NO. 73102-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JAMES ATKINSON,

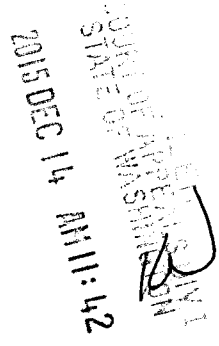
Appellant/Petitioner,

v.

ESTATE OF BERT W. HOOK, JERRY HOOK, PERSONAL REPRESENTATIVE

Respondent.

APPELLANT'S REPLY BRIEF



David P. Boswell
WSBA #21475
Attorney for Appellant/Petitioner

Boswell Law Firm, P.S.
505 W. Riverside
Fernwell Building, Suite 500
Spokane, WA 99201
(509) 252-5002

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

I. INTRODUCTION

Since 1540 probate law has been governed by statute.[1] The English Statute of Wills is rooted deeply in America's common law history, as are its complements, the English Statute of Frauds and the English Wills Act.[2] American probate law developed from these early statutory pillars, establishing and organizing testamentary rights and freedom. Importation of principles of testamentary rights and freedoms to the United States was "one of the blessings of the Magna Carta."[3] American probate law has "shown remarkable uniformity and stability" because of these deep common law roots, adhering constantly to what are "considered the three basic execution formalities: that a will be in writing, signed by the testator and witnessed."[4]

After nearly 500 years of development and experience, American laws of descent and distribution governed by the statutes of each state, protected and respected among and between them by the Full Faith and Credit Act of the U.S. Constitution, by the dignity of statutory

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[1] *3 Statutes of the Realm 744 (1540) ("English Statute of Wills").*
[2] *Statute of Frauds (1677) 29 Car. II, ch. 3 (1676); Wills Act of 1837, 7 Wn. 4, 1 Vict. ch. 26, 217 (1837).*
[3] *Estate of Malloy, 134 Wn.2d 316, 321, 949 P.2d 804 (1998), citing 1 Kelly Kunsch, Washington Practice: Methods of Practice, ch. 28, 617 (4th Ed. 1997).*
[4] *Quinnipiac Probate Law Journal, 27 Quinn. Prob. Law Jour. 419 (2014).* General uniformity and stability of these execution requirements in America is likely due to the legal purposes they serve. Taken together, these three formalities are commonly understood to serve four functions: the ritual function, the evidentiary function, the protective function and the channeling function. *Id. @ 420.*

recognitions of testamentary freedom *inter se* between the states, and by principles of comity.[5] One cardinal, immutable, unchangeable, uniform and consistent rule has underpinned the dignity and stability of the law of wills -- the rule that courts will give effect to a testator's intentions and will affirmatively seek out ways to do so, without construing probate statutes to defeat that intent. This is the duty of a probate court. To this immutable principle of the law of descent and distribution a court is bound. This rule forges the dignity of testamentary freedom.[6]

Here is what Mr. Hook says about it: "The Arizona will *was* not a valid will and *any intent underlining the making of it is irrelevant.*" *Brief of Respondent* @ 34 (italics added). He says that [Washington's] "minimum statutory formalities must be met before the court can conclude that a will is valid, regardless of whether the testator [sic] intent is clear." *Id.* (underlining added).

In this case, the court has before it the facially and presumptively valid Last Will and Testament of the decedent, Bert W. Hook. This will is

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[5] *See, Full Faith & Credit Act, Section 1, Article IV, U.S. Constitution; RCW 11.12.020(1) (deeming foreign wills valid).*

[6] It is "the basic principle underlying any discussion of the law of wills" and is thought of "not only as a natural almost political right, but as a natural condition of law as well." *Malloy, supra, @ 321.* It is a fundamental tenant of our liberal legal tradition. *Id.* It is the "supreme rule" and the "polar star." *In Re Soesbe's Estate, 58 W2d 634, 636, 364 P2d 507 (1961)("supreme rule"); In Re Elliot's Estate, 22 W2d 334, 351, 156 P2d 427 (1945)("fundamental maxim, first and greatest rule, the sovereign guide, the polar star... ").*

in writing, signed by the testator and witnessed, in conformity with all three of the ancient "basic execution formalities" and as required by Arizona law. It is "deemed" valid under Washington law. Bert's Arizona will revokes the will his brother deceptively admitted to probate in San Juan County. It names Mr. Atkinson as personal representative, foreclosing Mr. Hook's legal standing to pursue nefarious, non-justiciable counterclaims against him (and other witnesses and Arizona beneficiaries). It is a valid foreign will, a plain, direct manifestation of Bert Hook's right and freedom to dispose of his property according to the dictates of his desires. This is not irrelevant.

By dismissing the Arizona will (on the basis of statutory interpretation and construction), the trial court turned a blind eye to Bert's intentions. It ignored probate statutes, decisional law and its duty. It has done just the opposite of what it was bound by the "natural condition" of probate law to do. It construed its own state's codes antagonistic to their purposes; it ignored its own state Supreme Court's holdings; it destroyed the stability and dignity of the law of wills and defeated Bert Hook's last wishes. It violated the "basic principle", the "supreme rule", the "polar star", the "sovereign guide".

II. APPELLANT'S REPLY

(A) Reply to Respondent's Restatement of Issues.

