No. 100170-3

SUPREME COURT OF
THE STATE OF WASHINGTON

IN THE MATTER OF THE ESTATE OF ZORA P. PALERMINI

ANSWER TO PETITION FOR REVIEW
GEORGE BRALY, AS PERSONAL REPRESENTATIVE AND TRUSTEE

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TABLE OF CONTENTS

Ogden Murphy Wallace PLLC
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TABLE OF AUTHORITIES

Cases

Ogden Murphy Wallace PLLC
901 Fifth Ave., Ste. 3500
Seattle, WA 98104

Statutes

Rules

I. INTRODUCTION

The Petition for Review is but the latest salvo in Petitioner Dominique Jinhong's now years-long campaign to delay, if not evade, justice for her abhorrent exploitation of her dying grandmother. This Court should put an end to that campaign and decline review, for Petitioner cannot meet the standard for review pursuant to RAP 13.4.

Throughout her life, Decedent Zora P. "Polly" Palermini lived frugally and saved in order to provide for her two disabled sons, who were unable to care for themselves. Polly planned her affairs years in advance so that, upon her death, her living trust – which held almost all of her assets – would fund two new trusts for the care of her sons, thus ensuring that they would be cared for after she was gone.

In the last weeks of Polly's life, however, as she lay in hospice with a terminal illness, Petitioner – Polly's granddaughter, a licensed attorney, and the co-trustee of Polly's

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trust – systematically transferred almost the entirety of Polly's assets to herself, robbing Polly's trust of virtually all of its assets and rendering it utterly incapable of providing for the care of Polly's surviving adult son. In a matter of weeks, using forged legal instruments, financial exploitation, and undue influence, Petitioner unmade what Polly had spent a lifetime trying to achieve, all for her own personal enrichment.

As the Court of Appeals affirmed in its well-reasoned decision in this matter, the trial court found after considering mountainous evidence that in the final weeks of Polly's life, Petitioner had among other things:

- Used undue influence, financial exploitation, and self-dealing to transfer title to Polly's house from Polly's trust to herself;
- Forged legal documents to obtain unfettered access to Polly's investment accounts;
- Liquidated over $600,000 of Polly's investments and transferred the proceeds to a payable-on-death

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bank account with Petitioner as the beneficiary;

- Paid from Polly's checking account Petitioner's personal debts, including credit cards, student loans, and campaign debt from Petitioner's failed campaign for superior court judge; and
- Purchased a new motorcycle for Petitioner's then-spouse using $22,000 of Polly's money.

The trial court arrived at these findings after hearing extensive testimony from a multitude of disinterested witnesses, including Polly's longtime estate-planning attorney, friends, and neighbors. In arriving at its unpublished decision affirming the trial court's findings, the Court of Appeals noted that the evidence of Petitioner's wrongdoing was "overwhelming."

Against this backdrop, Petitioner has the temerity to suggest that she is the victim of a biased trial judge who had a "thumb on the scale of justice" by ruling against Petitioner on "every major evidentiary issue;" an "aggressive" disinterested trustee; "patriarchal" third-party witnesses who had the nerve to

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offer testimony that conflicted with Petitioner's self-serving fictions; and a Court of Appeals engaged in "truncated" analysis of the law. As this Court will soon see, however, seldom has the principle of Occam's Razor been so much in evidence. The evidence at trial was conclusive and the Court of Appeals correctly analyzed the applicable law. Petitioner lost not because a trial judge, an appellate panel, and a host of third parties with no stake in the outcome conspired against her, but because she stole her dying grandmother's estate.

Indeed, Petitioner here serves up the same well-worn and now twice-rejected arguments as she did both at the trial court and before the Court of Appeals, all of which essentially boil down to the same thing: that the court should have considered Petitioner's self-serving statements to the effect that Polly *wanted* her to engage in all of the above-referenced conduct. Petitioner seems to believe that if she had just been allowed to testify that Polly, while grappling with the final stage of terminal illness, suddenly decided that she no longer needed to

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Seattle, WA 98104

care for her disabled son and instead should liquidate her entire estate and give it all to Petitioner, the trial court would have ignored the voluminous other evidence of Petitioner's fraud, undue influence, breach of fiduciary duty, and financial exploitation, and ruled in her favor. It would be a risible fantasy if the circumstances were not so tragic.

