93247.6

NO. 93247-6

SUPREME COURT
OF THE STATE OF WASHINGTON

JAMES ATKINSON,

Petitioner,

v.

ESTATE OF BERT W. HOOK,

JERRY HOOK, Personal Representative,

Respondent.

ANSWER TO PETITION FOR REVIEW

SMITH GOODFRIEND, P.S.

By: Catherine W. Smith
WSBA No. 9542
Valerie Villacin
WSBA No. 34515

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

LAW OFFICE OF
DOUGLAS STRANDBERG, P.S.

By: Douglas F. Strandberg
WSBA No. 926

P.O. Box 547
Friday Harbor, WA 98250
(360) 378-3390

THE LAW OFFICE OF
ROCK C. SORENSEN, P.S.

By: Rock C. Sorensen
WSBA No. 33386

P.O. Box 173
Friday, Harbor, WA 98250
(360) 378-6286

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules and Regulations

Other Authorities

A. Relief Requested By Respondent.

Jerry Hook, Personal Representative of the Estate of Bert Hook, respondent in this Court and in the Court of Appeals, asks this Court to deny James Atkinson's petition for review of Division One's May 9, 2016 decision, which is attached as Appendix A.[1] Atkinson fails to address the RAP 13.4(b) criteria for review; most of the issues he raises for review were neither argued nor decided in the Court of Appeals. Addressing an unusual fact pattern that is unlikely to arise again, Judge Becker's opinion is wholly consistent with authority, from both this Court and the lower courts, and statutory law governing the making of wills, and raises no issues of constitutional or substantial public interest. This Court should deny review.[2]

B. Restatement of the Case.

Respondent Jerry Hook adopts the facts as set forth in the Court of Appeals decision (Op. ¶¶ 3-16), and briefly summarizes the facts relevant to Jerry's counterclaims against Atkinson here, which remain pending in the trial court and unresolved because the Court

---

[1] Atkinson failed to attach a copy of Division One's decision to his Petition for Review, as required by RAP 13.4(c)(9). This Answer cites to the Opinion in Appendix A as "Op. ¶___".

[2] Only if it grants review, this Court should examine whether Division One's acceptance of review as a matter of right of a partial summary judgment order was proper under RAP 2.2(a) when trial was still pending on respondent's undue influence and elder abuse claims against petitioner. (*See* Appendix B, discussed in Grounds for Denial of Review § C.3, *infra*)

of Appeals ruled that Atkinson could appeal the partial summary judgment order:

Bert Hook executed a Last Will and Testament on February 29, 1988 and a codicil on June 10, 1999 (the "1988 will"), naming his brother Jerry Hook as personal representative and leaving him his entire estate. (Op. ¶ 3) In July 2011, two months before his upcoming heart surgery, Bert, age 77, placed his brother Jerry on three of his Washington bank accounts, as joint tenant with right of survivorship. (CP 1051) Jerry already had the only keys to Bert's safety deposit box in a Friday Harbor bank. (CP 1051)

In October 2011, Bert was discharged after his surgery to the care of Jerry and Jerry's wife at their home on Lummi Island for rehabilitation. (CP 1053) Frustrated with perceived restrictions on his activity in Jerry's home, in November 2011 Bert asked petitioner Jim Atkinson and Atkinson's girlfriend, Anna Levitte, to take him to his apartment in Salome, Arizona, where Bert, a lifelong Washington resident, normally spent winters. (CP 23-24)

Bert's physical and mental health deteriorated rapidly in Arizona. Bert was hospitalized five times in the weeks before his death; Atkinson, Levitte, and another friend took over much of his care and began controlling his finances. (CP 1053-55) Patient notes

from a January 2012 hospitalization describe Bert as "confused," "very paranoid," "unruly with staff," "hallucinating," and "disoriented." (CP 1618, 1619, 1620, 1623) On his doctor's recommendation, Bert was to be transferred to a nursing facility after this hospitalization. But Atkinson, described in the patient notes as "very powerful in his need to control" Bert's health care, took Bert "home" to his apartment in Salome instead. (CP 1607)

On February 2, 2012, Bert visited a medical clinic complaining of "being confused most of the time and not being able to remember normal day-to-day things that are important." (CP 1633) The next day, a registered nurse visited Bert at his apartment and reported he required supervision "due to cognitive impairment." (CP 1056) On February 8, Bert met with a doctor who described Bert as having "hallucinations" and a "tough time breathing," in "chronic pain" and "confused." (CP 1056, 1635-36)

Two days later, on February 10, 2012, Atkinson drove Bert, who was threatening to kill himself, 30 miles out in the desert to the "Ranch." There, Bert allegedly dictated from memory, in great detail, "last wishes" for the distribution of his assets, which Levitte later typed up from another friend's "scribbles." (CP 124, 126-29, 134-35, 245) On February 13, Bert signed this typed document (the

"Atkinson will"), naming Atkinson personal representative and leaving the bulk of his estate to Atkinson, Levitte, and the friend who purportedly "scribbled down" Bert's last wishes, with smaller bequests to Jerry and others. (Op. ¶¶ 5, 6; *see also* CP 124, 126-29, 1150-51)[3] A notary public notarized Bert's signature. (Op. ¶ 6) It is indisputable that the Atkinson will was not then valid under the law of either Arizona, where Bert signed it, or Washington, where Bert was domiciled, because it had not been signed by two witnesses. Ariz. Rev. Stat. Ann. § 14-2502(3).

On February 18, 2012, Atkinson left Bert alone, with a gun, in Atkinson's truck. Bert killed himself. (CP 135; Op. ¶ 7) Shortly after Bert's death, Atkinson cashed a $20,000 check from Bert's Arizona checking account. (CP 1059-60)

It is undisputed that both the 1988 will and 1999 codicil had been validly executed. On March 9, 2012, Jerry filed a petition to probate the 1988 will in San Juan County Superior Court.[4] (Op. ¶ 9)

---

[3] The Court of Appeals decision states that Bert prepared a new written will in January 2012. (Op. ¶ 5) However, the purported new will is dated February 13, 2012, and Atkinson claims it was "dictated" on February 10. (*See* CP 124, 134, 245)

[4] Petitioner makes much of the fact that Atkinson had told Jerry his brother Bert had signed another will. (Petition 3) Atkinson did not provide a copy of the Atkinson will to Jerry until after the probate was commenced. (CP 984) To this day, petitioner has never produced the original of the claimed Atkinson will.