(1) Bert's Arizona will was made valid in accordance with Arizona law.

On April 9, 2014, Judge Eaton ruled:

> "Arizona law (A.R.S. Section 14-2502(A)) provides that a witnessed will must be:
>
> "1. In writing;
> 2. Signed by the testator...; and
> 3. Signed by at least two people, each of whom signed within a reasonable time after (witnessing the testator sign)...
>
> On its face, the Arizona Will appears to meet all three of these requirements. It is in writing, it bears the signature of Bert Hook, and it bears the signatures of two people, Linda Darland and Anna Levitte." (underlining added).[7]

The trial court has established that Bert's Arizona will is *prima facie valid.*

The trial court also said that it should not construe the proviso language of RCW 11.12.020(1) "in a way that would defeat what, at least facially, appears to be the last wishes of Bert Hook." *CP-474.* The court emphasized this by stating again that the Arizona will constituted "the apparent last wishes of Bert Hook." *Id.*[8]

The trial court ascertained Bert's testamentary intentions. They have been established in the case.

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[7] It also bears a notary acknowledgement and seal. *CP-29.*

[8] "Apparent" means that which is obvious, evident, or manifest. *Black's Law Dictionary (5th Ed. 1979) @ 88.*

The trial court's findings that the Arizona will is *prima facie* valid under Arizona law and that it reflects Bert's last wishes are unchallenged on this appeal and are now verities. *State v. Bustamante-Davila, 138 Wn. 2d 964, 983 P.2d 590 (1999).*[9] *And see, State v. Vangerpoen, 125 W.2d 782, 786, 888 P.2d 1185 (1985)(prima facie means evidence of sufficient circumstances which would support a logical and reasonable inference of facts sought to be proved); Black's Law Dictionary (9th Ed., 2009) p.130 (prima facie means enough evidence to rule in a party's favor).*

Significantly, the trial court also correctly recognized the "three basic execution formalities" underpinning the stability and dignity of the law of wills by saying that "the most significant acts are that of the testator signing the document and that of the two people who witnessed the signing." *CP-473.* As applied to this case, the trial court found correctly "that significantly more of the necessary acts occurred in Arizona." *Id.* These are also unchallenged findings on this appeal and are verities. *Bustamante-Davila, supra.*

Finally, the trial court correctly concluded that the intent of RCW 11.12.020(1), (2) "is clearly to allow the admission of wills properly executed under the laws of jurisdictions other than Washington." *CP-472.*

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[9] Mr. Hook's asserts these findings were reversed, but the contention finds no support in the record.

This is an "important factor." *Id.* The court said that "the proviso language of RCW 11.12.020(1) reflects a clear legislative intent that Washington should recognize testamentary instruments that have been properly executed in other jurisdictions." *CP-473.*

But, Judge Eaton was later persuaded to sidestep the truth and significance of his (unchallenged) findings and conclusions by the ruse of technical construction. The trial court was persuaded to ignore the clear legislative intent it recognized (that effect be given to valid foreign wills), to vacate its prior order establishing that Arizona law applied (permitting Mr. Hook to take a position diametrically inconsistent to his prior one) and to construe Washington's foreign wills proviso in order to frustrate Bert Hook's recognized last wishes, his testamentary intentions.[10] The trial court exalted a word above the testator's intentions and construed two statutes to defeat that intention and the intent of the statutes themselves.[11]

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[10] Hook's first position was that "it is uncontroverted that Mr. Hook executed the document entitled Bert Hook Last Will and Testament in Arizona." *CP-82.* The trial court erred allowing Hook to take an inconsistent position later, contrary to our state Supreme Court's holding that "judicial estoppel applies to a party's stated legal assertion." *Anfinson v. FedEx, 174 Wn.2d 851, 866 P.3d 289 (2012).*

[11] RCW 11.12.020(1), deeming foreign wills valid in Washington, and RCW 11.12.230 deeming a testator's intent controlling. Justice does not depend in Washington on the "sporting theory" anymore or on interpretations of decisions that have been made on other, unwritten grounds. *First Federal Savings v. Ekanger, 93 Wash. 2d 777, 781, 643 P2d 129 (1980) (new rules of procedure intended to eliminate justice inherent in archaic procedural concepts once characterized by Vanderbilt as the sporting theory of justice); Wichert v. Cardwell, 117 Wash.2d 148, 153, 812 P.2d 858 (1991)(maxims of statutory interpretation "are merely justifications for decisions arrived at on other grounds which may or may not be revealed in the opinion").*

The issues in this case are not, as he argues, whether the trial court threw out the Arizona will because it did not meet Washington's will formalities, but rather, whether it meets Arizona's will formalities and, under Washington law, is, therefore, deemed valid. It does, and it is.

The issues are not, as Mr. Hook argues, whether the court denied Mr. Atkinson's motion to revoke Letters Testamentary because they issued (by deceit) before attesting will witness Anna Levitte subscribed her signature to the Arizona will, but whether or not the Arizona will was made valid after the death of Bert Hook in accordance with Arizona's statute and its decisional law, as the unchallenged findings of the trial court reflects. It was -- "on its face".