As she did before the Court of Appeals, Petitioner here engages in an intellectually dishonest mangling of the evidentiary record and legal issues in the case below. Among other things, Petitioner mischaracterizes the evidentiary burdens at trial, neglecting to mention that under well-established Washington law, it was *her burden* to prove by clear, cogent, and convincing evidence that the property she took from Polly was *not* taken by undue influence; relies on irrelevant legal authorities concerning competence even though competence was not the subject of any claims; and claims that the Court of Appeals "relied heavily" on the testimony of an expert witness which the Court of Appeals did not so much as *mention* in its

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Seattle, WA 98104

decision. This Court must not be misled by Petitioner's revisionist mischaracterization of the law and record in this case, and the Petition, which strains the very notion of good faith, should be denied.

II. IDENTITY OF ANSWERING PARTY

George Braly is the Personal Representative of the Estate of Zora P. Palermini and the Trustee of the Zora P. Palermini Living Trust (the "Trust") (collectively hereafter, the "Estate").

III. ISSUES PRESENTED FOR REVIEW

Petitioner's formulation of the issues presented for review mischaracterizes both the evidence and legal issues in this case, and appears to be designed to mislead this Court. The Estate responds as follows:

1. **No.** Not only does Petitioner once again mischaracterize the burden of proof at trial – wrongly insisting that the Estate bore the burden, when in fact the burden was hers – but Petitioner raises the issue of whether the evidence of undue influence was too

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"speculative" to support the trial court's finding for the first time in her Petition, and the Court should decline to consider it.

2. **No.** Petitioner's contention that Polly's "wishes were ignored" is mere fiction, unsupported by any evidence in the record, and the Court of Appeals correctly affirmed the trial court's evidentiary rulings. Moreover, the Court of Appeals concluded that the evidence of Petitioner's misdeeds was "overwhelming," and any error by the trial court was immaterial and harmless in any event.
3. **No.** Petitioner's sole objection on appeal to the trial court's finding of fraud hinges on her claim that the false certificate of trust forged to gain access to Polly's investment accounts was not, in fact, a forgery. Ample evidence proved that it was.
4. **No.** Petitioner offers no argument on this point and thus has waived it. Moreover, application of the

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Seattle, WA 98104

Slayer Statute was correct in light of the trial court's findings of financial exploitation, undue influence and fraud.

IV. STATEMENT OF THE CASE

Petitioner's Statement of the Case deviates substantially from the record as established by competent evidence at trial, omitting entirely the "overwhelming" evidence of her malfeasance cited by the Court of Appeals and instead presenting an invented narrative of Petitioner's own design. Relying on purported testimony which the trial court properly excluded, or which was never even offered, Petitioner repeats numerous claims which are unsupported, if not directly contradicted, by evidence in the factual record.

Accordingly, Respondent herein provides an accurate summary of the pertinent facts as found at trial.

A. Background.

At the time of her death, Polly was a widow with three living children: her daughter Jonnie Kay Schoenholtz ("Jonnie

Kay") and her sons Louis Daniel Palermini ("Dan") and Matthew Scott Palermini ("Matt"). CP 2090. Both Dan and Matt suffered physical and mental disabilities, and Polly supported them emotionally, financially, and physically until her death. CP 1363, 2090-92, 3573; RP 359, 495, 735, 923, 983, 1363.

B. Polly's Assets And Estate Plan.

Uniformly, the third-party witnesses at trial confirmed that Polly lived an austere life and socked away funds for a single purpose – to provide for her sons' long-term care. RP 527, 986. In the four years leading up to her death, Polly never withdrew funds from her investment accounts. CP 3837-3841; RP 745; 764-765. Instead, while living only on social security income and limited military benefits, Polly supported herself and both her sons, and continued to save. CP 4570-6647. Polly knew that Dan and Matt were unable to support themselves, and that their disabilities would require increasing levels of care with age. RP 303, 306-307, 359, 445, 735, 986; CP 3573,

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Seattle, WA 98104

3249-3315.

