

NO. 46441-1-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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IN RE THE ESTATE OF RAY MERLE BURTON,

Deceased.

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RESPONDENT'S BRIEF

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**A. Introduction**

Ray Merle Burton (“Burton” or the “Decedent”) died intestate, having failed to validly execute a will witnessed by at least two competent individuals. Appellant Victor White claimed that two non-identical documents, one of which is missing, and each of which were witnessed by only one person, combined to create a holographic will. In the alternative, White argued that the documents combined to create a contract to devise. The trial court rejected the claim that two non-identical documents, one of which cannot be found, each of which were supposedly witnessed by only one person, could be combined together to create a single will. The trial court made no ruling on the validity of White’s claim that the two documents created a contract to devise and saved that issue for a later date. As such, the trial court has not issued a final order disposing of all claims against all parties, nor has the trial court found no just cause for delay. White’s appeal should be denied as untimely and the matter remanded to the trial court for final resolution of all claims.

In the alternative, this Court should affirm the trial court’s findings as White failed to show valid execution of a will in compliance with RCW 11.12.020 or a lost will in compliance with RCW 11.20.070. In addition, Respondent Richard Didricksen requests his attorney fees pursuant to RAP 18.1 and RCW 11.96A.150.

**B. Issue Statements**

1. Under RAP 2.2(a), an appeal of right exists only when the trial court has finally resolved all claims against all parties, or found that there is no just cause for delay. Should this Court dismiss White's appeal with prejudice and remand the matter to the trial court for final resolution of all claims against all parties when White has outstanding claims that have not yet been resolved? **Yes.**

2. Washington State enforces a minimal, but strict standard for the valid execution of a will, requiring, pursuant to RCW 11.12.020(1), that it be in writing and attested by at least two competent witnesses. Should this Court hold that the trial court did not err when it rejected White's claim that two non-identical documents, each of which were supposedly witnessed by one person, could be combined to create a single will? **Yes.**

3. Under RCW 11.20.070, a lost will must be validly executed. Should this Court hold that the trial court did not err when it found that White failed to satisfy his evidentiary burden for a lost will when, even accepting all of his evidence as true, White failed to prove that the lost document constituted a validly executed will witnessed by two competent individuals? **Yes.**

4. Should this Court grant Didricksen his attorney fees pursuant to RAP 18.1 and RCW 11.96A.150? **Yes.**

**C. Statement of the Case**

On an unspecified date, Lisa Erickson purportedly signed a piece of paper or tablet in which Burton supposedly left all of his property to White.<sup>1</sup> Clerk's Papers (CP) at 15. No one has recovered this document. CP at 15. On January 24, 2014, Shirley Outson signed a Health Care Advanced Directive form drafted by an unknown individual. CP at 11 – 13. No other witness signature appears on the document. CP at 13. Outson did not witness the drafting of the writing on the Health Care Advanced Directive. *See* CP at 11 – 12. The writing includes two different sets of handwriting. In one handwriting, the document purports to state that “That Victor White remain my care taker til I go to sleep/die the transfer of Gold Mines & Monte carlo & Black Hawk one, All my collector cars and real estate located at 36619 Mountain Hwy E Elatoville [sic], Wa 98328.” CP at 13. In a second set of handwriting, the document purports to state that “I wish all my worldly possessions to go to Victor White.” CP at 13. Additionally, a drafter had checked the

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<sup>1</sup> Below, Respondent objected to the declarations offered by Victor White on varying grounds such as the Deadman's Statute and hearsay. *See e.g.*, CP at 109 – 10. The trial court did not rule on these objections. By reciting the claims made below, Respondent does not waive or concede his objections. Respondent includes the information in his recitation of facts to provide this Court with a complete picture of the claims made below.

box indicating that he did want to have artificially provided nutrition and hydration and that he did not want to have artificially provided nutrition and hydration. CP at 13.

On January 25, 2014, Ray Merle Burton passed away due to natural causes. CP at 25.