On March 23, Atkinson faxed Jerry a copy of the purported Atkinson will; Bert's signature was notarized, but the faxed document had not been signed by two witnesses. (CP 1150-51) On March 27, Jerry advised Atkinson that the Atkinson will was not facially valid under either Arizona or Washington law because it had not been properly witnessed. (CP 1153-54)

On March 29, 2012 – 40 days after Bert died, and 45 days after Bert purportedly signed the Atkinson will in Arizona – Levitte signed the Atkinson will as a "witness" in Spokane. (Op. ¶ 10; CP 29-30) On April 4, Atkinson filed a petition in San Juan County Superior Court contesting the validity of the 1988 will, claiming that the Atkinson will was Bert's last will because under Arizona law, a witness may sign a will "within a reasonable time after that person witnessed [ ] the signing of the will." (Op. ¶ 11; CP 34)

Jerry asserted counterclaims, including that Atkinson kept Bert "so medicated and sedated" in the weeks before his death that he was incapable of making informed decisions; that Atkinson financially abused Bert, "a vulnerable adult;" and that Atkinson was an "abuser" within the meaning of RCW 11.84.010 and RCW 74.34.020, prohibiting him from taking under the Atkinson will even if it were valid. (CP 1109, 1110)

On February 12, 2014, Jerry moved for partial summary judgment to dismiss Atkinson's will contest because the Atkinson will was not valid under the law of Washington, where Levitte had signed it as a witness. (Op. ¶ 16; CP 384) In his motion, Jerry asked the court to vacate an earlier stipulation (on which neither the parties nor the court had ever relied) that the validity of the Atkinson will could be decided under Arizona law. (Op. ¶ 16; CP 391-93)

The trial court initially concluded that Arizona law should determine whether the Atkinson will was facially valid, while noting "there may be many reasons why the [ ] will should not be recognized as a valid testamentary document under Arizona law."[5] (Op. ¶ 16; CP 474) On Jerry's motion for reconsideration, the trial court vacated this ruling and concluded that the Atkinson will was executed in Washington, because "it only became an executed document when

---

[5] Atkinson repeatedly claims that the trial court made an "unchallenged finding" that the Atkinson will was "valid on its face under Arizona law." (Petition 2, 4-5, 8, 9, 17) That assertion is false. First, the trial court never made any such finding; it initially determined only that the Atkinson will "appears" to meet the requirements under Arizona law (CP 472), and should only be deemed legally executed "*if* facially valid under the law of Arizona." (CP 474, emphasis added) Second, Jerry challenged this determination when he moved for reconsideration. (CP 483-87) The trial court thereafter vacated its preliminary assessment based on the reasoning affirmed by the Court of Appeals. (CP 574; Op. ¶ 16) Third, the trial court never determined if the notary was also an attesting witness, or if Levitte signed the will, after Bert's death, within a "reasonable time." *See Estate of Black,* 153 Wn.2d 152, 167-68, ¶ 24, 102 P.3d 796 (2004); *Estate of Muder*, 159 Ariz. 173, 765 P.2d 997, 998-99, 1001 (1988).

Ms. Levitte signed it and she signed it in Washington" (CP 574), and that it was not legally executed because two witnesses had not signed it in the presence of and at Bert's direction, as required by RCW 11.12.020. (CP 651) The trial court entered partial summary judgment dismissing Atkinson's will contest on August 8, 2014. (Op. ¶ 16; CP 651-52)

Atkinson filed a notice of appeal. Jerry moved to dismiss because the trial court's partial summary judgment was not a final order; among other matters, Jerry's counterclaims against Atkinson still needed to be addressed. The Court of Appeals denied the motion to dismiss. (Appendix B) Addressing Atkinson's appeal of the dismissal of his will contest on the merits, Division One affirmed, rejecting Atkinson's claim that the Atkinson will was a "foreign will" that should be judged for validity under Arizona law. (Op. ¶ 29) The court reasoned that the proviso for foreign wills in RCW 11.12.020 allows the validity of the Atkinson will to be assessed under the Arizona statute only if Arizona was the place where it was executed. (Op. ¶ 23) Since Levitte, the purported second witness, signed the will in Washington, Division One concluded the will was executed in Washington, not Arizona. (Op. ¶¶ 26, 28)

C. Grounds for Denial of Review.

1. This Court should deny review because Division One's decision is consistent with this Court's decisions that a testator's intent must be expressed in a validly executed will.

a. No effect can be given to a purported will that was not validly executed under RCW 11.12.020.

Atkinson's petition for review is premised on the claim that this Court's decision in *Estate of Elliott*, 22 Wn.2d 334, 156 P.2d 427 (1945) (Petition 5, 7, 8, 9, 10, 11, 12, 16) stands for the proposition that "a testator's intentions" are "sovereign." But this Court in *Estate of Elliot* in fact held that "courts go to the utmost possible length to carry into effect the testator's wishes, *provided always that he has given them lawful expression*." 22 Wn.2d at 351 (emphasis added). The Court of Appeals' decision is wholly consistent with this principle. The only "lawful expression" of Bert Hook's wishes was his validly executed 1988 will. The Atkinson will was invalid on the day Bert signed it, on the day he died, and on the day it was signed by a beneficiary as a purported second witness in Washington. It was never a "lawful expression" of Bert's intent.

Respondent has no quarrel with the principle that our courts endeavor to carry out a testator's intent. RCW 11.12.230. "Where a will, rational on its face, is shown to have been *executed in legal*

form, the law presumes that the testator had testamentary capacity and that the will speaks his wishes." *Dean v. Jordan*, 194 Wash. 661, 668, 79 P.2d 331 (1938) (Petition 11) (emphasis added). But "if the testator has not complied with the statutes which regulate the execution of the will, his intention to pass his property by will has no legal effect and it will be ignored by the courts." Jeffrey A. Schoenblum, 2 Page on the Law of Wills §19.4, at 12 (2d ed. 2003). Because the Atkinson will was not in "legal form" under either Washington or Arizona law when Bert died, there is no presumption that Bert intended to distribute his property under its terms.

The Court of Appeals' refusal to enforce a distribution set out in an invalid will is wholly consistent with this Court's decisions. Most recently, in *Estate of Malloy,* 134 Wn.2d 316, 949 P.2d 804 (1998), this Court concluded that a testator's attempt to change her will by making handwritten "strike-outs" was "invalid and ineffective," because "they were accomplished without the formalities required for the proper execution of wills." 134 Wn.2d at 328. Because the testator's later handwritten changes did not meet the statutory requirements, this Court refused to effect those attempted changes. *Estate of Malloy,* 134 Wn.2d at 328.

Estate of Malloy is only the latest of a long line of cases from this Court holding that the testator's wishes must be set out in an instrument validly executed as a will under our statutes. *See Estate of Browne*, 193 Wash. 166, 168, 74 P.2d 913 (1938) (invalidating will when two purported witnesses signed will after testator's death); *Estate of Chafey*, 167 Wash. 185, 190, 8 P.2d 959 (1932) (invalidating will when there was no evidence that the two purported witnesses signed the will in the testator's presence); *Estate of Brown,* 101 Wash. 314, 317, 172 P. 247 (1918) (invalidating handwritten will that did not comply with the statute for making a will); *Estate of Jones,* 101 Wash. 128, 132, 172 P. 206 (1918) (invalidating will when one purported witness did not sign will as witness and other purported witness did not witness testator sign the will).

The Court of Appeals also has consistently relied on these precedents to refuse to give effect to instruments purportedly setting out the testator's intent that fail to comply with the statutes governing the making of wills. *See Estate of Burton v. Didricksen,* 189 Wn. App. 630, 638-39, ¶ 24, 358 P.3d 1222 (2015) (two witnesses attesting to the same testamentary gift in two separate documents was insufficient to meet the two-witness requirement of RCW 11.12.020); *Estate of Ricketts,* 54 Wn. App. 221, 224, 225, 773 P.2d

93 (1989) (invalidating a codicil witnessed by two individuals that failed to meet the "minimum statutory formalities").