To address her sons' long-term care, Polly placed all or substantially all of her assets, including her home and her Morgan Stanley investment account, into the Trust. CP 2092, 3186-87. In October 2010, Polly retained a lawyer, John Kenney, to update her estate plan. RP 300-301. Polly updated her plan three times with Mr. Kenney between 2011 and 2016. RP 304-305; 355-356; 420-421. In each version of her plan, the primary beneficiaries of her estate were special needs trusts for Dan and Matt. RP 445. Polly repeatedly told third parties that her sole concern was the care of her "boys" – Dan and Matt – and that she intended the entirety of her estate, valued in excess of $1.5 million, to be available to care for them for the remainder of their lifetimes. RP 303, 306-307, 359, 445, 495, 506, 508, 735, 983, 986; CP 3573, 3249-3315.Throughout Polly's planning four themes remained constant: (1) Polly's assets, including her home, were to be held and managed in the Trust; (2) her sons' trusts were the primary beneficiaries, with

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Seattle, WA 98104

the survivor as successor beneficiary; (3) Petitioner would be co-fiduciary; and (4) Petitioner would be one of several remote contingent beneficiaries only after the deaths of both sons. CP 2091.

The final amendment and restatement of Polly's Trust, and her associated pour over Will and Durable Power of Attorney, were dated October 12, 2016. CP 3249-3315; 3318-3356; Ex. 237. Polly named George Braly, who was her accountant, as co-trustee, co-executor of her estate, and co-agent under her power of attorney together with Petitioner. *Id*.; CP 2092. Polly told her attorney and her friends that she wanted the co-fiduciary arrangement because of mistrust of her family, and specifically because she did not trust Petitioner. RP 339; 432-433; 502.

C. Petitioner Exploits Polly.

The evidence established that in the last two months of Polly's life, as she was receiving palliative care in hospice, Petitioner went about systematically converting virtually all of

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Seattle, WA 98104

Polly's assets to her own benefit.

Petitioner began by drafting a new power of attorney naming herself as Polly's sole agent. RP 580; CP 3414-3423. Petitioner then forged a Certification of Trust which identified her as the *sole* trustee in order to gain access to Polly's investment account. CP 2099-2104, 3575-3579, 3590-3599; RP 752, 756, 767, 773-777. Within the first 24 hours of gaining access to the account, Petitioner liquidated $120,000 in investments, transferred them to Polly's checking account, and proceeded within the next five days to withdraw $22,000 from Polly's checking account to buy a motorcycle for Petitioner's wife; pay Petitioner's personal credit cards and student loans, and pay a loan from Petitioner's failed run for superior court judge, thereby taking over $91,000 from Polly's checking account while Polly was dying in hospice. CP 2097-99, 3635-3643, 3829-3835. There was no evidence that Polly knew of any of the transfers or payments.

Simultaneously, Petitioner drafted a quitclaim deed to

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Seattle, WA 98104

transfer title of Polly's house from the Trust into her own name. CP 2105. Still unsated, a mere two days before Polly's death, Petitioner directed Morgan Stanley to sell the bulk of Polly's investments and transfer an additional $508,000 into a pay-on-death bank account on which Petitioner was the beneficiary. CP 2103-04, 3690-3692.

When all was said and done, Petitioner had transferred to herself roughly $1.2 million from Polly and her Trust. Petitioner's looting left the Trust unable to provide for Matt's care for the remainder of his lifetime, as Polly always had intended. CP 2099-2112.

Petitioner offered no competent evidence to rebut any of these findings, which were memorialized in the trial court's Final Findings of Fact and Conclusions of Law. CP 2089-114. The sole proffered basis for Petitioner's "alternative explanation" of these events in her Petition – including such tales that Polly directing Petitioner to take these actions or Polly "tearing up" a promissory note – is Petitioner's own say-so,

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Seattle, WA 98104

which was properly excluded at trial.

Petitioner subsequently filed her appeal of the trial court's decision in Division I of the Court of Appeals on November 25, 2019. Division I affirmed the trial court's decision by unpublished opinion dated August 2, 2021, No. 82048-6-I ("Opinion"), confirming that Petitioner "misappropriated nearly all the assets in the [Estate] by falsifying documents, misrepresenting her authority, exerting undue influence over Polly as a vulnerable adult, and exploiting her fiduciary powers." Opinion at 1.

V. ARGUMENT

A. Petitioner Fails To Show Review Is Warranted Under RAP 13.4.

Petitions for review to the Supreme Court are only granted where (1) the decision of the Court of Appeals is in conflict with a decision of the Supreme Court or a published decision of the Court of Appeals; (2) the case involves a significant question of law under the Constitution of the State of Washington or of the United States; or (3)

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Seattle, WA 98104

the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b). As discussed herein, Petitioner fails to show that any of these bases for review are present.

