximately a year and a half after decedent died, the respondent ran across an old 1977 mineral lease signed by decedent on property in North Dakota. RP 162-163, 172 Respondent had her attorney contact a North Dakota title company and conduct a limited search of the title records for a search fee that did not exceed \$100. RP 176, 182-187, Exhibit 5.

To document the rights of Willard F. Johnson, in March of 1992 respondent caused to be recorded in the land records of North Dakota a “Proof of Death and Heirship” affidavit, which listed all of the children of decedent, and which attached a photocopy of the copy of his will. RP 162, 174. A photocopy of the “Proof of Death and Heirship” was admitted as Exhibit 101. The respondent recorded the “Proof of Death and Heirship” affidavit not to transfer assets, but to document in the land records the death of the decedent, to identify his heirs, and to disclose the provisions of decedent’s will should the oil and gas rights ever be determined to be valuable. RP163.

After the initial TEDRA hearing, the court concluded from the evidence before it that decedent had executed a valid will. The court further

found that there were questions of fact as to the contents of the will, and set the matter for a trial. CP 121-123,151.

At the trial, the court took testimony of Colleen Wynecoop, George Diana, and Scott Johnson. Each witness was examined and cross-examined. At the conclusion of the trial the court specifically found that the testimony of respondent Colleen Wynecoop was credible. CP 187, RP 220. The court made its oral ruling that the lost will should be admitted to probate. Thereafter, the court entered its formal finding, conclusions and ruling. CP 180-188.

Respondent takes exception to several matters in the appellants "Statement of Facts and Statement of the Case." In the Section A heading, Appellants assert that Ms. Wynecoop has "acknowledged" that the decedent died intestate and failed to "assert the purported lost will until June 2015." To the contrary, respondent has always understood that decedent died testate with a will, and in fact respondent filed a copy of the will in 1992 in the state of North Dakota. Exhibit 101. Further, there is no evidence in the record that decedent "rented" from respondent. The only evidence is that he did not rent.

Section B of Appellant's Statement of the Case sets forth a theoretical argument; not any relevant facts relating to a lost will.

Finally, in Section D of their Statement of the Case, the appellants mis-characterize the trial judges letter ruling. CP 121-123. The letter stated

that the case presented questions of fact that had to be answered by a trial on the merits. The trial judge did not rule in favor of the appellants in the letter. If there was any ambiguity arising out of the letter, the trial judge made his decision abundantly clear at the presentment hearing when he explained his ruling and scheduled factual issues for trial. RP 82-90.

#### IV. ARGUMENT

##### A. Standard of Review.

Errors of law are subject to de novo review by the appellant courts. The “de novo” or “error of law” standard of review permits the appellate court to substitute its judgment for that of the decision maker whose decision is being reviewed. *Skamania County v. Columbia River Gorge Comm’n*, 144 Wn.2d 30 (2001).

However for factual determinations made by the trial court, the appellate courts apply a “substantial evidence” standard of review to findings of fact, and will not overturn findings of fact if supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570 (1959). Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premises. *King County v. Wash. State boundary Review Bd*, 122 Wn.2d 648,675 (1993)

Procedural rulings as to the conduct of the trial, and evidentiary rulings made at trial that are discretionary in nature are judged by whether the trial court abused its discretion. Under an abuse of discretion standard, the reviewing court will find error only when the trial court's decision (1) adopts a view that no reasonable person would take and is thus "manifestly unreasonable," (2) rests on facts unsupported in the record and is thus based on "untenable grounds," or (3) was reached by applying the wrong legal standard and is thus made "for untenable reasons". *State v. Blackwell*, 120 Wn.2d 822, 845 (1993). Whether it was proper for the court to decide factual questions by conducting a trial is determined by the "abuse of discretion" standard. Likewise, determinations as to the admissibility of evidence over a dead man statute objection is reviewed for an abuse of discretion.

After the initial hearing the trial court found based upon affidavit testimony, that the decedent had executed a valid will. That determination alone would generally warrant de novo review. However subsequent to the initial hearing, the trial court conducted a full trial and took live trial testimony regarding the totality of the facts and circumstances prior to the execution of the decedent's will, the execution of the will, and what transpired after the execution of the will. Witnesses were cross-examined, and their credibility challenged. The court then entered its written findings of fact based upon the trial testimony. Given the entire record and the fact

finders determination of facts relevant to the execution of this lost will, it is submitted that the appeals court should apply a “substantial evidence” standard after a review of the entire record on the question of whether a valid will was executed by the decedent and as to the authenticity of the copy.