The issues on this appeal also include whether or not the trial court, having properly established the facial and presumptive validity of the Arizona will, and having established that it reflects the testator's last wishes and intentions, can, thereafter, defeat them by technical rules of construction, contrary to clear legislative intent and contrary to decisional law. The answer is no. Bert Hook's date of death is irrelevant. Mr. Hook's argument to the contrary is deliberately a specious distraction.[12]

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[12] There has been no "post-death attestation" in this case, as Mr. Hook asserts. *Response @ 30.* Ms. Levitte's affixation of her signature to the original Arizona will may properly be called a post-death subscription, but she attested, i.e. witnessed Bert's signing his will in Arizona. *Estate of Lindsay, 91 Wn. App. 944, 948, ___P.3d___ (1998) ("a witness is one who has personal knowledge that a will was signed by the testator"). In Re*

(B) Reply to Respondent's Restatement of Facts.

Once again, unfortunately, it is necessary for Jim Atkinson to politely advise the court to beware of the falsehoods, tawdry innuendo and disgusting insinuation set out in Mr. Hook's Restatement of Facts at pages 3-20 of Response Brief ("the Timeline"), and elsewhere. His exposition of alleged facts is rife with the histrionic, the menial, the false, and worse. In the interest of brevity, Mr. Atkinson simply catalogues some of them for the court to see, and know, the limitless extent to which he will employ spin-doctoring and dissimulation in order to incubate prejudice and color the court's unbiased determination of this appeal. It should be remembered that this appeal concerns a question of law decided on summary judgment.

The catalogue is attached as Appendix "A".

(C) Reply to Respondent's Argument.

Chambers' Estate, 187 Wash. 417, 424, 60 P.2 41 (1936). Attestation is the act of the senses, subscription is the act of the hand; one is mental, the other is mechanical. *Id.* The "three basic execution formalities" were fulfilled in Arizona on February 13, 2012 and Mr. Hook's entire argument regarding post-death subscription ignores its recognition and acceptance in Arizona, and, even in Washington. RCW 11.20.020(2) provides for the proof of wills by attesting witnesses "at the request of the testator, or after his or her decease, at the request of the executor", by making an affidavit stating such facts as they would be required to testify to in court to prove such a will. Washington courts recognize this procedure as an "alternate" method" of proving the will, calling them "self-proving affidavits". *See, in Re Estate of Young, 23 Wash. App 761,766, 598 P.2d 7 (1979) (alternate method for establishing the valid execution of a will); Estate of Starkel, 134 Wash. App 364, 134 P.3d 1197 (2006) (discussing "self-proving affidavits"; legislative amendment to RCW 11.20.020); RCW 11.12.020(2) (allowing validation of wills "whenever executed").*

(1) Bert's Arizona will is valid under the established rules of law, per *Estate of Elliott.*

It is an undisputed fact in this case that Bert's Arizona will on its face meets all Arizona's will requirements. It is in writing, it is signed by the testator, and two attesting witness signatures are affixed to it. The Arizona will is *prima facie* valid.

The Arizona will also reflects Bert's last wishes, his intentions. Because Washington deems facially valid foreign wills to be valid, (and the purpose of all probate codes is to give effect to a testator's intentions and validly executed foreign wills), it follows that Bert's last will from Arizona must be recognized. These are the facts; these are the established rules of law.

When the trial court decided to ignore Bert's last wishes and intentions it erred. When the trial court decided to ignore the foreign wills proviso of Washington's statute of wills, it erred. When the trial court decided to defeat the testator's intentions by technical rules of statutory construction it erred. And when the trial court decided to allow Mr. Hook to take a position diametrically opposite to his previous stipulation and the court's order, it erred.

The Arizona will is valid under Arizona law. Washington deems valid foreign wills valid. The Arizona will reflects Bert's last wishes.

Courts do not construe statutes to defeat a testator's intentions. These are the established rules of law. The Arizona will is Bert's valid last will. One cannot make a Washington will out of an Arizona will (and then declare it lacks Washington formalities) because an attesting witness subscribed a signature in a certain place. No statute requires a will witness to affix his/her signature in any particular place. Testamentary freedone does not turn on such a caprice.

(2) No cases cited by and relied upon by Mr. Hook are applicable.

In defense of this appeal, Mr. Hook first asserts that the Arizona will is not valid under Washington law. *Response Brief @ 21.* For this contention, he cites to the cases of *Estate of Burton v. Didricksen, 2015 WL 4920961, Estate of Ricketts, 54 Wn. App. 221, 773 P.2d 93 (1989), Estate of Malloy, 134 Wn.2d 316, 949 P.2d 804 (1998).* None of these cases are applicable in this case. At first, Mr. Atkinson makes no assertion that Bert's last will from Arizona complied with Washington's will formalities. He does not understand why he should have to defend against such arguments when they are not contested. It was Mr. Hook who, with evident pomp and confidence, asserted that "it is uncontroverted that Mr. Hook executed the document entitled "Bert Hook Will, Last Will and Testament, in Arizona." *CP-82.* This case is not about the Arizona will

conforming to Washington's will formalities, it is about the Arizona will's validity under Arizona law and Washington's stated public policy deeming it valid, in recognition of the ancient rights of testamentary freedom and the polar star of ascertaining a testator's intentions and giving effect to them. Mr. Hook's conclusion that a "will that is not properly witnesses before the decedent dies can never become a valid will under Washington law", *Response Brief @ 24,* is simply false. An Arizona will can be made valid after the death of a testator and, when done, is a valid will under Washington law.