As an initial matter, the Opinion cites to and is fully reconciled with the decisions of this Court and the Court of Appeals. Indeed, the Court of Appeals itself noted that "none of the cases cited by [Petitioner] support her argument." Opinion at 13. As further discussed herein, the purported "conflicts" with existing caselaw identified in the Petition are all simply the result of Petitioner's misreading or mischaracterization of the law.

Furthermore, Petitioner fails to identify any actual matter of public importance implicated by her claims. This Court evaluates whether a petition concerns matters of public importance by considering "(1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3)

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the likelihood of future recurrence of the question." *In re Mines*, 146 Wash. 2d 279, 285, 45 P.3d 535 (2002). Thus, the Court looks for a matter affecting "a substantial percentage of the population" or one of "statewide importance," resolution of which will have an "important consequence to agricultural, industrial, financial, commercial and labor-management activities throughout the state." *Washington Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 77 Wash. 2d 94, 96, 459 P.2d 633 (1969). Here, the unpublished Opinion merely affirmed the outcome of a civil trial between private parties: Petitioner, the Estate whose assets she misappropriated, and the rightful beneficiaries of that Estate. The issues at stake in this case were certainly important to the Parties, but they did not involve a legal matter of *public* importance.

Nor does this case present any significant question of constitutional law. Petitioner contends that the trial court's refusal to exclude certain testimony on the grounds of spousal privilege raises the question of the extent to which *Obergefell v.*

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Seattle, WA 98104

Hodges, 576 U.S. 644, 135 S.Ct. 2584, 192 L. Ed.2d 609 (2015) retroactively voided the Oregon Supreme Court's decision in *Li v. State*, 338 Or. 376, 110 P.3d 91 (2005). The Court of Appeals found it unnecessary to reach that argument in order to resolve the issues in this case, however, as the testimony Petitioner sought to exclude was "admitted through several other sources, including Polly's handwritten notes." Opinion at 20. Moreover, any determination as to the effect of *Obergefell* on *Li* is an issue of Oregon law which – without the need to reach it in this case – is best left to an Oregon court.

Unable to meet the standard for review under RAP 13.4, and just as she did before the Court of Appeals, Petitioner's brief merely attempts to relitigate a multi-week trial with proffers of alleged "evidence" that was never admitted or even offered at trial. But that is not the purpose of review by this Court, and the Petition should be denied.

B. <u>This Court Should Deny Review Of The Court Of Appeals' Conclusion That The Evidence At Trial Was Sufficient</u>.

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901 Fifth Ave., Ste. 3500
Seattle, WA 98104

After a bench trial, appellate review is limited to whether substantial evidence supports the trial court's findings of fact and whether those findings support the conclusions of law. *Endicott v. Saul*, 142 Wn. App. 899, 909, 176 P.3d 560 (2008). In evaluating the sufficiency of the evidence, the reviewing court views all reasonable inferences in the light most favorable to the prevailing party. *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 104, 267 P.3d 435 (2011). The appellate court does not review the trial court's credibility determinations or weigh conflicting evidence. *Quinn v. Cherry Lane Auto Plaza, Inc*., 153 Wn. App. 710, 717, 225 p.3d 266 (2009). Applying this standard, the Court of Appeals correctly rejected Petitioner's contention that the evidence was insufficient as a matter of law to support the trial court's finding that she engaged in undue influence, and review of the Court of Appeals' decision is unwarranted for at least the following three reasons.

First, Petitioner failed to raise her argument that the evidence at trial was too "speculative" to support the finding of

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Seattle, WA 98104

undue influence before the Court of Appeals. Indeed, the only evidence Petitioner described as "speculative" in her brief before that court was the testimony of the Estate's neuropsychology expert – but contrary to Petitioner's contention that the Court of Appeals "relied heavily" on the expert's testimony, Petition at 20, the Court of Appeals did not even *mention* this witness, or his testimony, in its decision, let alone rely on it. It is well-settled that this Court does not consider issues raised for the first time in a petition for review and should deny review of this issue on that basis alone. *Crystal Ridge Homeowner's Ass'n v. City of Bothell*, 182 Wn.2d 665, 678, 343 P.3d 746 (2015).