As applied to the unusual factual circumstances here, these decisions compel the conclusion that a post-death attestation could never validate a will under Washington law, because the witness could never sign the will "in the presence of the testator and at the testator's direction or request" after the testator's death. A testamentary instrument becomes "fixed" upon the testator's death. *Young v. O'Donnell,* 129 Wash. 219, 224, 224 P. 682 (1924) (citations omitted). If a will is not valid when the testator died, its "fixed" status is that of an invalid will. Atkinson's claim (Petition 2, n.1) that RCW 11.20.020 allows post-death attestation is false. Instead, the statute only allows a witness to sign an affidavit stating that she previously signed the will in the presence of the testator and at the testator's direction or request after the testator's death in order to *prove* the will – not to validate a will that was not valid when the testator died.

"The purpose of the statutory requirements regulating the execution of wills are to ensure that the testator has a definite and complete intention to dispose of his or her property and to prevent, as far as possible, fraud, perjury, mistake and the chance of one instrument being substituted for another." *Estate of Malloy,* 134

Wn.2d at 322-23. "A writing is not valid as a will unless it complies with the provisions of the statute." *Estate of Chafey*, 167 Wash. at 188. The Court of Appeals was correct that the Atkinson will was not valid because it failed to comply with RCW 11.12.020 requiring two witnesses sign a will "in the presence of the testator and at the testator's direction or request." (Op. ¶ 19)

b. The Atkinson will was not validly executed before the testator's death under Washington or Arizona law.

RCW 11.02.005 (20) statutorily defines a will as an "instrument validly executed as required by RCW 11.12.020." RCW 11.12.020 requires that a valid will "shall be attested by two or more competent witnesses, by subscribing their names to the will [ ] while in the presence of the testator and at the testator's direction or request." RCW 11.12.020(1). A "foreign will" executed outside Washington is valid only if "executed in the mode prescribed by the law of the place where executed or of the testator's domicile, either at the time of the will's execution or at the time of the testator's death." RCW 11.12.020 (1).

Contrary to Atkinson's repeated assertions (Petition 1, 8, 9, 10, 11), the document he champions was not a "valid foreign will." Whether the Atkinson will is an "Arizona will" or "Washington will" depends on where it was executed. RCW 11.12.020(1). Because

"execute" is not defined by the statute, the Court of Appeals properly relied on the dictionary to define it. (Op. ¶ 25, *citing Cornu–Labat v. Hosp. Dist. No. 2 Grant County,* 177 Wn.2d 221, 231–32, 298 P.3d 741 (2013)). The definition of execute is "to make a (legal document) valid by signing; to bring a (legal document) into its final, legally enforceable form." (Op. ¶ 25, *citing* Black's Law Dictionary 689 (10th ed. 2014)). Here, the Atkinson will was not "executed" in Arizona because it was not in its "final, legally enforceable form" when Bert signed it, and only became "final" and "legally enforceable" when signed by two witnesses.

Only Bert and a notary public signed the Atkinson will in Arizona, and both Washington and Arizona law requires the signature of two witnesses to make a will valid. (Op. ¶ 28, *citing* RCW 11.12.020 and Ariz. Rev. Stat. Ann. § 14-2502(3)) Even though Arizona law allows a witness to sign a will within a reasonable time after the testator signs it, rather than in the testator's presence, the purported second witness here did not sign the Atkinson will in Arizona. If the Atkinson will was ever "executed," it was executed in Washington, where the second witness signed it. The Court of Appeals correctly concluded that since the Atkinson will was not

executed in Arizona, the proviso in the statute for foreign wills did not apply. (Op. ¶ 29)[6]

2. This Court should not accept review to decide issues not addressed by the Court of Appeals because they were not properly raised below.

This Court should not accept review to decide issues not addressed in the Court of Appeals decision, raised by Atkinson only in his reply brief, and that in any event would not compel reversal.

a. The trial court did not abuse its discretion in declining to apply judicial estoppel to a withdrawn stipulation of law.

The Court of Appeals undoubtedly did not "rule on the issue of judicial estoppel to take inconsistent positions in the litigation" (Petition 12) because Atkinson argued judicial estoppel for the first time in the Court of Appeals in a footnote to his reply brief. (Reply

---

[6] The 1990 amendment to RCW 11.12.020, which Atkinson raises for the first time in the petition (Petition 10), is of no consequence in this case. The foreign will proviso prior to 1990 read, "that a last will and testament, executed without the state, in the mode prescribed by law, either of the place where executed or of the testator's domicile shall be deemed to be legal executed." RCW 11.12.020 (Laws 1990, ch. 79, § 1). The Legislature amended the statute to read, "that a last will and testament, executed in the mode prescribed by the law of the place where executed or of the testator's domicile, either at the time of the will's execution or at the time of the testator's death, shall be deemed to be legally executed." The only change was to make a will valid if executed consistent with the law of the testator's domicile either at the time of the testator's death or when executed. This amendment has no effect here because Bert was domiciled in Washington when he died (CP 964) and was already dead by the time the will was purportedly later executed.

Br. 6) *See Disciplinary Proceeding of Kennedy,* 80 Wn.2d 222, 236, 492 P.2d 1364 (1972) (refusing to consider arguments raised first in a reply brief; "points not argued and discussed in the opening brief are deemed abandoned and are not open to consideration on their merits"). In any event, far from being in conflict with *Anfinson v. FedEx Ground Package System, Inc.*, 174 Wn.2d 851, 864, ¶ 20, 281 P.3d 289 (2012) (Petition 13), the trial court's decision here was fully consistent with *Anfinson,* which affirmed as wholly discretionary the trial court's decision *declining to apply judicial estoppel.*

Judicial estoppel does not prohibit the trial court from vacating a stipulation on a legal issue "determined to be erroneous." (CP 574, 650) *See Folsom v. County of Spokane,* 111 Wn.2d 256, 261, 759 P.2d 1196 (1988) (it is a "long-standing rule that stipulations of law are not binding"). While Jerry's assertion that Washington law should apply to determine whether the Atkinson will was valid is inconsistent with his earlier stipulation that Arizona law should apply, there is no evidence that he purposely "misled" the trial court. *Anfinson,* 174 Wn.2d at 861, ¶ 14. Rather than an "act of duplicity," Jerry's changed position was "an evolving understanding of the relevant law." *Anfinson,* 174 Wn.2d at 865, ¶ 22; *see also Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 539, ¶ 8, 160 P.3d 13 (2007)

(judicial estoppel is "inappropriate when a party's prior position was based on inadvertence or mistake."). This Court should not consider this issue, which the Court of Appeals did not decide because it was not properly raised, and where in any event the trial court did not abuse its discretion in declining to apply judicial estoppel to a stipulation, never relied upon by either the courts or the parties, to an issue of law.

b. There is no "significant relations test" that would require application of Arizona law to the making of the Atkinson will.

This Court should not grant review to address whether the validity of a will should be determined based on the law of state that has "the most significant relationships with a controversy" (Petition 15), another issue the Court of Appeals did not address after Atkinson raised it for the first time in his reply brief. (Reply Br. 13) Nothing in RCW ch. 11.12 supports a "significant relations test" for the validity of a will. Under RCW 11.12.020, a will is only valid if "executed in the mode prescribed by the law of the place where executed or of the testator's domicile, either at the time of the will's execution or at the time of the testator's death." The proposition that "the law of the state with which the contract has the most significant relationship [ ] will govern the validity and effect of the contract," *Baffin Land Corp. v.*

Monticello Motor Inn, Inc., 70 Wn.2d 893, 899, 425 P.2d 623 (1967) (Petition 15), does not apply here because this is a will contest, not a contract dispute.