In a second defense of this appeal, Mr. Hook argues that "post death attestation" should be rejected as a matter of public policy. For this contention he relies on four principle cases.[13] None of these cases apply here. Every single one of the cases Jerry Hook relies upon in his Response for the proposition that a will cannot be made valid after a testator's death involve a will that was executed within the state and under that state's statute. Nowhere does he cite to any authority for the proposition that a different state's laws might or will supersede, as Washington's foreign will proviso does. Every one of the cases Mr. Hook relies upon setting a bright line at death concern a domestic will, not a

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[13] *Kammerer v. W. Gear Corp., 96 Wn.2d 416, 635 P.2d 708 (1981); Estate of Saueressig, 38 Cal. 4th 1045, 136 P.3d 201 (2006); Estate of Flicker, 339 NW 2nd 914 (Neb. 1983); Estate of Royal, 826 P.2d 1236 (Colo. 1992).*

foreign will and not one of these cases concern two simultaneous witnesses to the execution. Most importantly, none of them is an Arizona will where post-death attestation is permitted within a reasonable time, even after death. *Estate of Jung, 109 P.3d 97 (Ariz. 2005).*

Washington already has a public policy with respect to the recognition of valid foreign wills. It is a public policy that has been determined by the people speaking through their legislature. *Housing Authority v. Saylors, 87 Wn.2d 732, 740, 557 P.2d 321 (1976) (public policy determined by the people speaking through the legislature).* That public policy is controlled by the "polar star", the court should give effect to a testator's intentions. It is also controlled by the legislative intent that valid foreign wills are deemed valid in Washington. If Mr. Hook seeks to change established public policy in the State of Washington, it is a matter he should be taking up with the state legislature, not the courts. This court would be remiss to encroach on the separation of those powers.

(3) Significant acts equal choice of law

At page 30 of Response Brief, Mr. Hook argues by reliance on the dissenting opinion in *Kammerer v. W. Gear Corp., 96 Wash.2d 416, 425, 635 P.2d 708 (1981)*, that the Full Faith and Credit clause of the U.S. Constitution should not apply to Arizona's probate code to recognize and give effect to foreign laws. This is his argument that "post-death

attestation" should be rejected as a matter of public policy in Washington state.

First, the dissent in *Kammerer,* like the majority, addressed itself to conflict of laws questions presented between California and Washington contract law regarding the recovery of punitive damages. Heavy reliance and emphasis was placed on the *Restatement (2d) Conflict of Laws.* Although no such contract dispute is involved here, the facts and findings of this case support the establishment and application of Arizona law, not Washington law. Washington long ago abolished the rule of *lex loci contractu* and adopted the choice of law test which looks to which state had the most significant relationships to the controversy. *Baffin Land Corp. v. Monticello Mot. Inn, 70 Wn.2d 893, 425 P.2d 623 (1967).* Said the *Baffin* court:

> "We have determined that we should no longer adhere to the rule of *lex loci contractus.* We therefore adopt what we consider to be the better rule, *viz,* that the law of the state which...has the most significant relationship...will govern the validity and effect of the contract." *Citing restatement second, Conflict of Laws § 332.*

Here, it is unchallenged on this appeal that Arizona is the place where "the most significant acts" took place, i.e. the testator signing the document and that of the two people who witnessed his signing, *CP-473,* and that "significantly more of the necessary acts occurred in Arizona." *Id.*

Thus, under choice of law principles, Arizona law would apply to resolve any conflict of law question.

(4) Jurisdictional Argument.

Mr. Hook's arguments, and the trial court's ruling that Mr. Atkinson is subject to the exercise of the court's personal jurisdiction, fail.

First, Mr. Hook asserts that the issue of personal jurisdiction over Mr. Atkinson is "not properly before this court." *Response @ 38.* Nevertheless, he wants this court to address the issue in order to avoid a "likely second appeal when the trial court rules against Atkinson" after trial on Mr. Hook's counterclaims for abuse and financial exploitation.

This argument is completely devoid of merit as it presupposes the court should render an advisory opinion on the exercise of personal jurisdiction over Mr. Atkinson when he loses at trial.[14] The truth is, there will not be any trial if this court rules, as it should, that Mr. Hook is not the personal representative of his brother's estate because the Arizona will is Bert's last will and expressly revokes his old one. Under Arizona law, only a personal representative has standing to bring a claim for abuse or exploitation of a vulnerable adult, CP-1393, and, under Washington law (which should not apply to this case at all), only a personal representative has standing to make such claims. *CP-307-309.* If Mr.

Hook is not the personal representative, he will have no standing to try these claims.

Moreover, Mr. Hook cites to no authority, state or federal, for the proposition that, by custodial delivery of a decedent's last will and testament, a person consents to the jurisdiction of a probate court for any counterclaim which might be imagined against a non-resident defendant. None of the cases cited by Mr. Hook (all Washington cases) have anything to do with such a proposition and fail completely to rebut the authority presented by Mr. Atkinson in his opening brief.[15] Mr. Atkinson's alleged consent, as he argues, cannot be gleaned from his legal compulsion to deliver Bert's last will to the court.