Second, and perhaps more fundamentally, Petitioner's contention that the Court of Appeals' decision conflicts with published authority is based entirely on her application of an incorrect legal standard. Because Petitioner was concededly Polly's fiduciary, the Court of Appeals correctly affirmed that it was *Petitioner's* burden at trial to prove by *clear, cogent and*

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convincing evidence that self-dealing actions she took in a fiduciary capacity were **not** the result of undue influence or fraud – as the very cases Petitioner cites make plain. Opinion at 21-22; *In re Melter*, 167 Wn. App. 285, 296, 273 P.3d 991 (2012) ("if the recipient has a confidential or fiduciary relationship with the donor … the burden of persuasion shifts to the donee to prove that the gift was intended and not the result of undue influence"); *Wilkins v. Lasater*, 46 Wn. App. 766, 777, 733 P.2d 221, 228 (1987) ("[t]he burden of proof is on the fiduciary to demonstrate no breach of loyalty has been committed"); *McCutcheon v. Brownfield*, 2 Wn. App. 348, 357, 467 P.2d 868, 874 (1970) ("Because undue influence is treated in law as a species of fraud, ***evidence of a gift between persons in a confidential relationship must be clear, cogent and convincing***.") (emphasis added, internal citations omitted). The presumption against gifts in the context of a fiduciary relationship acts to invalidate the transaction if the fiduciary is unable to meet her burden. *Meyer v. Campion*, 120 Wn. 457,

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Seattle, WA 98104

468, 207 P. 670 (1922).

Petitioner makes much of the fact that the presumption of undue influence by a fiduciary may be rebutted, but tellingly omits any discussion of the well-settled rule discussed in the foregoing authority and by the Court of Appeals that such rebuttal must be made by ***clear, cogent, and convincing evidence***. Opinion at 21-22. Instead, Petitioner wrongly asserts that the *Estate* bore the burden to prove undue influence by clear, cogent, and convincing evidence, but Petitioner herself needed only to introduce some modicum of evidence concerning Polly's competence to meet her own burden to rebut the presumption. *See, e.g.*, Petition at 17-19. That is not the law, and the Court of Appeals' conclusion that Petitioner had failed to meet her burden is in perfect harmony with controlling authority. Opinion at 21-22.

Third, Petitioner again incorrectly argues that evidence of Polly's *competence* – which was never in dispute, nor was it the subject of any claims at trial – somehow negates evidence of

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Seattle, WA 98104

undue influence. As the Court of Appeals correctly held, however, a person who is *competent* may nevertheless be unduly influenced. Opinion at 22 (citing *In re Estate of Haviland*, 162 Wn. App. 548, 567, 255 P.3d 854 (2011); *see also Matter of Estate of Lint*, 135 Wn.2d 518, 535, 957 P.2d 755 (1998) ("A will of a person who otherwise possesses testamentary capacity may be set aside upon a showing that a beneficiary exercised undue influence over the testator.") (citing *Dean v. Jordan*, 194 Wn. 661, 79 P.2d 331 (1938)).

That conclusion is not in conflict with the established precedent on which Petitioner seeks to rely. In declining to find undue influence, the court in *In re Estate of Jones*, 170 Wn. App. 594, 287 P.3d 610 (2012) found far more than competence on the part of the testator, for the fiduciaries at issue had introduced evidence to establish that the transaction at issue was favorable to the decedent and that decedent had engaged in the transaction after consulting with an independent financial advisor. *Id.* at 617-18. This evidence, coupled with the

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Seattle, WA 98104

opposing party's failure to adduce any evidence of undue influence at all, led the *Jones* court to conclude that summary judgment had properly been granted. *Id*. at 618. Those facts are markedly different from those at issue here, and *Jones* simply is not at odds with the Opinion.

Similarly, the court in *Zvolis v. Condos*, 56 Wn.2d 275, 352 P.2d 809 (1960) merely declined to hold that the fact that the decedent had not sought independent advice before engaging in the transaction was dispositive of undue influence. There, the court noted that the recipient of the gift had not initiated the transfer and that the evidence showed that he had not used undue influence to obtain it. *Id*. at 279. The evidence in this case was directly to the contrary. In addition, *Lint* affirms the proposition relied upon by the Court of Appeals that a beneficiary occupying a fiduciary position bears the burden to overcome the presumption of undue influence by clear, cogent, and convincing evidence. 135 Wn.2d at 535-36 (*citing Dean*, 194 Wn. at 671-72).