Even if the "significant relations test" were applicable, Washington has the most significant relation to Bert's testamentary intent. Bert had been a resident of Washington for 40 years before his death, including when he signed the Atkinson will. (CP 954) There is no evidence that Bert knew Arizona law when he signed the Atkinson will; Bert presumably did know Washington law since he had previously executed a will and codicil prepared by Washington lawyers, consistent with Washington law. (*See* CP 837-42, 843-46) A substantial portion of the property described in the Atkinson will is in Washington, including the "majority of his liquid assets" and "the vast majority of his personal property." (*See* CP 28-29, 957, 958) The "second" "witness" signed the Atkinson will in Washington. (CP 28-30) This Court should not consider this issue, which the Court of Appeals did not decide because it was not properly raised, and in any event where even if the validity of Atkinson will could be determined based on the law of the state that had the most "significant relations" with the Atkinson will, that state is Washington.

3. The Court of Appeals' discretionary denial of review of an order denying a motion to dismiss pending counterclaims was proper.

Finally, Atkinson complains that the Court of Appeals declined to consider his claim that the superior court lacked personal jurisdiction over him on Jerry's counterclaims because the counterclaims were still pending and the issue was not ripe for review. (Petition 15, Op. ¶¶ 36-38) The Court of Appeals' discretionary refusal to address this issue only highlights its error in inconsistently concluding that the trial court's partial summary judgment dismissing the will contest was reviewable as a matter of right. (Appendix B; Op. ¶ 40)

The partial summary judgment order dismissing Atkinson's will contest was not appealable; it was not a final judgment under RAP 2.2(a)(1), nor did it "determine[] the action and prevent[] a final judgment or discontinue[] the action" under RAP 2.2(a)(3). In allowing review to nevertheless proceed as a matter of right (Appendix B; Op. ¶ 40), the Court of Appeals relied on *Estate of Bernard,* 182 Wn. App. 692, 697, ¶ 2, 332 P.3d 480, *rev. denied,* 339 P.3d 634 (2014), which held that "a personal representative of an estate has the right to appeal an adverse decision in a will contest, as it is the

duty of the executor to take all legitimate steps to uphold the testamentary instrument."

Estate of Bernard has no application here, because Atkinson is not the personal representative of Bert's estate. Moreover, the only issue in *Estate of Bernard* was the validity of testamentary instruments; the order invalidating a codicil and amendment to a living trust was appealable because no factual issues remained for adjudication. 182 Wn. App. at 697-98, ¶ 3. Here, in contrast, Jerry's counterclaim that Atkinson abused and exploited Bert before his death still await adjudication and could make the validity of the Atkinson will moot.

By citing *Estate of Bernard* for the proposition that this partial summary judgment was reviewable as a matter of right (Op. ¶ 40), the Court of Appeals perpetuates the doubtful conclusion – reached in *Estate of Bernard* with no analysis of finality whatsoever – that an "adverse decision in a will contest" can be reviewed as a matter of right even if the estate dispute has not been finally resolved. The Court of Appeals should not have allowed this "appeal" of a partial summary judgment while Jerry's counterclaims were pending. *See, e.g., Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 300, 840 P.2d 860 (1992). If this Court does grant review, it should exercise its discretion to reach the merits, and affirm Division One's substantive decision on

the merits. *See* RAP 5.1(c); *Washington State Republican Party v. King Cty. Div. of Records,* 153 Wn.2d 220, 222, fn. 1, 103 P.3d 725 (2004) (re-designating notice of appeal of non-final order as a notice for discretionary review, accepting review and proceeding to the merits); *see also State v. Campbell,* 112 Wn.2d 186, 190, 770 P.2d 620 (1989). But it should also address whether the Court of Appeals was in error in concluding that the trial court's partial summary judgment was reviewable as a matter of right on appeal under the reasoning of *Estate of Bernard,* and correct the lower court's misapprehension that its review was on appeal, rather than discretionary.

D. Conclusion.

This Court should deny review. Respondent reserves the right to seek fees for answering the petition and for any further proceedings in this Court as contemplated by the Court of Appeals decision. (Op. ¶ 41)

Dated this 24th day of June, 2016.

LAW OFFICE OF DOUGLAS STRANDBERG, P.S.

By: _____
Douglas F. Strandberg
WSBA No. 926

SMITH GOODFRIEND, P.S.

By: _____
Catherine W. Smith
WSBA No. 9542
Valerie A. Villacin
WSBA No. 34515

Attorneys for Respondent

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 24, 2016 I arranged for service of the foregoing Answer to Petition for Review, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-File
Douglas F. Strandberg Law Office of Douglas Strandberg, P.S. P.O. Box 547 Friday Harbor, WA 98250 dfslaw@rockisland.com	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Mail
Rock C. Sorensen Law Office of Rock C. Sorensen, P.S. P.O. Box 173 Friday Harbor, WA 98250 rock@rocksorensenlaw.com	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-Mail
David P. Boswell Boswell Law Firm, P.S. The Fernwell Building 505 West Riverside Avenue, Suite 500 Spokane, WA 99201 boslaw@fernwell.net	___ Facsimile ___ Messenger ✓ U.S. Mail ✓ E-Mail

DATED at Seattle, Washington this 24th day of June, 2016.

Jenna L. Sanders

2016 WL 2643442
Only the Westlaw citation is currently available.
Court of Appeals of Washington,
Division 1.

In the Matter of the **ESTATE**
OF Bert W. **HOOK**, Deceased.
James Atkinson, Appellant,
v.
Estate of Bert W. **Hook**, Jerry **Hook**,
Personal Representative, Respondent.

No. 73102–5–I.
|
May 9, 2016.

Synopsis

Background: Probate proceedings were initiated, and beneficiary under first will and beneficiary under second will engaged in will contest. The Superior Court, San Juan County, Donald E. Eaton, J., named beneficiary under first will as personal representative and probated first will. Beneficiary under second will appealed.

Holdings: The Court of Appeals, Becker, J., held that:

[1] second will did not satisfy formalities required by Washington law, and thus could not be probated as Washington will, and

[2] will became executed document in Washington, and thus will could not be admitted to probate as foreign will.

Affirmed and remanded.

West Headnotes (12)

[1] **Wills**
Mode and Requisites in General

A will is not "executed" under statute governing the proper execution of wills until the occurrence of the last formal act necessary to make the will valid. West's RCWA 11.12.020.

Cases that cite this headnote

[2] **Wills**
Presence of Testator and Witnesses

Will did not satisfy formalities required by Washington wills that it be signed in presence of testator, and thus could not be probated as Washington will, as will was not attested to by second witness in presence of testator. West's RCWA 11.12.020(1).

Cases that cite this headnote

[3] **Wills**
Mode and Sufficiency in General

Wills
Instruments Which May Be Admitted to Probate or Record

Will became executed document in Washington when second witness signed it in Washington, rather than in Arizona where testator and first witness signed will, and thus will was a Washington will, not a foreign will, and could not be admitted to probate as foreign will under statute allowing validity of foreign wills to be assessed under law of state where executed, though significant acts towards execution had occurred in Arizona; formalities of execution under both Washington and Arizona law required two witnesses who had attested or signed will, will could not be valid under Washington or Arizona law until it had signatures of two witnesses, and signature of second witness was not placed on will until second witness signed it in Washington. A.R.S. § 14–2502(3); West's RCWA 11.12.020(1).