On March 28, 2014, White filed a Verified Petition for an Order Determining Validity of Will and Appointing Personal Representative (“Petition”). CP at 1 – 4. In his Petition, White asked that the trial court find that Mr. Burton “died testate having executed a holographic testamentary document” or, in the alternative, a contract to devise. CP at 1. White also requested that he be appointed personal representative with non-intervention powers. CP at 3.

That same day, Richard Didricksen, a cousin of the decedent, also filed a Petition for an Order Appointing Personal Representative in Intestate Estate and Adjudicating Solvency of Estate. CP at 117 – 20. Mr. Didricksen asked the trial court to find that the decedent died intestate, having failed to execute a will that complied with RCW 11.12.020(1). CP at 117 – 20. Mr. Didricksen also requested that he be named as personal representative. CP at 117 – 20. White opposed Mr. Didricksen’s Petition and requested to be appointed personal representative. CP at 121 – 25. White reaffirmed his request to be appointed as personal representative or

to have a Special Administrator appointed. CP at 121. In addition, White admitted that “only one witness’ [sic] signature appears on the Will[,] which fails to meet the statutory requirements for execution.” CP at 121.

On April 16, the trial court appointed a Special Administrator and the matter of intestacy was reserved for a later hearing. CP at 126 – 28.

On April 25, 2014, Didricksen filed a Motion for Order Declaring Estate to be Intestate and for Attorney’s Fees. CP at 31 – 38. Mr. Didricksen pointed out that the Health Care Advanced Directive failed to meet the basic requirements of RCW 11.12.020 because it was not signed by two witnesses. CP at 33 – 34. The Health Care Advanced Directive also failed to meet the requirements for a nuncupative will, the only other form of will recognized in Washington State. CP at 34. Moreover, Mr. Didricksen pointed out that the common law holographic will has been abandoned by statute and is not recognized. CP at 34.

In opposition to the Motion, White claimed that Burton executed a holographic will and substantially complied with the statutory requirements for a will. CP at 39. White also alleged that the first document that Burton supposedly executed met the requirements of a lost will pursuant to RCW 11.20.070(2). CP at 43 – 44.

In reply, Didricksen pointed out again that Washington requires strict compliance with RCW 11.12.020 and that even a lost will must be validly executed with at least two witness signatures. CP at 50 – 55.

On May 2, 2014, the trial court found that the lost document was not a Will, that the Health Care Advanced Directive was not properly authenticated or executed, and that the Estate was intestate. CP at 60; Verbatim Report of Proceedings (VRP) (May 2, 2014) at 14 – 15. The trial court did not bar White from “making claims he might have,” such as “promises, contractual or quasi-contractual claims.” VRP (May 2, 2014) at 15. On May 12, White filed a motion for reconsideration, arguing that the testimony of only one witness was needed to prove the contents of a lost will and that the writing was not offered as a holographic will, but as a handwritten will. CP at 61 – 64. The trial court denied his motion to reconsider, finding that White failed to prove the existence of a lost will because he did not show that two individuals witnessed the supposedly lost will. VRP (May 30, 2014) at 27. The trial court once again found that White was “free to pursue other legal remedies.” CP at 113.

Mr. White appeals the orders finding that Burton died intestate and denying his motion for reconsideration. CP at 100 – 05.

#### **D. Argument**

This Court should dismiss White's appeal because it is untimely. Unresolved claims still remain. In the alternative, this Court should affirm the trial court, holding that White failed to prove the existence of a valid will as required by RCW 11.12.020 or a lost will as required by RCW 11.20.070. Washington State employs a low bar for the creation of a valid will, but this low bar is strictly enforced. Washington does not recognize holographic wills, nor is substantial compliance valid. Whether dealing with a found or lost will, the testator must meet very simple requirements: put his will in writing and have that writing attested to by at least two competent witnesses. White failed to prove that the Decedent executed any writing that was witnessed by two competent individuals. White is not entitled to combine together multiple, non-identical documents into a single "will."

- a. This matter is not appealable at this time because the trial court's orders did not resolve all claims against all parties.**

This Court should dismiss White's appeal because this matter is not appealable at this time. The trial court has not resolved all claims against all parties.