Most importantly, none of Mr. Hook's arguments regarding the exercise of personal jurisdiction over non-resident Petitioner Atkinson pertain in any way to the constitutional basis for such assertion. It should be remembered that Mr. Hook has the burden of showing that jurisdiction is appropriate. *Schwarzenegger v. Fred Martin Motor Company, 374, F.3d 797, 800 (9th Cir. 2003); Outsource Services Mgt., LLC, v. Nooksack*

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[14] Mr. Hook should be made to explain by what device or arrangement the outcome of any trial is a foregone conclusion in his favor.

[15] It seems Mr. Atkinson's unsubstantiated assertions of fact supporting the trial court's jurisdiction by "consent" are the same false allegations presented in his timeline. *Response @ 39.* Mr. Atkinson never swore under oath that he resided in Spokane Valley or that he lived in Washington when he filed his petition to contest. This is pure mendacity. Mr. Atkinson simply gave his mailing address in Spokane Valley.

Business Corporation, 172 Wn. App. 799, ____, 292 P.3d 147 (Div. I, 2013). For a foreign state to have personal jurisdiction over an out-of-state defendant, that defendant must have certain minimum contacts with the foreign state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Richman v. Pryor, 2007 U.S. Dist. LEXIS 6355 (Western Dist. of Washington, 2007 @ 11).* Mr. Hook makes no attempt in this case to argue that the defendant had sufficient contacts with the State of Washington to have purposely availed himself of its jurisdiction and the record in this case is completely devoid of any such contacts or purposeful availment. As the *Pryor* court said:

> "Instead, plaintiffs appear to believe that they can evade the constitutional requirements imposed by *International Shoe* simply characterizing their action as a probate matter...The defect alleged by the defendant in this case is not a lack of adequate notice, however, but rather the absence of "minimum contacts" with Washington State that would enable a court here to enter judgment affecting the defendant's interests. Such restrictions on jurisdiction are constitutional, not statutory, in nature. As the Supreme Court has explained, such limitations are more than a guarantee of immunity from inconvenient or distant litigation. They are consequence of territorial limitations on the power of the respective states. However, minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the minimal contacts with that state are a prerequisite to its exercise of power over him." *Hansen v. Dencklaus, 357 U.S. 235, 250, 78 S. Ct. 1228, 2 L. Ed. 2nd 1283 (1958).*

The *Pryor* court found that the defendant failed to present any evidence of sufficient Washington contacts to satisfy the state's long-arm statute and that the plaintiff's motion to dismiss for lack of jurisdiction was appropriate.[16]

Mr. Hook fails in his burden to show sufficient contacts under Washington's long-arm statute to exercise personal jurisdiction over him. And, traditional notions of fair play and substantial justice will not support such an assertion of personal jurisdiction where Mr. Atkinson was under a legal compulsion to bring the Arizona will forward. There is no such thing as personal jurisdiction over a foreign defendant without constitutional basis. It is completely *non sequitor* to say Mr. Atkinson consented to the trial court's exercise of personal jurisdiction over him when the law imposed a duty upon him to bring the Arizona will forward. Traditional notions of fair play and substantial justice do not penalize people for performing their legal duties. Consent cannot be declared where legal compulsion exists.

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[16] Mr. Hook's assertion that Mr. Atkinson is a non-resident is completely disingenuous and false as it relies exclusively on his conclusory allegation that a mailing address constitutes residency and that Mr. Atkinson "swore" to it. Further, his assertion that "Atkinson is not a defendant", *Response @ 39*, is also completely disingenuous. Neither of these assertions or positions can be reconciled with Mr. Hook's prior position that Mr. Atkinson was, indeed, a non-resident defendant and subject to the non-resident defendant bonding requirement he wrongfully persuaded the court to impose as a condition of any appeal.

In considering the jurisdictional question raised on appeal, this court should also consider that Mr. Hook's counterclaims for abuse and exploitation of a vulnerable adult will not exist, and may not be prosecuted, if and when Bert's Arizona will is admitted to probate. As mentioned, only a personal representative of a valid will has standing to make such counterclaims under either Washington or Arizona law. Further, Mr. Hook's counterclaims claiming his brother's incapacity to make the Arizona will, and for undue influence (or fraudulent conspiracy by all of his friends, the ones really taking care of him in Arizona), are not justiciable yet, and will not be justiciable until the Arizona will is admitted to probate. Mr. Hook may then, on his own dime, as a beneficiary under the Arizona will, attack its validity -- but not before.

(5) Fee Request.

Mr. Atkinson reiterates his request for an order of attorney's fees as set forth in his opening brief, and additionally, seeks an award of fees pursuant to RCW 4.28.185, *et seq.*

III. CONCLUSION

Bert Hook intended to change his will and said so in writing to his attorney in November 2011, after he left Lummi Island and went to Arizona with his friends, Jack Jenkins, Jim Atkinson, Anna Levitte and Alan Hester. He told his caregivers in Arizona he intended to. Bert did

what he said he was going to do; he changed his will in Arizona. It is facially and presumptively valid under Arizona law. Because it has been executed in the mode prescribed by Arizona, it is deemed valid by the State of Washington. Bert Hook intended to revoke the old Washington will leaving everything to his brother, and said so in writing -- it's on the face of his Last Will and Testament from Arizona. Bert had good reasons for changing his will and told his friends what those reasons were, which, on their face, are sensible, cogent and convincing. He was exercising his testamentary freedom.