Cases that cite this headnote

[4] **Wills**
Nature and Requisites in General

A holographic will is effective in Washington if it is valid in the state of the testator's domicile. West's RCWA 11.12.020(1).

Cases that cite this headnote

[5] **Wills**
Time of Attestation

Arizona statute governing execution of wills does not preclude a witness from signing a testamentary document after the testator has died; it requires only that the signature be affixed within a reasonable time of witnessing the testator's signature or acknowledgment. A.R.S. § 14–2502.

Cases that cite this headnote

[6] **Statutes**
Plain Language;Plain, Ordinary, or Common Meaning

Statutes
Statute as a Whole;Relation of Parts to Whole and to One Another

Statutes
Similar or Related Statutes

Examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found, is appropriate as part of the determination whether a plain meaning can be ascertained.

Cases that cite this headnote

[7] **Statutes**
Dictionaries

Where the Legislature has not defined a term in a statute, the court may look to dictionary definitions.

Cases that cite this headnote

[8] **Wills**
Mode and Requisites in General

Meaning of the word "executed," in statute allowing validity of foreign wills to be assessed under the law of the place where executed, comprises the acts of the witnesses as well as the act of the testator. West's RCWA 11.12.020.

Cases that cite this headnote

[9] **Executors and Administrators**
Appeal and Error

Beneficiary under second will failed to preserve for appellate review, and failed to adequately brief, argument that trial court erred in denying motion to revoke letters testamentary that appointed beneficiary under first will as personal representative of estate based on first beneficiary's alleged deceit in trial court, and thus Court of Appeals would not consider the argument, where second beneficiary did not raise the deceit argument below in connection with his request to revoke the letters testamentary and failed to support argument with citation to relevant authority.

Cases that cite this headnote

[10] **Wills**
Review of Decisions in Actions Relating to Wills or Probate

Wills
Decisions Reviewable

Court of Appeals would decline to review order denying motion to dismiss counterclaims by beneficiary under first will against beneficiary under second will, in which first beneficiary alleged second beneficiary abused and financially exploited testator, a vulnerable adult, on personal jurisdiction grounds, since trial court's denial of motion to dismiss claims for lack of personal jurisdiction was not appealable final order, and neither party addressed criteria for discretionary review on appeal. RAP 2.3(a, b).

Cases that cite this headnote

[11] **Appeal and Error**
Judgment of Dismissal or Nonsuit

Denial of motion to dismiss for lack of personal jurisdiction is not an appealable final order. RAP 2.2(a).

Cases that cite this headnote

[12] **Trusts**
⇐ Costs
Wills
⇐ Discretion of Court

Attorney fee statutes governing attorney fees in will contests and trust and estate matters allow the court to exercise considerable discretion. West's RCWA 11.24.050, 11.96A.150(1).

Cases that cite this headnote

Appeal from San Juan Superior Court; Hon. Donald E. Eaton, J.

Attorneys and Law Firms

David P. Boswell, Boswell Law Firm PS, Spokane, WA, for Appellant.

Douglas Frank Strandberg, Law Office of Douglas Strandberg PS, Rock C. Sorensen, The Law Office of Rock C. Sorensen, P.S., Friday Harbor, WA, Catherine Wright Smith, Valerie a Villacin, Ian Christopher Cairns, Smith Goodfriend PS, Seattle, WA, for Respondent.

PUBLISHED OPINION

BECKER, J.

*1 [1] ¶ 1 A will is not "executed" under RCW 11.12.020 until the occurrence of the last formal act necessary to make the will valid. Here, although the testator and one witness signed a will in Arizona, the second witness signed it in Washington. Therefore, the will was executed in Washington, not in Arizona. The will is not valid in Washington because the second witness did not sign in the testator's presence.

¶ 2 At issue is an order granting summary judgment. To review an order granting summary judgment, we engage in the same inquiry as the trial court. We will not resolve factual issues but rather must determine if a genuine issue exists as to any material fact. All inferences are construed in the light most favorable to the nonmoving party. *In re Estate of Black*, 153 Wash.2d 152, 160–61, 102 P.3d 796 (2004).

¶ 3 The will in question was signed in Arizona by Bert Hook shortly before his death. Bert Hook was an unmarried man with no children. He maintained a residence in eastern Washington. He usually spent winters in a small town in Arizona. In 1988, Bert executed a valid Washington will, and in 1999, he added a valid codicil. These documents, which we will refer to as "the 1988 will," devised all of Bert's estate to Jerry Hook, his older brother and only sibling. Jerry was designated as personal representative.

¶ 4 In September 2011, at the age of 77, Bert underwent heart surgery in Spokane, Washington. After three weeks in an inpatient rehabilitation center, Bert was discharged to stay with Jerry in western Washington. Within a few days, Bert wanted to leave. Bert asked James Atkinson, a longtime friend who was then in Arizona, to come and get him. Atkinson drove up from Arizona with another friend, Anna Levitte. They took Bert to eastern Washington to help him close up his residence. The three then departed for Arizona, where Bert had his own residence in a rural airpark.

¶ 5 In January 2012, Bert prepared a new written will, which we will refer to as "the Atkinson will." The Atkinson will revokes the 1988 will and names Atkinson as the personal representative. The beneficiaries include Atkinson, Levitte, Jerry Hook, and several other individuals.

¶ 6 On February 13, 2012, Bert went with Levitte to the office of Linda Darland, a notary public. Levitte and Darland watched Bert sign the Atkinson will. Darland then signed the will and applied her notary seal.

¶ 7 On February 18, 2012, Bert Hook committed suicide in Arizona. Atkinson notified Jerry Hook and informed him that Bert had made a new will.

¶ 8 Atkinson contacted David Boswell, Bert's attorney in Spokane, about probating the Atkinson will. Atkinson and Levitte drove to Spokane on February 27, left the

Atkinson will with Boswell for his review, and returned to Arizona.

¶ 9 On March 9, 2012, Jerry Hook petitioned the San Juan County Superior Court for an order admitting the 1988 will to probate. The petition was granted, and the court issued letters testamentary to Jerry Hook on March 12.

*2 ¶ 10 Meanwhile, Boswell discovered that under Arizona law, a will signed by a testator is valid if it is also signed by two witnesses within a reasonable time. On March 29, 2012, Levitte traveled to Spokane and signed the Atkinson will.

¶ 11 On April 4, 2012, Atkinson filed a petition in the superior court of San Juan County contesting the 1988 will on the basis that the Atkinson will expressly revoked the 1988 will. Atkinson moved for withdrawal of the letters testamentary that had been issued to Jerry Hook. The trial court denied this motion.

¶ 12 On April 17, 2012, Atkinson filed an action in Arizona to probate the Atkinson will.

¶ 13 On July 6, 2012, the San Juan County court entered an order accepting the parties' stipulation that the "facial validity" of the Atkinson will would be determined under Arizona law.