A matter is appealable of right when, *inter alia*, final judgment is entered in any action or proceeding or when a written judgment affecting a

substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action. RAP 2.2 (a)(1), (3).

Although the trial court found that the Estate is intestate, White has a claim still pending. Specifically, in his Petition, he argues in the alternative that the Health Care Advanced Directive constitutes a contract to devise. In finding that Burton passed away intestate, the trial court specifically found that White was still able to bring these arguments. The trial court has not entered a final judgment or a judgment that, in effect, determines the action or prevents a final judgment. Moreover, the trial court has not entered findings of fact or conclusions of law finding that “there is no just reason for delay.” RAP 2.2(d). As such, this matter is not appealable of right and White’s appeal should be dismissed and this matter remanded to the trial court for resolution of the remaining claims.

**b. Burton passed away intestate because he failed to satisfy the minimum requirements of for executing a valid will.**

The Court did not err in finding that Burton died intestate. Burton never executed a valid will. There is no evidence to the contrary. The Health Care Advanced Directive does not constitute a valid will under Washington law, and Washington does not recognize holographic wills.

Washington law recognizes two kinds of wills: written wills and nuncupative wills. “[T]he requirements for valid will execution have been reduced to a minimum in Washington.” *In re Estate of Price*, 73 Wn.

App. 745, 751, 871 P.2d 1079 (1994). RCW 11.12.020(1) requires only that

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

These statutory requirements exist to ensure that the testator has a definite and complete intention to dispose of his or her property and to prevent fraud, perjury, mistake, and the chance of one instrument being substituted for another. *In re Estate of Malloy*, 134 Wn.2d 316, 323, 949 P.2d 804 (1998). “[T]he Legislature has defined wills and how they shall be executed and by whom, and no provision is made for holographic wills.” *In re Brown’s Estate*, 101 Wash. 314, 316, 172 P. 247 (1918). “[B]ecause the Legislature of this state has enacted laws providing for the kind of wills which may be executed and the manner of their execution, those forms of wills not provided for are not recognized.” *Brown’s Estate*, 101 Wash. at 317.

White correctly conceded multiple times below that the Health Care Advanced Directive and the missing form do not satisfy the requirements of RCW 11.12.020 because there is no document executed by the Decedent and attested to by two competent witnesses. *See e.g.*, CP

at 121. As such, this Court should hold that the trial court did not err in finding that the Decedent died without a validly executed will and thus died intestate.

White argues that the Decedent “substantially complied” with the statute of wills. However, “no published case in Washington endorses the principle of substantial compliance.” *Washington Estate Planning Deskbook*, § 16.6(7) (Wash. State Bar Assoc. 2005).<sup>2</sup> “[N]o will is valid unless there is compliance with all of the statutory requirements. The fact that the testator intended to comply ... is not ground for relaxing the rule.” *Atkinson on Wills* at 293.

White attempts to save his position by claiming that multiple, non-identical documents can be signed in counterparts and combined to make a single will. However, even if a will could be executed in counterparts, though White has offered no authority for this position, the non-identical instruments he offers do not combine to make “counterparts” of the same “will.” A legal document executed in “counterparts” is still copies of a single, identical document. A “counterpart” is “one of two corresponding copies of a legal instrument (as an indenture) : DUPLICATE.” WEBSTER’S THIRD NEW INT’L DICTIONARY, 520 (2002).

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<sup>2</sup> See Appendix A.

By White's own admission, the various documents that the Decedent supposedly signed are not identical copies signed in counterparts, but rather non-identical drafts of separate documents.<sup>3</sup> There is no suggestion that the Health Care Advanced Directive is a photocopy or printout of the earlier alleged document or that the two documents contained exactly identical words. Rather, each draft is a non-identical instrument with only one alleged "witness." At best Ms. Outson "witnessed" one document and Ms. Erickson "witnessed" a separate, non-identical document. However, there is no document in existence that was witnessed by two witnesses in counterparts.