Unfortunately, it will be necessary for the court to look through Mr. Hook's misrepresentation of facts (and law) to reject the premises of his arguments on appeal, and they are legion. At bottom, though, Mr. Hook's response (and his principle premise) is that Bert Hook's Arizona will was not valid at the time of his death under either Arizona or Washington law because Anna Levitte, the second subscribing witness, had not yet signed it. But this is not the point or the issue on appeal. Whether Bert Hook's Arizona will was valid at the time of his death is irrelevant because it is valid now. Mr. Hook makes a big noise that it should be declared invalid under Washington law because he cannot accept that Arizona allows wills to be made valid after death, but even Washington allows this. No noise from Mr. Hook will change the fact that

Bert's last will meets all of the formalities of Arizona's will statute and revokes his old Washington will. Proof of the error of Mr. Hook's principle contention on this appeal is found in his entreaty to this court to change existing public policy in Washington, to rewrite our Statute of Wills and hold that Washington will not recognize a validly executed foreign will no matter what Arizona or other states allow. It is to admit to this court that Bert Hook's last will is valid but should not be recognized as such, despite our legislative intent, the testator's intentions and the holding of *Elliott*. It is to say to this court that Jerry Hook's concepts of public policy should supplant existing public policy and that the public policy of the citizens of the State of Washington, currently expressed through their legislature, should be given no currency (or repealed) if it means his brother's last wishes should be given effect. It asks that the public policy of the State of Washington should change to suit Jerry Hook's purposes.

By trying to keep the court's focus on what was, and not what is, and by entreating the court about what should be, and not what is, Jerry Hook hopes to deflect attention and to incubate this court's prejudice against Mr. Atkinson and his other Arizona beneficiaries, to demean and degrade his own brother's intelligence and testamentary freedom and, in this way, hope to defeat the testator's intentions, the legislative intent and

the holding of *Elliott*. It is only by the exercise of histrionics, falsehoods and acrobatics that Jerry Hook has succeeded so far in defeating his brother's testamentary intentions and the intent of the legislature.

Towards the pursuit of, and in obedience to its duty of effectuation of the testator's intentions and legislative intent, the court should reverse the trial court.

The court should immediately revoke Jerry Hook's letters testamentary and install Jim Atkinson as the personal representative because the Arizona will is Bert Hook's last will. It is facially and presumptively valid.

If Mr. Hook wants to challenge the reasonableness or timeliness of the affixation of Anna Levitte's signature let him do it after it is admitted to probate. If he wants to challenge the Arizona will based on his brother's testamentary capacity, let him do so after it is admitted to probate. If he wants to challenge the validity of the Arizona will based on an alleged conspiracy of undue influence amongst Bert's friends, let him do it after the Arizona will is admitted to probate. That's the one that has to be given currency and effect. The Washington legislature did not carve out an exception for Jerry Hook, when it said that valid foreign wills will be deemed valid in Washington. The testamentary freedom exercised by

Bert Hook on February 13, 2012 is a clear and direct manifestation of his intentions; they should be honored, and it is error not to.

Bert Hook's Arizona will exists. It exists as a manifestation of Bert's exercise of testamentary freedom, that "natural condition" of the law of wills which rains down from sublime dimensions of the law's being, much as upon the steel of the compass needle, the influence of the Pole Star rains down from out of the starry heavens. Testamentary freedom does not depend on the meaning of a word or the place where an attesting witness affixes a signature. Testamentary rights and freedoms cannot be ruptured and its ideas and principles (assured by law) allowed to collapse the entire cosmos by giving a single word an arbitrary meaning to defeat the natural law and ancient purposes and principles. Mr. Hook is wrong to argue that domicile is relevant. He is wrong to argue that a testator's intentions are irrelevant. He is wrong to argue that public policy should be changed to suit his purposes. He is wrong to use the artifice of the law to defeat clear legislative intent and the purposes and policies underlying them. At every step, Mr. Atkinson is met by arguments which go to excuse, to palliate and to confound right and wrong and reduce a just man to the level of a reprobate. This is wrong.

This court should reverse the trial court and give effect to Bert's validly executed last wishes. It should declare unequivocally that the

foreign wills proviso of Washington's Statute of Wills manifest the legislative intent to give effect to facially and presumptively valid wills from foreign jurisdictions, as here. It should declare unequivocally that a testator's intention is the controlling determination in any discussion of the law of wills. It should revoke Jerry Hook's letters testamentary and install Jim Atkinson as the personal representative of Bert Hook's estate. It should declare that, if Mr. Hook wants to challenge his brother's testamentary capacity or the Arizona beneficiaries' influence upon him, or assert claims of exploitation of a vulnerable adult, that it will be his burden and must be conducted on his dime and at his expense. And, it should make an award of attorney's fees in favor of Mr. Atkinson and the Arizona beneficiaries who have so long endured the deplorable conduct of this litigation. Testamentary freedom is not so capricious as Mr. Hook makes it out to be. It is the court's duty to give effect here.

RESPECTFULLY SUBMITTED this 30th day of November, 2015.

BOSWELL LAW FIRM, P.S.