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Seattle, WA 98104

The Court of Appeals considered each of the foregoing authorities, and correctly held that it was Petitioner's burden at trial to prove by clear, cogent, and convincing evidence that the many benefits she reaped for herself while acting as Polly's fiduciary were *not* the product of undue influence. Petitioner utterly failed to do so, as there was little competent evidence introduced in her favor as to *any* of the subject transactions.[1]

C. Review Of Petitioner's Evidentiary Complaints Is Unwarranted.

The Court of Appeals correctly rejected Petitioner's claims of error in connection with the trial court's evidentiary rulings, and determined that even if there had been error as to certain discrete pieces of evidence, such error was harmless in light of the "overwhelming" evidence against Petitioner. Opinion at 14.

[1] It is worth nothing that the trial court, in fact, found that not only had Petitioner failed to meet her burden, but that even if the burden of proof had rested with the Estate – which it did not – the Estate *would have met that burden*, as it had actually proven by clear, cogent, and convincing evidence that the transfer of Polly's house, the transfers from her investment account and the transfers from her checking account all were financial exploitation. CP 2112.

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901 Fifth Ave., Ste. 3500
Seattle, WA 98104

1. *The trial court's ruling regarding spousal privilege was, at most, harmless error*.

Petitioner first takes issue with the trial court's refusal to bar the testimony of Petitioner's former domestic partner Kelly Montgomery – from whom she separated in 2006 – on the grounds of spousal privilege. The trial court ruled that because the Oregon Supreme Court invalidated Petitioner's same-sex marriage to Ms. Montgomery in 2005, the two were not legally married at the time of the communications, as would be required to invoke spousal privilege. Opinion at 18-19.

Petitioner contends that because the Oregon Supreme Court's decision invalidating same-sex marriages was later abrogated by *Obergefell*, the decision invalidating her marriage to Ms. Montgomery was void *ab initio* and the two were thus legally married at the time of the communications to which Ms. Montgomery testified. Petition at 25. The Court of Appeals declined to reach the issue, however, for it found that the testimony covered a period of time before the two had married and, even if the testimony was improperly admitted, such error

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Seattle, WA 98104

would have been harmless in light of the voluminous other evidence. Opinion at 19-20. Indeed, the Court of Appeals noted that the same information to which Ms. Montgomery testified had come in through other sources, including Polly's handwritten notes. *Id*.

Petitioner argues that this Court nevertheless should review whether spousal privilege applied to the testimony at issue due to the constitutional importance of recognizing the legitimacy of same-sex relationships, and, she contends, because there is precedent for applying the spousal privilege even to couples who are not legally married. Petition at 25. While Respondent does not disagree that the Supreme Court's decision in *Obergefell* righted a longstanding injustice, that alone does not warrant review of the Court of Appeals' decision for at least three reasons.

First, as noted above, the Court of Appeals found that it was unnecessary to reach the issue to resolve the case at bar. In light of that holding, there is no need for this Court to weigh in

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Seattle, WA 98104

on an issue of Oregon law, as it would not make a difference in the outcome of this case one way or another.[2]

Second, the ruling urged by Petitioner – that *Obergefell* revived her "marriage" to Ms. Montgomery – would lead to a markedly untenable result. For if Petitioner's marriage to Ms. Montgomery was never voided, then Petitioner and Ms. Montgomery are in fact *still married*, as they never filed for divorce. At the time of trial, Petitioner thus would have been married to two different people, which is a result barred everywhere, and one we presume no one involved would countenance. Such a ruling would mean that numerous couples who have long since separated would, without their knowledge, suddenly be legally married to one another again. That is a result the Court need not, and should not, reach.

Third, Petitioner's attempted reliance on *McDonald v.*

[2] The Texas District Court opinion cited by Petitioner does not compel a different result. Rather, *Ranolls v. Dewling*, 223 F. Supp. 3d 613 (E.D. Tex. 2016) reached only the narrow conclusion that *Obergefell* could be applied to allow same-sex partners to claim benefits or standing as "surviving spouses" of their deceased partners who had died prior to *Obergefell*.