Here, the Health Care Advanced Directive was not signed by two witnesses. White admits "only one witness' signature appears on the Will[,] which fails to meet the statutory requirements for execution." CP at 121. As such, the Health Care Advanced Directive was not executed according to the formalities required under Washington law, and is not valid as a written will. RCW 11.20.020.

The multiple documents White relied on also do not constitute a nuncupative will. Under a nuncupative will, a member of the United States Armed Forces or a merchant marine may dispose of his or her wages, or any person can dispose of personal property worth not more

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<sup>3</sup> See VRP (May 30, 2014) at 29.

than \$1,000. RCW 11.12.025. Additionally, the nuncupative will must be witnessed by two witnesses and cannot be used to bequeath real property. RCW 11.12.025.

The Health Care Advanced Directive is also not a nuncupative will, which requires that testamentary words be proved by two witnesses. Here, there was, allegedly, only one witness for the Health Care Advanced Directive. Moreover, a nuncupative will may only dispose of personal property of a value not exceeding one thousand dollars. RCW 11.12.025. Here, Decedent died possessed of real estate and the Health Care Advanced Directive would not be sufficient to convey such real estate.

Mr. White has previously<sup>4</sup> argued that “Mr. Burton executed a holographic Will prior to his death.” CP at 39 (“Mr. Burton executed a holographic Will prior to his death.”). This is not the case because holographic wills are not recognized as valid wills in Washington. As the Supreme Court of Washington has recognized, while the right to make a holograph will existed at common law, “it is clear that the common law has been modified by statute in this state, because no provision was made for such wills.” *Brown’s Estate*, 101 Wash. at 316. In other words, “a holographic will is not recognized as a valid will in this state.” *Id.* at 317.

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<sup>4</sup> Mr. White subsequently denied claiming that the Decedent executed a holographic will. CP at 63 (“The Will submitted has not been offered as a holographic will, but rather as a handwritten will that is signed and witnessed.”).

A will must be properly witnessed by two people, RCW 11.12.020, and the Health Care Advanced Directive is invalid as a will.

Mr. White has also argued that “[t]o the extent the Will proffered by [him] may be found not in compliance with statutory requirements, it is still evidence of an agreement to devise, regardless of its compliance with statutes for execution of a Will.”<sup>5</sup> However, that is not the issue before the Court at this time and the cases previously cited by Mr. White are inapposite to the issue of intestacy. The two inquiries are fundamentally different.

There is in fact a line of Washington cases standing for the proposition that an oral contract to devise may be upheld in equity, but are not favored, and require that proof be established “to a high probability,” equivalent to evidence that is “clear, cogent and convincing.” *Bale v. Allison*, 173 Wn. App. 435, 454, 294 P.3d 789 (2013) (quoting *Cook v. Cook*, 80 Wn.2d 642, 645 - 46, 497 P.2d 584 (1972)). These cases stand for the proposition that an oral contract to devise may be upheld in certain circumstances. They do not state that a contract to devise is somehow a will substitute or the functional equivalent of a properly executed will. The Health Care Advanced Directive offered here is not a valid will, even assuming it could be offered as evidence in support of a contract to devise.

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<sup>5</sup> CP at 122.

In other words, whether the Estate is intestate does not turn on whether there was a valid agreement or contract to devise (which can be litigated at a later date).

Thus, taken together, Decedent did not execute a valid written or nuncupative will. Washington law does not permit holographic wills. The Health Care Advanced Directive is not a valid will and the Court should thus declare the Estate intestate.

White cites *Kim v. Lee*,<sup>6</sup> for the proposition that strict compliance with statutory procedures are not always required and the Court should ignore the defects with the documents. *Kim* is not a will case. That case dealt with whether a judgment was valid under RCW 4.64.030 where the judgment summary began on the first page and continued on to the second page. The court noted that the judgment was effective because it “was in actual compliance with the substantive purpose of RCW 4.64.030 despite the minor procedural imperfection,” and that the legislature did not intend “strict compliance with RCW 4.64.030 where circumstances exist which would make it difficult or impossible to fit the entire judgment summary on the first page.” *Id.* at 592. In other words, the procedural error was “not material under the circumstances.” *Id.*

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<sup>6</sup> 102 Wn. App 586, 591, 9 P.3d 245 (2000), *rev'd on other grounds*, 145 Wn.2d 79, 31 P.3d (2001). Appellants' [sic] Opening Brief at 13.