¶ 14 On April 26, 2013, after an evidentiary hearing, the San Juan County court entered an order determining that Washington was Bert Hook's domicile at the time of his death. As a result of this determination, which is unchallenged on appeal, the Arizona court stayed the probate action commenced by Atkinson and eventually dismissed it. *See* ARIZ.REV.STAT. § 14–3202.

¶ 15 On May 24, 2013, Jerry Hook moved for partial summary judgment, arguing that the Atkinson will was invalid under Arizona law because Darland signed the will as a notary, not as a witness, and Levitte did not sign it within a reasonable time of witnessing Bert Hook's signature. On July 26, 2013, the trial court denied this motion, finding there were factual issues with respect to whether the Atkinson will was validly executed under Arizona law.

¶ 16 On February 12, 2014, Jerry Hook filed a second motion for partial summary judgment. This time he argued that the will was invalid under Washington law. He asked the court to vacate the stipulation to Arizona law. The court denied the motion. Jerry Hook moved for reconsideration. On July 11, 2014, the court granted reconsideration and ruled that the Atkinson will was executed in Washington, not Arizona, and its admission to probate was dependent upon compliance with the formalities of Washington law, not Arizona law. Because the Atkinson will is plainly invalid under Washington law, the court dismissed Atkinson's will contest with prejudice. As a result, the letters testamentary issued to Jerry Hook remain in effect and Bert Hook's estate will be probated under the 1988 will. Atkinson appeals.

MEANING OF "EXECUTED"

¶ 17 Atkinson contends that the Atkinson will was executed in Arizona, is valid under Arizona law, and must be given effect in Washington as the last expression of Bert Hook's wishes.

¶ 18 The starting point is Washington's Statute of Wills, RCW 11.12.020. This statute "describes the proper execution of all wills." *Estate of Black,* 153 Wash.2d at 164, 102 P.3d 796.

> **Requisites of wills—foreign wills.** (1) Every will shall be in writing signed by the testator or by some other person under the testator's direction in the testator's presence, 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: PROVIDED, That a last will and testament, executed in the mode prescribed by the law of the place where executed or of the testator's domicile, either at the time of the will's execution or at the time of the testator's death, shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state.
>
> *3 (2) This section shall be applied to all wills, whenever executed, including those subject to pending probate proceedings.

RCW 11.12.020.

[2] [3] ¶ 19 The Atkinson will was not attested to by Levitte, the second witness, in the presence of Bert Hook.[1] For this reason, the Atkinson will does not satisfy the formalities required of Washington wills by the first part of RCW 11.12.020(1). Unless the proviso for foreign wills applies, the Atkinson will cannot be given effect.

[4] ¶ 20 Under the proviso, a will "executed in the mode prescribed by the law of the place where executed" will be given effect in Washington. For example, a holographic will is effective in Washington if it is valid in the state of the testator's domicile. *In re Wegley's Estate,* 65 Wash.2d 689, 690, 399 P.2d 326 (1965).

[5] ¶ 21 Atkinson contends the will is legally enforceable in Washington because it is valid in Arizona. The Arizona statute requires two witnesses for execution, but it does not require that the witnesses sign in the presence of the testator. Witnesses need only sign "within a reasonable time" after witnessing the testator's signature or acknowledgement.

> **Execution; witnessed wills; holographic wills**
>
> **A.** Except as provided in §§ 14–2503, 14–2506 and 14–2513, a will shall be:
>
> 1. In writing.
>
> 2. Signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction.
>
> 3. Signed by at least two people, each of whom signed within a reasonable time after that person witnessed either the signing of the will as described in paragraph 2 or the testator's acknowledgment of that signature or acknowledgment of the will.
>
> **B.** Intent that the document constitute the testator's will can be established by extrinsic evidence, including, for holographic wills under § 14–2503, portions of the document that are not in the testator's handwriting.

ARIZ.REV.STAT. ANN. § 14–2502. As construed by an Arizona appellate court, the Arizona statute "does not preclude a witness from signing a testamentary document after the testator has died." *In re Estate of Jung,* 210 Ariz. 202, 203, 109 P.3d 97 (Ariz.Ct.App.2005). It requires "only that the signature be affixed within a reasonable time of witnessing the testator's signature or acknowledgment." *Estate of Jung,* 210 Ariz. at 207, 109 P.3d 97.

¶ 22 If the validity of the Atkinson will is assessed under the Arizona statute quoted above, as Atkinson contends it should be, summary judgment was improperly granted. Levitte signed the will 45 days after she witnessed the signing of the will by Bert Hook. Conceivably, further proceedings would determine that 45 days is "within a reasonable time" and that the signatures of Levitte and Darland satisfy the Arizona statute.

¶ 23 But the proviso for foreign wills in RCW 11.12.020(1) allows the validity of the Atkinson will to be assessed under the Arizona statute only if Arizona was the "place where executed." The preliminary and dispositive issue, then, is the meaning of the word "executed" as used in RCW 11.12.020. Atkinson contends a will is "executed" once the testator has signed it. He claims the Atkinson will was executed in Arizona on February 13, 2012, when Bert Hook signed it in the presence of Levitte and Darland.

*4 [6] ¶ 24 The meaning of a statute is a question of law reviewed de novo. The court's fundamental objective is to ascertain and carry out the legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wash.2d 1, 9–10, 43 P.3d 4 (2002). Examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found, is appropriate as part of the determination whether a plain meaning can be ascertained. *Dep't of Ecology,* 146 Wash.2d at 10, 43 P.3d 4; *see also Estate of Black,* 153 Wash.2d at 164, 102 P.3d 796. The statutory context must be taken into account. *Dep't of Ecology,* 146 Wash.2d at 11, 43 P.3d 4.

[7] ¶ 25 Where the legislature has not defined a term, we may look to dictionary definitions. *Cornu–Labat v. Hosp. Dist. No. 2 Grant County,* 177 Wash.2d 221, 231–32, 298 P.3d 741 (2013). Both parties cite dictionary definitions to the effect that "execute" means to make a document valid or legal by signing. *See, e.g.,* BLACK'S LAW DICTIONARY 689 (10th ed. 2014) ("To make (a legal document) valid by signing; to bring (a legal document) into its final, legally enforceable form"). That definition is useful, but it does not go far enough to support Atkinson's

assertion that a testator's signature on a will is enough by itself to execute the will.

[8] ¶ 26 The trial court concluded that the execution of a document means completing all of the steps necessary to make the document a legal instrument. By this reasoning, a will is not "executed" until the occurrence of the last formal act necessary to make the will valid. We agree and hold that the meaning of the word "executed" in RCW 11.12.020 comprises the acts of the witnesses as well as the act of the testator.

¶ 27 That this is the plain meaning of "executed" in RCW 11.12.020 is demonstrated by examining a related statute, RCW 11.20.070(1). In the case of a lost or destroyed 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." RCW 11.12.070(1). The use of RCW 11.12.020 is required to determine whether a lost will was properly executed under RCW 11.20.070. *Estate of Black,* 153 Wash.2d at 164, 102 P.3d 796. In *Estate of Black,* it was clear that the lost will had been signed by the testator, but it was unclear whether the document had been signed by more than one attesting witness. The court held that proof of a signature by a second attesting witness was required to complete the formalities of execution. *Estate of Black,* 153 Wash.2d at 166, 102 P.3d 796.