Ogden Murphy Wallace PLLC
901 Fifth Ave., Ste. 3500
Seattle, WA 98104

White, 46 Wn. 334, 337-38, 89 P. 891 (1907) for the proposition that she and Ms. Montgomery should be treated as common-law spouses is unavailing because Washington long ago eliminated the doctrine of common law marriage. *Meton v. State Indus. Ins. Dep't*, 104 Wn. 652, 655, 177 P. 696 (1919). Nor does *State v. Denton*, 97 Wn. App. 267, 270, 983 P.2d 693 (1999), resurrect common-law marriage, as that court merely recognized that the lack of a marriage license did not invalidate an otherwise legally valid marriage.

2. *There was no waiver of the Dead Man's Statute*.

Petitioner exhorts this Court to review the Opinion with respect to whether the Estate waived the protections of the Dead Man's Statute, RCW 5.60.030 (the "DMS") at trial. In general, the DMS bars "testimony from a party in interest as to (1) any transaction had by him or her with the deceased and (2) any statement made to him or her, or in his or her presence, by the deceased, when the testimony is adverse to the deceased and the opposing party claims through the deceased's estate." *Thor v.*

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Seattle, WA 98104

McDearmid, 63 Wn. App. 193, 199, 817 P.2d 1380 (1991). Petitioner does not seek review of the Court of Appeals' ruling as to the proper scope and application of the DMS at trial in the first instance, and thus concedes that such application was proper. Instead, she argues that the Court of Appeals erred by rejecting her contention that the Estate and/or Polly's son, Matt, waived the protections of the DMS either by calling Petitioner as an adverse witness or by responding to Petitioner's written discovery. Petitioner is wrong.

First, a party only waives the DMS by calling an adverse witness if it elicits testimony from that witness *which would otherwise be barred by the DMS*. Opinion at 13-14 (citing *Thor*, 63 Wn. App. at 20; *Estate of Lennon v. Lennon*, 108 Wn. App. at 167, 175, 29 P.3d 1258 (2001)). The Court of Appeals affirmed the trial court's determination that the questions posed to Petitioner on the stand "sought information only about [Petitioner's] own actions and state of mind," and thus were not subject to the DMS and could not form the basis of waiver. *Id*.

Ogden Murphy Wallace PLLC
901 Fifth Ave., Ste. 3500
Seattle, WA 98104

Petitioner offers no justification for a different result here, instead simply repeating the arguments the Court of Appeals already considered and rejected.

Second, it is well-settled that the DMS is not waived by responding to discovery. *See Botka v. Estate of Hoerr*, 105 Wn. App. 974, 981-82, 21 P.3d 723 (2001) ([N]o useful purpose would be served by requiring a party entitled to the protection of [the DMS] to preserve that protection by resisting discovery until a court commanded compliance"); *In re Estate of Reynolds*, 17 Wn. App. 472, 475-76, 563 P.2d 1311 (1977); *McGugart v. Brumback*, 77 Wn.2d 441, 463 P.2d 140 (1969) (discovery does not waive DMS, *unless such discovery is introduced into evidence by representative of estate*). Thus, the mere fact that Matt responded to Petitioner's requests for admission did not and could not waive the protections of the DMS. Again, Petitioner offers no basis supporting review of this issue, as the Opinion is squarely in alignment with the relevant published authorities.

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Curiously, Petitioner contends that what she describes as her own "notes" were improperly barred under the DMS. Petition at 29. But the trial court did not exclude the notes pursuant to the DMS; it excluded them as inadmissible hearsay. CP 1501-13. Petitioner offers no challenge to that ruling here, and her request for review of a ruling which was never made is a nullity.

3. *Petitioner seeks review of a hearsay ruling that never occurred*.

Petitioner further misrepresents the record in purporting to challenge the Court of Appeals' "condoning" of a hearsay ruling that never actually occurred. Petitioner claims that the trial court wrongfully excluded testimony by her then-spouse "that she was present when Polly asked whether the transfer from Morgan Stanley 'went through' and responded 'good' when she heard that it had." Petition at 30. Tellingly, Petitioner does not direct the Court to the record where the challenged testimony actually appears, because the record reflects that the witness *never attempted to testify* that Polly

said anything about which transfer she meant, or what the response to the question was, or that Polly ever said "good" during that conversation. Indeed, Petitioner's counsel *admitted* that the witness was *not* attempting to identify what transfer Polly allegedly meant, and that the response to Polly's alleged question ***would have been hearsay***:

> **Ms. Cobb**: The fact that she answered that – the fact that she just asked a question is simply not hearsay. It's not a statement and it's not – it's simply offered for the – to prove that Polly had understood that **something** was going on. We're not – **this witness is not testifying that she knew what that something was**. **She's testifying only that Polly made – asked a question, "did the transfer go through**." It doesn't go any further than that. **There was actually a response after that. We're not going to ask her about that because that would be a statement**.
>
> … **This witness is not going to testify as to what that transfer was or even her understanding of it**.