**B. The trial court did not error by submitting factual questions to a trial.**

When after the initial hearing the court determined that there were questions of fact, the appellants assert that the trial court abused its discretion when the court set the matter for a trial.

RCW 11.96A.100 (10) states: “If the initial hearing is not a hearing on the merits or does not result in a resolution of all issues of fact and all issues of law, the court may enter any order it deems appropriate, which order may (a) resolve such issues as it deems proper, .....and ( c) set a schedule for further proceedings for the prompt resolution of the matter.” (Emphasis added)

RCW 11.96A.et.al, the Trusts and Estate Dispute Resolution Act (“TEDRA”), establishes an efficient and streamline process that allows for the expedited resolutions of disputes involving trusts and estates. However long before the adoption of TEDRA, the courts have held hearings and trials to implement the provisions of the lost wills statute, and to deal with other matters involving the administration of estates. Conducting a trial to

determine questions of fact is a basic principle of due process inherent in our justice system.

The Appellants assert that unless a party in a TEDRA proceeding affirmatively requests that the initial proceeding not be a hearing on the merits, that the superior court has no discretion to schedule additional hearings when the evidence before the trial court presents unresolved questions of fact. This argument is contrary to the broad jurisdiction conferred on the superior courts generally to resolve estate administration issues, and is specifically contrary to the express statutory language of RCW 11.96A.100 which states that “the court may enter any order it deems appropriate” to resolve “all issues of fact”.

When the court determined that questions of fact existed after the submission of written materials by the parties at the initial hearing, the trial court entered an order that it deemed appropriate setting a trial date for the resolution of the questions of fact. RP 87-88. That is exactly the process authorized in RCW 11.96A.100 (10). The trial court did not abuse its discretion.

C. **The trial court did not err in making evidentiary rulings relating to the dead man’s statute.**

The appellants assert in their brief that the “trial court erred in allowing Ms. Wynecoop to testify in this lost will case” (Brief 13), that “Ms.

Wynecoop should not have been permitted to offer any substantive testimony with respect to Mr. Johnson's purported will" (Brief 15) and that "Ms. Wynecoop should have been declared incompetent to offer any testimony with respect to the execution of Mr. Johnson's purported will" (Brief 16).

The dead man's statute does not establish a class of witnesses that are precluded from offering relevant testimony. The heading of RCW 5.60.030 is illustrative: "Not excluded on grounds of interest—Exception— Transaction with person since deceased". The basic rule of RCW 5.60.030 is contained in the first sentence: "No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility". Witnesses may testify even if they have an interest in the case, however their credibility can be challenged.

The balance of RCW 5.60.030 sets forth the dead man's exception to the general rule. The dead man's exception states that "a party in interest or to the record" is precluded from testifying in his "own behalf" as to any "transaction" with, or statement to him by, a deceased person, when the party "adverse" to the interested party "sues or defends as executor, administrator or legal representative" of that deceased person, "or as deriving right or title by, through or from" such person.

The dead man's statute exception prevents the introduction of a certain type of evidence by an interested party. The dead man's statute does not preclude a witness who has an interest in the case and who has relevant evidence, from testifying on matters that are not transactions with the decedent or statements by the decedent.

Respondent submitted an initial declaration setting forth her relevant testimony. (CR 21-32). When appellant's raised numerous dead man's statute objections in their first responsive pleading (CR43-71), respondent filed a second declaration breaking down her testimony in separate sentences that allowed the dead man's statute objections to be specifically argued as to each line of proposed testimony. (CR 78-87). At the initial hearing, on a line by line basis, the court heard argument and ruled as to what evidence was admissible and what evidence was barred. The trial court meticulously either allowed the testimony or ruled that the proposed testimony should be not allowed. (See RP 25-58, CP78-87, CP96-105). At the trial, appellants renewed their objections and the court allowed or disallowed evidence consistent with its prior rulings.

The trial court denied entry of evidence of any statements that the decedent may have made. However the court did allow respondent to testify as to what she directly observed and communications that she personally had with third parties. She testified to items that came into her possession and

other matters surrounding the last months of the decedent's life. Nothing in the dead man's statute precludes her from testifying to such matters.

What is telling in the argument of the appellants is that appellant's make no specific reference to the record of any particular evidentiary ruling made by the trial court that they deem to have been incorrect, and how a particular evidentiary fact prejudiced them. Appellants do not submit reasons why any particular evidence should have been rejected.

In the broadest terms, Appellants assert that "Ms. Wynecoop was improperly permitted to testify (both in writing and in court) regarding the execution of Mr. Johnson's purported will".

However, the evidence in the record relating to the decedent's will is not barred by the dead man's statute.