Here, the legislature has intended strict compliance with the statute of wills and the Decedent did not comply with them. There is no published Washington decision endorsing the principal of substantial compliance. The two documents are not “in actual compliance” with the requirement of two witnesses attesting to a single document, and there are no circumstances that would have made it impossible for the Decedent to obtain a second signature on either document. The error in this case is manifestly material, particularly since Washington has only minimal requirements for a valid will execution.

White also cites *In re Estate of Ricketts*,<sup>7</sup> for the contention that substantial compliance is sufficient in this case. However, *Ricketts* entirely rejects the notion of substantial compliance. In *Ricketts*, the court declined to admit a codicil to probate because the witnesses did not comply with the then-existing requirements for execution of a valid codicil (*i.e.*, by attesting to the testator’s signature on the codicil). Noting that “minimum statutory requirements *must* be met,” the court of appeals reversed an order admitting the codicil to probate. *Id.* at 224 (emphasis added). In other words, the court *insisted on formalities and required strict adherence to the statutory framework*. The fact that the legislature

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<sup>7</sup> 54 Wn. App. 221, 773 P.2d 93 (1989). Appellants’ [sic] Opening Brief at 13 – 15.

later allowed witnesses to execute wills by affidavit<sup>8</sup> does not change the underlying principle that, in Washington, courts require a will be executed in strict compliance with the statute of wills.

White has failed to prove a validly executed will. Indeed, he gives away his case when he admits that the “statute of wills requires two witnesses to the testator’s Will,” because Washington law still requires strict compliance with the formalities of wills. That did not occur here.

**c. White failed to prove the existence of a lost will because even a “lost” will must still be witnessed by two individuals.**

White has not provided sufficient proof of a lost will because no document he relies on was witnessed by two individuals.

“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.” RCW 11.20.070. “The proponent must prove that the will was in existence at the time of the testator’s death and *that it was properly executed.*” *In re Estate of Black*, 116 Wn. App. 476, 484, 66 P.3d 670 (2003), *aff’d on other grounds*, 153 Wn.2d 152, 102 P.3d 796 (2004) (emphasis added). The statute is designed to promote certainty and prevent fraud in the proof of lost and destroyed wills and “is in harmony

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<sup>8</sup> LAWS OF 1990, ch. 79, § 1.

with the well-established legislative policy of this state that, with some minor exceptions, every will must be in writing and attested by at least two witnesses.”<sup>9</sup> *In re Kerekhof's Estate*, 13 Wn.2d 469, 476, 125 P.2d 284 (1942).

Here, Mr. White has presented absolutely no proof that the “lost” document was properly executed. In fact, White admits that the earlier document was “witnessed” by only one individual – Ms. Erickson. Even if every statement alleged by Ms. Erickson is true, her testimony fails to establish that the lost document was a validly executed will. As such, the trial court did not err in finding that the lost document did not constitute a lost will within the meaning of RCW 11.20.070.

**d. The trial court did not rule on the evidentiary objections raised by Didricksen, leaving nothing for this Court to address.**

Evidentiary rulings are reviewed for abuse of discretion. The trial court did not rule on any of Didricksen’s evidentiary objections. It is evident that the trial court was able to determine that the Decedent did not execute a valid will without reaching these issues. *See* VRP (May 30, 2014). Even assuming everything that White and his witnesses claim is true, there is no evidence that the Decedent executed a valid will that was witnessed by two individuals. Because the trial court did not rule on the

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<sup>9</sup> This is not to say that the will must be *proven* in court by two witnesses, but that it must be *attested* to by two witnesses.

evidentiary objections, this court cannot determine whether the trial court abused its discretion. If this Court finds that the Decedent might have executed a valid Will, it should first remand for a determination of Didricksen's evidentiary objections. Otherwise, White's evidentiary arguments should be rejected.