David P. Boswell, WSBA #21475
Attorney for Appellant/Petitioner

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 November 30, 2015, I arranged for service of the foregoing Appellant's Reply Brief 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 X E-File
Mr. Douglas F. Strandberg Attorney at Law P.O. Box 547 Friday Harbor, WA 98250	_____Facsimile _____Messenger _____U.S. Mail X E-Mail
Rock C. Sorensen Law Office of Rock C. Sorensen, P.S. P.O. Box 173 Friday Harbor, WA 98250	_____Facsimile _____Messenger X E-Mail
Catherine W. Smith Ian Cairns SMITH GOODFRIEND, P.S. 1619 8th Avenue North Seattle, WA 98109-3007	_____Facsimile _____Messenger _____U.S. Mail X E-Mail

DATED at Spokane, Washington this 30th day of November, 2015.

Linda LaPlante

APPENDIX "A"

(1) At page 16 of Response Brief, Mr. Hook insists his brother's domicile is relevant. This is false. Domicile is not relevant to consideration of the execution and validity of a domestic or foreign will. No part of either Arizona's or Washington's statutory will formalities require a testator to be domiciled anywhere to make a valid will. If they did, some decisional authority might have been proffered. It was not. *Declaration of Expert Thomas Culbertson, CP-90-91 (domicile is superfluous; valid Arizona will is facially valid under Washington law.)* The court should not entertain Mr. Hook's hypotheticals ("if", "had been", "could be"). The Arizona will has been executed in the mode prescribed by Arizona. It is valid regardless of Bert's domicile. Besides, Mr. Hook admitted in court, on the record, that domicile has no bearing on the execution or validity of a will. *CP-82.* He knows better. His assertion otherwise is just another masquerade on the court.

(2) At page 6 of his Response Brief, Mr. Hook, suggests that Bert Hook signed a blanket Healthcare Power of Attorney appointing Atkinson and another friend, Jack Jenkins, as his agents. This is false. The Arizona Healthcare Power of Attorney which Bert Hook signed naming James Atkinson and Jack Jenkins as his agent, was conditional. It stated: "This power of attorney is effective on my inability to make or communicate healthcare decisions." *CP-145.* This event never happened. Bert was always able to make and communicate his own healthcare decisions before he died. *See Discussion, infra @ No. 7., CP-185, CP-190.* And, Jerry Hook's representation that Jim Atkinson exercised an effective Health Care Power of Attorney during a 911 incident two days before he died is false. Alan Hester was there as a disinterested witness and recalls that the 911 responders tested Bert for competency, found Bert capable and competent and left Bert at home because Bert wanted to stay there. *CP-172.*

(3) At page 9 of his Response Brief, Mr. Hook asserts that the "trial court struck Atkinson's Declaration in Support of the claim" that Bert had expressed a desire to make a new will earlier. This is false. The court deferred rulings on Hook's motion to strike and expressly stated that "nothing shall preclude the petitioner from

seeking to introduce the exhibits in a later proceeding if they are determined to be relevant to such a proceeding." *CP-193.* Bert Hook's express intentions to make a new will, communicated to his attorney many months before he died, have not been struck by the trial court as Mr. Hook claims. And, Mr. Atkinson did not waive his challenge in the trial court as to any testimony regarding the Dead Man's Statute because Washington law did not (and does note) apply to the issues in the case. At the time the trial court entered its order on Mr. Hook's motion *in limine* and to strike, October 31, 2012, it had already entered an order that Arizona law would be applied to determine the facial validity of the Arizona will. *CP-78.* This would include Arizona's so-called Deadman's Statute, which varies greatly from Washington's. Mr. Hook's assertion misrepresents the order. Another masquerade.

(4) Repeatedly, in another attempt at tawdry innuendo, Jerry Hook characterizes Anna Levitte as Jim Atkinson's "girlfriend". *Response @ 1, 6, 13, passim.* While it is true that Mr. Atkinson and Ms. Levitte are not married, they have had an equity relationship for many years. By referring to Anna Levitte as "the girlfriend", Mr. Hook wants it to appear that she belongs to some sort of inferior or minority class, maybe as a gender, maybe as an unmarried woman, but whatever it is, it is repugnant to the administration of justice to bring personal discriminatory opinions into play. Jerry Hook's prejudices against unmarrieds or other domestic relationships should not influence the court's opinion in this case. This is rank spin-doctoring. Personal decisions relating to marriage are constitutionally protected. *See, Planned Parenthood v. Casey, 405 U.S. 833, 851, 112 S. Ct. 2791, 120 l. ed. 2nd 674 (1992).*

(5) At page 39 of Response Brief, Mr. Hook asserts "Atkinson swore under oath that he resided in Spokane Valley in his Petition to Probate the Arizona will in Arizona." This is false. Mr. Atkinson simply gave his mailing address as Spokane Valley, Washington in said petition, properly identifying himself as a "devisee". *CP-1094.*

(6) At page 17-18 of Response Brief, Mr. Hook suggests that Jack Jenkins' attorney, Jacob Cohen of Oak Harbor, rendered an admissible opinion in this case that there was a high probability the