¶ 28 The formalities of execution under both Washington and Arizona law include two witnesses who have either "attested" or "signed" the will. RCW 11.12.020(1); ARIZ.REV.STAT. ANN. § 14-2502(3). The Atkinson will, although signed by Bert Hook in Arizona, could not be a valid or legal instrument under Washington or Arizona law until it had the signatures of two witnesses. The signature of the second witness was placed on the Atkinson will on March 29, 2012, when Levitte signed it in Spokane. The trial court reasoned that while "significant acts toward the execution" of the Atkinson will occurred in Arizona, it "only became an executed document when Ms. Levitte signed it and she signed it in Washington."

*5 ¶ 29 We affirm the trial court's reasoning. Because Arizona was not the "place where executed," RCW 11.12.020(1), the proviso in the statute for foreign wills does not apply. The Atkinson will is a Washington will, not a foreign will. As a Washington will, it is invalid. There is no second witness who attested to the Atkinson will while in the presence of Bert Hook and at his direction or request. The Atkinson will cannot be admitted to probate in Washington either as a foreign will or as a Washington will.

¶ 30 Atkinson opposes this result with the argument that Bert Hook's last wishes expressed in the Atkinson will may not be defeated by a technical construction of the term "executed." He derives this argument from *In re Estate of Elliott,* 22 Wash.2d 334, 351, 156 P.2d 427 (1945). In that case, the court stressed the importance of carrying out the expressed will of the testator.

> "Courts will not, by technical rules of statutory or other legal construction, defeat the right of the testator to have effect given to the latest expression of his testamentary wishes."
>
> ...
>
> "Statutes should not be construed so as to defeat the will of the testator, unless such construction be absolutely required. Neither should the will of a testator be defeated, as here, by the carelessness of the persons whose duty it was to present the codicil for probate. It is not their rights which are taken away, but the right of the testator to have his will carried out."

Estate of Elliott, 22 Wash.2d at 351, 156 P.2d 427, quoting *In re Estate of Bronson,* 185 Wash. 536, 549–50, 55 P.2d 1075 (1936) (Beals, J., dissenting). *See also* RCW 11.12.230 (courts must have "due regard" for the testator's intent).

¶ 31 Atkinson's reliance on *Estate of Elliott* is misplaced. He quotes the above passage out of context. Read in full, *Estate of Elliott* shows that a court will not concern itself with carrying out a testator's wishes expressed in a will unless it is first established that the will is properly executed and admissible in probate.

¶ 32 In *Estate of Elliott,* more than seven months after the decedent's first will was admitted to probate, the appellant petitioned to have a later will admitted to probate. The trial court rejected the appellant's petition because it was outside the statute of limitations for a will contest. The Supreme Court reversed, holding that the statute of limitations for a will contest is inapplicable when a later will is offered. A court of probate "has inherent authority at any time, while an estate is still open, to admit to

probate a later will than that theretofore probated." *Estate of Elliott,* 22 Wash.2d at 361, 156 P.2d 427.

¶ 33 In reaching that conclusion, the court said that "the right to dispose of one's property by will is not only a valuable right but is one assured by law, and will be sustained whenever possible." *Estate of Elliott,* 22 Wash.2d at 350, 156 P.2d 427. The intent of the testator is " 'a fundamental maxim, the first and greatest rule, the sovereign guide, the polar star, in giving effect to a will.' " *Estate of Elliott,* 22 Wash.2d at 351, 156 P.2d 427, citing JOHN R. ROOD, A TREATISE ON THE LAW OF WILLS, § 413, at 352 (2d ed.1926). But the court qualified these statements by adding that "*the instrument must, of course, first be admitted to probate* " and the court will give effect to "the latest and final expression of the decedent's testamentary wishes, *if such result can be obtained within the established rules of law.*" *Estate of Elliott,* 22 Wash.2d at 351, 156 P.2d 427 (emphasis added).

*6 ¶ 34 The established rules of law include the formalities of executing a will in compliance with RCW 11.12.020. In *Estate of Elliott,* it was undisputed that the competing wills were both properly executed. That is not the case here. Because the Atkinson will was not properly executed, it cannot be admitted to probate within the established rules of law in Washington. Therefore, the wishes of Bert Hook expressed therein will not be given effect.

LETTERS TESTAMENTARY

[9] ¶ 35 In April 2012, the trial court denied Atkinson's motion to revoke the letters testamentary that appointed Jerry Hook as the personal representative of Bert Hook's estate. The basis for the motion was Atkinson's assertion that the appointment of a personal representative should follow the Atkinson will rather than the 1988 will. Atkinson argues that the letters testamentary should be revoked because Jerry Hook was deceitful to the trial court. The alleged deceit is that when Jerry Hook submitted the 1988 will to probate, he did not disclose to the court that Atkinson had told him there was a more recent will. Because this argument was not raised below in connection with the request to revoke the letters testamentary and is unsupported by citation to relevant authority, we do not consider it.

COUNTERCLAIMS

[10] ¶ 36 When Jerry Hook filed an answer to Atkinson's will contest petition, he asserted counterclaims based on allegations that Atkinson abused and financially exploited Bert Hook, a vulnerable adult. Atkinson moved to dismiss the counterclaims for lack of personal jurisdiction. The trial court denied the motion to dismiss. Atkinson contends the trial court erred by asserting in personam jurisdiction over him for the purpose of hearing the counterclaims.

[11] ¶ 37 As Jerry Hook points out, the denial of the motion to dismiss the counterclaims for lack of personal jurisdiction is not an appealable final order under RAP 2.2(a). The counterclaims are still pending in the superior court. Jerry Hook nevertheless joins Atkinson in asking this court to decide the issue of personal jurisdiction, an issue that is not properly before this court on direct appeal, to avoid a second appeal. As a basis for discretionary review, Jerry Hook invokes RAP 1.2(a) ("rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits").

¶ 38 Discretionary review is not granted under RAP 1.2(a). The criteria for discretionary review are stated in RAP 2.3(b). Neither party has addressed RAP 2.3(b). We decline to review the order denying the motion to dismiss Jerry Hook's counterclaims.

ATTORNEY FEE REQUESTS

¶ 39 Both parties have requested an award of attorney fees on appeal under RCW 11.96A.150(1). Jerry Hook additionally asks for fees under RCW 11.24.050.

¶ 40 When Atkinson's will contest petition was dismissed in the trial court, it was not apparent that Atkinson had a right to an immediate appeal. The trial court refused to enter findings under CR 54(b) and denied certification for discretionary review under RAP 2.3(b)(4). Presumably because the case had not ended, neither party made a request for attorney fees in the trial court. Later, however, this court allowed Atkinson to proceed with a direct appeal, having determined that the order dismissing the will contest was an appealable final order under RAP

2.2(a). *See Estate of Barnard,* 182 Wash.App. 692, 728, 332 P.3d 480, *review denied,* 339 P.2d 634 (2014).

*7 [12] ¶41 The attorney fee statutes cited by the parties allow the court to exercise considerable discretion. The trial court, being more fully acquainted with the entire case and the parties, is in a better position than this court to exercise that discretion. Because of the posture of the present case, the trial court has not yet had the opportunity to consider whether an award of attorney fees to either party is appropriate. Under these circumstances, we decline to award attorney fees on appeal to either party and instead defer to the trial court. On remand, the trial court may hear requests for attorney fees, including fees for this appeal.