**e. This Court should award Didricksen his attorney fees and costs on appeal.**

Attorney fees and expenses incurred on appeal can be awarded if applicable law, a contract, or equity permits an award of such fees and expenses. RAP 18.1(a). The party requesting an award of fees and expenses must devote a section of its opening brief to the request for the fees or expenses. RAP 18.1(b). TEDRA provides this Court with the authority to hear this matter and order the relief requested by Didricksen. RCW 11.96A.150, one of TEDRA's provisions, states:

(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.

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and

guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10).

Didricksen is entitled to attorney fees and costs incurred on appeal.

**E. Conclusion**

In conclusion, White's appeal is untimely and should be dismissed. In the alternative, this Court should affirm the trial court's findings that the Decedent died intestate because White failed to prove a validly executed will. Whether lost or found, a will *must* be attested to by two witnesses. White's attempt to combine non-identical documents, each of which were witnessed by only one person, does not create a valid will. Finally, Didricksen is entitled to his attorney fees.

RESPECTFULLY SUBMITTED this 10th day of December,  
2014.

EISENHOWER CARLSON, PLLC

By:   
\_\_\_\_\_  
Chrystina R. Solum, WSBA #41108  
Attorneys for Respondent

**CERTIFICATE OF SERVICE**

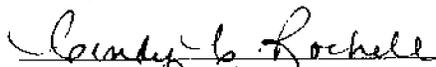
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

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DATED this 10<sup>th</sup> day of December, 2014 at Tacoma,

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Cindy C. Rochelle  
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# APPENDIX A

**WASHINGTON  
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## **CHAPTER 16**

### **WILLS**

Watson B. Blair

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Watson B. Blair founded Watson Blair Law Group PLLC in 2002 and, before that, had been a principal of Riddell Williams P.S. and a co-chair of the Trusts, Estates, and Personal Planning Group of Bogle & Gates P.L.L.C. He is a Fellow of the American College of Trust and Estate Counsel and practices primarily in the areas of estate planning, probate and trust administration, family-owned and other closely held businesses, charitable giving, resolution of intrafamily disputes, civil liberties and personal constitutional rights, guardianships, and nonprofit corporations and associations. Mr. Blair was a co-chair and member of the Probate Law Task Force and has served on the Executive Committee of the Real Property, Probate and Trust Section of the Washington State Bar Association and of the Estate Planning Council of Seattle. He also serves as a director and officer of several nonprofit organizations in Washington and serves as a trustee in Washington and New York. Mr. Blair received his B.A. degree from Yale University and his J.D. degree from the University of California, Hastings College of Law.

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### **§16.1 INTRODUCTION**

These materials examine wills, the provisions that practitioners should consider when drafting wills, and the laws and doctrines that have developed over the years to ensure that a decedent's property will pass according to the decedent's true wishes. There are safeguards to ensure that the maker of a will (the "testator") has adequate mental capacity and freedom from undue influence and to ensure that the instrument presented as the testator's last will and testament is genuine. Many of these safeguards overlap and interrelate, and several threads reappear regularly in the fabric of these laws and doctrines.

### **§16.2 SCOPE OF THE RIGHT TO DISPOSE OF ONE'S PROPERTY AT DEATH**

The right to dispose of one's own property at death is not a natural right and is granted by statute. See *In re Sherwood's Estate*, 122 Wash. 648, 654-55, 211 P.2d 734 (1922); cf. *In re Estate of Burns*, 131 Wn.2d 104, 113-15, 928 P.2d 1094 (1997).

### **§16.3 DEFINITION OF WILL AND CODICIL**

The terms "will" and "codicil" are defined in RCW 11.02.005(8) and (9), respectively.

#### **(1) Will**

RCW 11.02.005(8) defines a "will" as an instrument validly executed as required by RCW 11.12.020. To be a will, an instrument is not required to contain specific provisions. The instrument need only be executed with the formalities of a will. See §16.6 of this chapter for the

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necessary to prove a will. That alternative is commonly referred to as a "self-proving affidavit." See WASHINGTON LAW OF WILLS Ch. 2 §A.5. Being able to preserve the testimony in support of a will at the time that the will is executed is a great advantage.