1. Evidence of the signing of a will is not barred by the dead man's statute.

Petitioner testifies that she contacted two witnesses to come to her house to act as witnesses to a will signing. She met the decedent's attorney at her home at the same time. She watched the two witnesses go into the decedent's bedroom with the attorney. She saw the decedent, the two witnesses and the attorney meet with the decedent, go over the documents brought by the attorney, finish their business, and depart.

All of this is direct evidence of what the petitioner saw with her own eyes and actions that she took. An interested party can testify as to her own acts. *Kellar v. Estate of Kellar*, 172 Wn. App. 562, 574 (2012).

Proof of statements or transactions with third persons (petitioner's contacts with Burgesses and Daily) are not barred by the dead man's statute. *Peoples Nat. Bank v. National Bank of Commerce*, 69 Wn. 2d 682, 690 (1966)

Further, the act of the decedent signing his will and the circumstances surrounding the will signing are not "transactions" between the respondent and the decedent. Testimony as to what the petitioner did and saw as to the circumstances surrounding the decedent's execution of this will are operative facts which the petitioner observed with her own eyes. Unlike the facts *In re Shaughnessy's Estate*, 97 Wn.2d 652 (1982), the case cited in the appellants' brief, the respondent had no role in preparing the will, did not see the will prior to its execution, and had no discussions with the decedent about the will until well after it was executed. The evidence of decedent signing his will and the circumstances as to how it was signed, as observed by the respondent, do not constitute a transaction between the respondent and decedent. Such testimony is simply not barred by the dead man's statute.

2. The copy of the will is not barred by the dead man's statute.

The dead man's statute does not prevent the introduction by an interested party of documents or other written statements by the decedent, as these are not "testimony by the party". *Kellar* (supra at 575); *Thor v. McDearmid*, 63 Wn. App. 193, 202 (1991); In *Wildman v. Taylor*, 46 Wn. App. 546, 551 (1987), over dead man's statute objection, the court allowed the introduction of contract documents with the decedent. The court stated: "We hold RCW 5.60.030 is inapplicable to the introduction of written documentation, executed by the deceased, of a transaction or statement by the deceased."

3. Evidence of the loss of a will and a recognition of the signature thereon is not barred by the dead man's statute.

Respondent has testified as to the circumstances of how the will of May 4, 1990 was lost. Testimony of the loss of a writing is not evidence of a transaction with the deceased and the identification of a signature upon a writing is not a transaction with the deceased. *O'Steen v. Estate of Wineberg*, 30 Wn.App. 923,935 (1982). See also *Jewitt v. Budwick*, 145 Wash. 405 (1927).

The court did not abuse its discretion in allowing the respondent to testify or in allowing evidence at trial over dead man statute objections. The first sentence of RCW 5.60.030 allows the respondent to testify even though

she may have an interest in the case. Further, there is nothing in the trial record that evidence of a transaction with or a statement by the decedent was admitted in violation of the dead man's statutory exception.

**D. There is substantial evidence in the record to prove that the decedent executed a valid will.**

The law has long recognized that wills that were validly executed but which can not be located following the testator's death, can be probated under certain circumstances. In pertinent part, Washington's "lost will" statute RCW 11.20.070 reads as follows:

**RCW 11.20.070 Proof of lost or destroyed will**

(1) If a will has been lost or destroyed under circumstances such that the loss or destruction does not have the effect of revoking the will, the court may take proof of the execution and validity of the will and establish it, notice to all persons interested having been first given. The proof must be reduced to writing and signed by any witnesses who have testified as to the execution and validity, and must be filed with the clerk of the court.

(2) The provisions of a lost or destroyed will must be proved by clear, cogent, and convincing evidence, consisting at least in part of a witness to either its contents or the authenticity of a copy of the will. (Emphasis added)

To admit a lost will, the evidence both of its valid execution and as to its contents must be "clear, cogent and convincing". *In re Estate of Black*, 153 Wn.2d 152, 163 (2004).

The lost will's statute expressly states that "proof" in a lost will case can come from "any witness" who has relevant testimony as to the execution

and validity of a will. Like any issue before a court, evidence (proof) can be either direct evidence, or circumstantial evidence.

A valid will must be (1) prepared in writing, (2) signed by the testator, and (3) witnessed by two witnesses. RCW 11.12.020(1).

Evidence presented to the court to show that the decedent executed a valid will was:

- The decedent was ill with terminal cancer. RP 120.
- Attorney Leo Daily, decedent's long time Spokane attorney came to where the decedent was in Stevens County on May 4, 1990. RP 127.
- Two disinterested people, Ron and Della Burgess, were asked to come to where decedent was on May 4, 1990. RP 127.
- Ron and Della Burgess were told that they would be acting as witnesses to a will signing. RP 125-127.
- Ron and Della Burgess and Daily all arrived at where the decedent was and went into a room with the decedent and were observed going over papers that Daley had brought with him. RP 128-129.
- The witnesses and Daily were in the room with the decedent 30 to 45 minutes. RP130.