¶ 42 Affirmed and remanded for further proceedings consistent with this opinion.

WE CONCUR: SPEARMAN and SCHINDLER, JJ.

All Citations

--- P.3d ----, 2016 WL 2643442

Footnotes

1 It is assumed for purposes of summary judgment that the signature of Darland, the notary, is one attestation by a competent witness.

End of Document

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

April 3, 2015

Douglas Frank Strandberg
Law Office of Douglas Strandberg PS
PO Box 547
Friday Harbor, WA, 98250-0547
dfslaw@centurylink.net

David P. Boswell
Boswell Law Firm PS
505 W Riverside Ave Ste 500
Spokane, WA, 99201-0518
boslaw@fernwell.net

Rock C Sorensen
Law Office of Rock C Sorensen, P.S.
PO Box 173
Friday Harbor, WA, 98250-0173
rock@rocksorensenlaw.com

Catherine Wright Smith
Smith Goodfriend PS
1619 8th Ave N
Seattle, WA, 98109-3007
cate@washingtonappeals.com

Ian Christopher Cairns
Smith Goodfriend PS
1619 8th Ave N
Seattle, WA, 98109-3007
ian@washingtonappeals.com

Valerie A Villacin
Smith Goodfriend PS
1619 8th Ave N
Seattle, WA, 98109-3007
valerie@washingtonappeals.com

CASE #: 73102-5-I
In re the Matter of the Estate of: Bert W. Hook

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on April 3, 2015:

RULING ON MOTION FOR STAY AND MOTION TO DISMISS
Atkinson v. Estate of Hook
No. 73102-5-I
April 3, 2015

This matter involves a contest between two wills executed by the decedent Bert Hook. Bert died on February 18, 2012 as a result of suicide. In 1988 Bert executed a Washington will, followed by a 1999 codicil, that named Bert's brother, Jerry Hook, as the personal representative and sole beneficiary of Bert's estate. On February 12, 2012, six days before his death, Bert executed an Arizona will that expressly revoked prior wills and codicils and named James Atkinson as the personal representative and Atkinson and others, including Anna Levitte, as beneficiaries. When Bert signed the Arizona will, it was witnessed by Linda Darland and Anna Levitte. Darland signed the will at the time of execution; Levitte signed the will 39 days after Bert executed it while she was in the State of Washington.

In March 2012, Jerry Hook commenced probate of the Washington will in San Juan County, Washington. Atkinson contacted Bert's Spokane attorneys and delivered a copy of Bert's Arizona will. Based on counsel's advice, Atkinson commenced this will contest. Jerry answered the will contest and raised claims of abuse and exploitation of a vulnerable adult against Atkinson, Levitte and another Arizona beneficiary. The parties initially stipulated that Arizona law would apply to determine the validity of the Arizona will. The parties do not dispute that under Arizona law, a witness to a will may affix his or her signature within a reasonable time, even after death. After a series of proceedings, the trial court on reconsideration granted Jerry's motion to vacate the stipulation, ruled that the Arizona will could not be deemed a valid foreign will in Washington, and dismissed the will contest with prejudice. The trial court denied Atkinson's motion for CR 54(b) findings and denied RAP 2.3(b)(4) certification.

Atkinson filed a notice of appeal, and on March 2, 2015, filed a motion to stay trial court proceedings pending appeal and to enjoin distribution of the estate assets to Jerry Hook. Hook opposed the motion for stay, arguing that Atkinson would suffer no harm from a partial distribution of estate assets because Hook agreed to distribute only those assets that he would take under either will and that beneficiaries of the Arizona will other than Atkinson and Levitte had disclaimed any interest in favor of Hook. Hook also argued that to the extent a stay may be warranted, under RAP 8.1(b)(2), (b)(3), and 8.3 Atkinson was required to post security in an amount/type to be determined by the trial court. In addition, Hook moved to dismiss the appeal as premature, arguing that the trial court order dismissing the will contest with prejudice is not appealable because although it is final as to the will contest, Hook's claims against Atkinson for abuse and vulnerable adult claims remain pending, and under RAP 2.2(d), an appeal is available only if the trial court enters CR 54(b) findings, which the trial court declined to do.

Atkinson replied that the trial court's dismissal with prejudice is a final, appealable order, that CR 54(b) and RAP 2.2(d) are inapplicable because the case involves essentially a single claim – Bert's right to dispose of his property according to his intentions, and that Hook, by seeking a distribution of assets, was treating the trial court order as final. Otherwise, he argued, if the trial court has not entered findings permitting an immediate appeal, the prevailing party cannot seek enforcement of the non-final order. See Atkinson's Reply at 3, n.2, discussing Fluor Enterprises v. Walter Construction, 141 Wn. App. 761, 172 P.3d 368 (2007). Hook also argued that in any event this court retains the authority to determine whether or not CR 54(b) findings are warranted.

Atkinson has established that the trial court order declaring the Arizona will invalid and dismissing the will contest with prejudice is appealable under RAP 2.2(a). See Estate of Bernard, 182 Wn. App. 692, 332 P.3d 480 (2014) (generally a personal representative of an estate has the right to appeal an adverse decision in a will contest, as it is the duty of the executor to take all legitimate steps to uphold the testamentary instrument). Under RAP 7.2(a), after review is accepted by the appellate court, the trial court has authority to act in a case only to the extent provided in this rule, unless the appellate court limits or expands that authority under RAP 8.3. A formal ruling on Atkinson's motion for a stay is not required; further trial court proceedings on Hook's abuse and vulnerable adult claims will not go forward at this time. However, the trial court retains authority to decide questions of supersedeas, stays and bonds as provided for in RAP 8.1, and in particular RAP 8.1(b)(2), (c). To the extent Atkinson seeks a stay of a partial distribution of assets pending appeal, he should proceed in the trial court in the first instance. See RAP 8.1(h) (a party may object to a supersedeas decision of the trial court by motion in the appellate court).

Therefore, it is

ORDERED that respondent Jerry Hook's motion to dismiss this appeal is denied; and it is

ORDERED that the clerk will set a perfection schedule; and it is

ORDERED that the trial court's authority to proceed is limited by RAP 7.2; and it is

ORDERED that to the extent appellant James Atkinson seeks to stay enforcement of the trial court decision, he should proceed initially in the trial court.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

hek

SMITH GOODFRIEND, PS

June 24, 2016 - 2:26 PM

Confirmation of Filing

Filed with Court:	Supreme Court
Appellate Court Case Number:	93247-6
Appellate Court Case Title:	In Re the Matter of the Estate of: Bert W. Hook

The following documents have been uploaded:

- 932476_20160624142457SC639173_2021_Answer_Reply.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Answer to Petition for Review.pdf

A copy of the uploaded files will be sent to:

- dfslaw@centurylink.net
- rock@rocksorensenlaw.com
- cate@washingtonappeals.com
- valerie@washingtonappeals.com
- boslaw@fernwell.net
- ian@washingtonappeals.com

Comments:

Sender Name: Jenna Sanders - Email: jenna@washingtonappeals.com
Filing on Behalf of: Catherine Wright Smith - Email: cate@washingtonappeals.com (Alternate Email:)

Address:
1619 8th Avenue N
Seattle, WA, 98109
Phone: (206) 624-0974

Note: The Filing Id is 20160624142457SC639173