The witness may execute the self-proving affidavit "before any person authorized to administer oaths," if the testator requests or, after the testator has died, if the executor or any person interested under the will requests that the witness does so. See RCW 11.20.020(2); WASHINGTON LAW OF WILLS Ch. 2 §A.5.

The affidavit must either be written on the will itself or be attached to the will or to a photographic copy of the will. See RCW 11.20.020(2); WASHINGTON LAW OF WILLS Ch. 2 §A.5.

A declaration under penalty of perjury may be used in lieu of an affidavit. RCW 9A.72.085.

#### **(6) Testamentary intent**

Every will must not only satisfy the statutory formalities for the execution of a will, but must also be executed with testamentary intent. Testamentary intent is commonly referred to by its Latin name: *animus testandi* (as distinguished from the intent to attest a will, *animus attestandi*). A testator has *animus testandi* if he or she intends the document to represent his or her last will and testament. WASHINGTON LAW OF WILLS Ch. 2 §A.6.; see also RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §3.1 cmt. g (1998).

For example, if a will was executed with all of the formalities required for the execution of a will but was executed "under compulsion [or] undue influence, as part of a ceremonial, for the purpose of deception, or for the purpose of perpetuating a jest," or if a will (as compared to a gift under the will) is conditioned upon a contingency that never occurred, the instrument is not a valid will because there is no *animus testandi*. Conversely, however, the circumstances surrounding a will may be unusual without rendering the will invalid, as long as the proper formalities for the execution of wills are followed and as long as the testator has the *animus testandi*. WASHINGTON LAW OF WILLS Ch. 2 §A.6.; *In re Watkins' Estate*, 116 Wash. 190, 193, 198 P. 721 (1921).

#### **(7) Substantial compliance with all statutory requirements**

Professor Atkinson writes that "no will is valid unless there is compliance with all of the statutory requirements. The fact that the

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testator intended to comply, or that the will contained commendable provisions, is not ground for relaxing the rule. The heirs at law are thus favored, although this is probably more of a by-product of the desire for certainty than of a policy to discourage free testation." He then adds that "the courts do not insist upon performance of the formalities in the most literal or exacting sense which construction of the statute permits. Substantial or reasonable compliance with each requirement should be enough." ATKINSON ON WILLS at 293; *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §3.3 (1998); UNIF. PROBATE CODE §2-503 (rev. 1990). No published case in Washington endorses the principle of substantial compliance, although the court arguably approved the principle of substantial compliance in dictum in *In re Estate of Ricketts*, 54 Wn. App. 221, 773 P.2d 93 (1989).

### (8) No requirement that will be dated

RCW 11.12.020 does not require that a will be dated. However, it is extremely important to know the date of an instrument. Without dates, one cannot know when instruments were executed and hence which instrument is the *last* will.

## §16.7 EXECUTION OF WILLS OUTSIDE WASHINGTON (OR IN ACCORDANCE WITH LAW OF TESTATOR'S DOMICILE)

A will that does not comply with the formalities for the execution of a will in the state of Washington may nevertheless be honored and probated in Washington if the will was executed with the formalities required in the state either where the will was executed or at the testator's domicile, either at the time the will was executed or at the time the testator died. RCW 11.12.020; *see also In re Wegley's Estate*, 65 Wn.2d 689, 399 P.2d 326 (1965); *In re Bauer's Estate*, 5 Wn.2d 165, 105 P.2d 11 (1940); WASHINGTON LAW OF WILLS Ch. 2 §§B.1. & C.

For example, the courts in Washington may honor and probate an unwitnessed holographic will provided that it was executed either in a jurisdiction that recognized holographic wills or by a testator who was domiciled in a jurisdiction that recognized such wills. That is true even though the general rule in Washington is that unwitnessed holographic wills are not recognized.

**EISENHOWER & CARLSON**

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