- Daley took all papers with him after he left the premises. RP 132.
- Thereafter copies of legal documents were delivered by mail to the respondent mailbox addressed to the decedent. RP135-136.
- The mailing contained a photocopy of a will executed May 4, 1990 with a notarized Witness Attestation page. The photocopy of the will had a red “COPY” stamp in the upper right corner. Ex.1. The envelop in which the photocopy was in bore the stationary mark of Leo Daley’s law office. Ex. 2; RP 141.
- George Diana testified that the style of the will and the stationary was consistent with the distinctive characteristics and style of the work product produced by Leo Daley in this law practice. RP101-102.
- Also in the mailing was an original durable power of attorney. Ex. 3, RP 138.
- The durable power of attorney was recorded in the land records of Stevens County on May 10, 1990 by Colleen Wynecoop. Ex. 3, RP 138.

- George Diana testified that he knew and recognized the signature of Leo Daley, and that Leo Daley did notarize the signatures of Ron and Della Burgess. RP 100,108.
- Respondent testified that she knew and recognized the signature of Ron and Della Burgess, and that they did sign the will as witnesses. RP131-132.
- Respondent testified that she knew and recognized the signature of the decedent, and that it appeared to be the same as the decedent's signature on the will. RP 116-117.

The decedent, the two witnesses, and the attorney are all deceased and testimony from them is unavailable. However, the entire mosaic of all of the above referenced evidence, both direct evidence and circumstantial evidence, established a clear and certain picture that the decedent executed a valid will by signing a testamentary writing before two witnesses. *See* RCW 11.12.020 (1).

Appellants incorrectly argue: "To be valid, a will must be witnessed in accord with RCW 11.20.020(2)"(Brief 18). That statute allows for the self authentication of a will if the witnesses' signatures are notarized. However, the only requirements for a validly executed will are those set forth in RCW 11.12.020(1).

RCW 11.20.020(2) is not pertinent to an analysis of what kind of evidence can be presented in a lost wills case about the valid execution of a lost will. Appellants' claim that the "original" of the attestation affidavit is required to prove the execution of a valid will is not a requirement of the lost wills statute. The lost wills statute states that "any" witness can present evidence as to the execution of the lost will. The lost wills statute has no requirement that the evidence of the valid execution of the will must include original documents with original signatures of witnesses who witnessed the execution of the will. The lost wills statute does not require the live direct testimony of the two witnesses before whom the will was signed by the testator. There is no requirement under the lost wills statute that a "statutory witness" must testify on the matter. The lost wills statute simply states that "any" witness may present proof by relevant direct testimony or other circumstantial evidence about issues that are relevant to the lost will. That is exactly the type of evidence that was presented by Diana, and Ms. Wynecoop.

The affidavits submitted at the initial hearing provide ample support for the de novo conclusion that the decedent executed a valid will on May 4, 1990. Further, after a full trial on all matters relating to the lost will, there is substantial evidence in the record to support the trial court's factual finding, by clear, cogent and convincing evidence, that decedent executed a valid will.

**E. There is substantial evidence to establish the authenticity of the photocopy of the will and to prove the provisions thereof by clear, cogent and convincing evidence.**

Once the existence of a validly executed will has been established, paragraph 2 of the “lost wills” statute requires that the provisions (i.e. the contents) of the will must be proved by “clear, cogent and convincing evidence”.

The contents of the will can be proved by a single witness in either of two different ways:

(1) by witness testimony as to the contents of the will OR

(2) by witness testimony as to the authenticity of a copy of the will.

Because the decedent, the two witnesses, and the notary/attorney who prepared and notarized the will are all deceased, there was no direct witness testimony as to what they knew of the contents of the will.

In proving the authenticity of a photocopy of any document, (i.e. in this case the document that is the photocopy of the will), the court is governed by the normal rules of evidence. ER 901 is the basic evidentiary rule dealing with authentication of a document. ER 901(a) provides that authentication is “satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”

The general authentication of evidence under ER901(a) is met by a prima facie showing that the proposed evidence (here the photocopy of the

will) is what the proponent claims it is. The requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. The requirement is met if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of authentication. *State v. Bradford*, 175 Wn.App. 912, 928 (2013). Once a prima facie showing is made, the document is admissible as far as ER 901 is concerned. However the opposing party may submit contrary evidence and the issue of authenticity is ultimately judged by the trier of fact.