RP 1649-50 (emphasis added).[3]

Simply put, Petitioner did not even attempt to *offer* this testimony at trial and she may not do so now.

[3] Footnote 10 of the Petition, in which Petitioner asserts that the witness was "ready to testify" as to the identity of the transfer, is demonstrably false in light of her counsel's representation on the record.

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D. Ample Evidence Supported The Trial Court's Finding Of Fraud.

Petitioner contends that the evidence supporting the trial court's finding of fraud was insufficient, but again offers no authority in support of her position beyond that which the Court of Appeals already considered.

The trial court found, and the Court of Appeals agreed, that Petitioner committed fraud by misrepresenting to Morgan Stanley that she was the sole trustee of Polly's trust in order to gain access to Polly's investment account and transfer funds to another account for Petitioner's benefit. Opinion at 22-23. Petitioner contends that the Court of Appeals ruling is "in conflict" with Washington authorities setting forth the elements of fraud because (1) she contends that "wrongfully excluded hearsay evidence" would have showed that Polly directed the transfer of funds from Morgan Stanley; (2) there was "conflicting testimony" from handwriting experts regarding the phony certificate of trust forged by Petitioner; and (3) the trial court inferred from the evidence that Morgan Stanley relied on

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the forged document in agreeing to make the transfer despite there being no direct testimony on that point. Petition at 32.

The Court of Appeals correctly rejected the same arguments Petitioner makes here, and its decision is consistent with governing law. The trial court considered all *admissible* evidence; Petitioner cannot rely on inadmissible (and transparently self-serving) testimony which was properly excluded to claim that the court's conclusion was incorrect. Moreover, appellate courts do not engage in the weighing of evidence, and the "conflicting testimony" by the handwriting experts thus is of no relevance. *Quinn*, 153 Wn. App. at 717. Indeed, the Court of Appeals "does not 'second guess' the trial court if the facts as found by the trial court are supported by substantial evidence." *Davis v. Pennington*, 24 Wn. App. 802, 803, 604 P.2d 987, 987 (1979).

E. Petitioner Was Properly Disinherited Under RCW 11.84.150.

Although Petitioner purports to identify the application of RCW 11.84.150, the so-called "Slayer Statute," as a subject of

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review for this Court, she presents no argument on the subject in her Petition, thus waiving that issue. *State v. Johnson*, 119 Wn.2d 167, 170, 829 P.2d 1082 (1992). Moreover, the Slayer's Statute was properly applied to disinherit Petitioner by operation of law after she was found to have financially exploited Polly —*literally while she was on her deathbed* — to the detriment of Polly's disabled son.

VI. CONCLUSION

For the reasons stated herein, this Court should decline the Petition for Review.

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This answer contains 5,840 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 1st day of October, 2021 in Seattle, Washington.

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By 

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No. 100170-3

SUPREME COURT OF
THE STATE OF WASHINGTON

IN THE MATTER OF THE ESTATE OF
ZORA P. PALERMINI

DECLARATION OF SERVICE
GEORGE BRALY, as Executor and Trustee

Teresa R. Byers, WSBA #34388
Daniel J. Vecchio, WSBA #44632
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Attorneys for George Braly, as Executor and Trustee

The undersigned hereby declares as follows:

1. I am an employee of the law firm of Ogden Murphy Wallace PLLC, attorneys for George Braly, as Executor and Trustee in the above-entitled matter.

2. I am a citizen of the United States and a resident of the State of Washington. I am over the age of eighteen years and not a party to this action.

3. On the 1st day of October, 2021, I caused to be served as indicated, a true and correct copy of Answer to Petition for Review, Motion for Over-Length Answer to Petition for Review, and this Declaration of Service, as follows:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 1st day of October, 2021.

Chris Elliott
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