To further understand authentication, ER 901(b) sets forth ten illustrations of examples of authentication. ER 901(b)(4) provides as follows:

(4) *Distinctive Characteristics and the Like.* Appearance, contents, substance, internal patterns, and other distinctive characteristics, taken in conjunction with circumstances.

The essence of this illustration is that authenticity may be shown by circumstantial evidence.

The record is replete with substantial circumstantial evidence regarding the authenticity of the photocopy of the will.

- the photocopy appeared shortly after the decedent was observed signing his will on May 4, 1990;

- the photocopy has the signatures of both Burgesses and Leo Daily, who were known to be present when the decedent executed his last will on that date;
- the photocopy was in an original gray envelope with Leo Daily's markings;
- the photocopy had an original red "COPY" stamp marked on it;
- the photocopy is similar in formatting, font appearance, and signatures as compared to an original durable power of attorney that was recorded in the public land records on May 10, 1990;
- the photocopy was similarly notarized by Leo F. Daily on May 4, 1990 in the exact same way that the recorded durable power of attorney was executed on the same day;
- a copy of the photocopy of the will was filed in a public record in 1992, more than two decades before the value of the North Dakota mineral rights was discovered;
- proposed photocopy of decedent's will is entirely legible. It identifies all of decedent's children. None of the words in the photocopy are missing, smeared, blurred or indecipherable. Every part of the photocopy of the will speaks clearly on its

face as to its provisions and contents. The contents of the will are clear;

- there was no evidence that the photocopy was faked, forged or not what it appeared to be.

Without citation to any authority, appellants assert that the provisions of ER 901 are not applicable in lost wills cases. They assert that evidentiary standards (i.e., the Rules of Evidence) are not compatible with the lost will statute's burden of proof requirement of clear, cogent and convincing evidence. However, the appellants are confusing the difference between a rule of evidence that governs the admission of evidence at trial, and the ultimate burden of proof that must be met on the issues that will decide the case.

ER 901 will allow the admission of evidence by the finder of fact if the document "is what its proponent claims." However such evidence when admitted, together with all of the other evidence, must still be sufficient to meet the required burden of proof when weighted by the finder of fact. This is true whether the case requires a preponderance of the evidence, clear, cogent and convincing evidence, as this case does, or evidence beyond a reasonable doubt, as in a criminal case.

Appellants assert that the trial judge "improperly placed the burden on the appellants to disprove the purported will's authenticity". (Brief 25)

That is not true. The cited portion of the judge's ruling was the judge weighing all of the evidence, and determining whether Ms. Wynecoop had met her burden of proof by clear, cogent and convincing evidence.

When all of the evidence was submitted to the court, the judge weighed it and concluded by clear, cogent and convincing evidence that the photocopy of the will was authentic, and that the photocopy was sufficient to establish the contents of the decedent's will.

#### **V. ATTORNEY'S 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 code (Title 11 RCW) gives this court discretion in awarding costs and attorneys' fees to parties in probate proceedings. RCW 11.96A.150.

The respondent sought to probate a lost will. After review of the entire record, and after testimony at trial, the trial court concluded that the proposed lost will was validly executed and that the photocopy of the will was authentic to prove the contents of the will. The appellants, in the face of overwhelming evidence, found by the trier of fact to be clear, cogent and convincing, have elected to aggressively fight this process at every turn. It is respectfully requested that the respondent be awarded her attorney's fees.

## VI. CONCLUSION

The trial court did not abuse its discretion by holding a trial on questions of fact surrounding the lost will. Nor did the trial court abuse its discretion in admitting any evidence over dead man statute objections. Finally, there was substantial evidence in the record to meet the clear, cogent and convincing burden of proof that the decedent did execute a valid will, and that the offered photocopy of the will was authentic and clear to prove the contents of the will.

RESPECTFULLY SUBMITTED, this 4<sup>th</sup> day of January, 2017.

MCGRANE & SCHUERMAN, PLLC



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DAVID E. MCGRANE, WSBA #8064  
Counsel for the Respondent

## 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 4<sup>th</sup> day of January, 2017, the foregoing was delivered to the following persons via U.S. mail with postage fully prepaid thereon:

Matthew William Daley  
Witherspoon, Kelley, Davenport & Toole  
422 W. Riverside Ave., Ste 1100  
Spokane, WA 99201-0300  
email: mwd@witherspoonkelley.com

Clerk's Office  
State of Washington  
Court of Appeals, Division III  
500 N. Cedar St.  
Spokane, WA 99201-1905

  
\_\_\_\_\_  
Karen Hansen, Legal Assistant.