Arizona will was invalid under both Arizona and Washington law. This is directly contrary to Mr. Jenkin's own prior statements that the Arizona will was valid and contrary to Judge Eaton's findings that "on its face, the Arizona will meets all Arizona will formalities." *CP-472.* Mr. Cohen's colloquial, hearsay, unsubstantiated and unqualified opinion was bought and paid for by Mr. Hook and his counsel after their failed attempt to bribe Mr. Jenkins into swearing falsely himself (in exchange for property) that the Arizona will was invalid. When Mr. Jenkins refused to give the false statement Mr. Hook demanded of him, Mr. Hook simply arranged to substitute the false opinion of Mr. Jenkin's attorney. Mr. Cohen's opinion is weak as hypothesis and worthless as proof. Moreover, conclusory opinions of law are not admissible on summary judgment. *Parkin v. Colocousis, 53 Wn. App. 649, 653, 769 P.2d 326 (1989) (neither trial court nor appellate court can consider conclusions of law); Eriks v. Denver, 118 Wn.2d 451, 458, 824 P.2d 1207 (1992) (disregard conclusions of law when court is presented with question of law).*

(7) There is no evidence that Bert Hook lacked testamentary capacity to make his Arizona will. Jerry Hook, however, using his cherry-picked excerpts from over a 1,000 pages of Bert's medical records, devotes no less than 6 pages of his response brief attempting to incubate prejudice about Bert's testamentary capacity – an issue not relevant at all on this appeal except to demean Jim Atkinson, Anna Levitte, Jack Jenkins and Bert Hook himself as sick or crazy. *Brief of Respondent @ 6-12.* Mr. Hook's spin-doctoring attempts to paint Mr. Atkinson, Mr. Jenkins, and Ms. Levitte with the blackest possible brush and to make his own brother out as demented are unseemly. First, Mr. Hook fails to explain how any of his detestable allegations concerning his brother's capacity (or an alleged conspiracy to unduly influence him) are relevant or justiciable. The Arizona will has not yet been admitted to probate. How it is that Mr. Hook thinks it necessary or relevant to make vulgar allegations concerning an unprobated will escapes Mr. Atkinson. It's a waste of time -- again. Mr. Hook has no standing and his counterclaims are neither justiciable nor ripe until the Arizona will is admitted to probate. If Mr. Hook wants to attack the validity of the Arizona will based on his brother's alleged incompetency or undue influence, or whatever, he must await its admission to probate. *See, In Re O'Brien's Estate, 13 Wn.2d 581,*

590, 126 P.2d 47 (1942)(unprobated will has no vitality or effectiveness for any purpose prior to its admission to probate); Shufeldt v. Hughes, 55 Wash. 246, 104 Pac. 253 (1909); In Re: Romano's Estate, 40 Wn.2d 796, 808, 246 P.2d 501 (1952) (executrix without standing to engage in a contest of an unprobated will). Mr. Hook has no direct immediate interest in an unprobated will. In order for there to be a justiciable controversy, there must be an actual, present and existing dispute as distinguished from a possible dormant, hypothetical, speculative or moot disagreement. *Wash. Educ. Ass'n. v. Pub. Disc. Comm'n., 150 Wn.2d 612, 622-23, 80 P.3d 608 (2003)* A justiciable controversy requires interests that must be direct and substantial rather than potential, theoretical, abstract or academic. *Id.* This cannot be the case until the Arizona will is admitted to probate. And when it is admitted to probate, Mr. Hook will have no standing to assert any counterclaims for alleged exploitation of a vulnerable adult. Only a personal representative has standing to do that in either Washington or Arizona. *CP-307-309.*

Although Mr. Hook submits only "portions" of the medical records, cherry-picked in order to incubate prejudice against Mr. Atkinson and the Arizona beneficiaries, the entirety of the records have been made part of the record. *CP-1593 (only "portions" of medical records submitted by Mr. Hook); CP-1749 (all of the medical records of the decedent compiled on CD ROM); CP-1754 (disc of "all records from all providers").* The tawdry and irrelevant innuendo Mr. Hook proffers with his "portions" are completely rebutted in these medical records, and their premises refuted by our decisional law. By February 12, 2012, Bert had been discharged into Hospice care and was allowed to return home, as he wanted. On February 13, 2012, Bert gave Hospice of Havasu his signed Authorization to Obtain Needed Information at his home. *CD ROM Bates #59.* This authorization was witnessed by Teri Cote, RN, a Hospice of Havasu employee. Bert also gave Hospice of Havasu his Do Not Resuscitate Consent and signed it himself, also witnessed by Terri Cote, RN, with the express understanding that Bert knew "death may result from any refused care." *CD ROM Bates #9.* Bert also signed his Hospice Benefit Election on February 13, 2012 and, importantly, signed his Arizona will that same day, before Linda Darland and Anna Levitte. The medical records show in the following days that

Hospice was discussing "the decline and death process" with Bert, *CP-1656,* and that Hospice was explaining to Bert that he was "transitioning", causing (naturally) agitation and anxiety. *CP-1659.* Hospice had asked Bert about his final arrangements and he nodded in agreement that he wanted to be cremated. *CP-1662.* Bert knew he was dying and Hospice told him he "could benefit from caregiver or placement" *(CD ROM @ Bates #97),* but he refused. *Id.* By way of further example, if and when they become relevant to this case, the medical records will show Mr. Hook's intentionally tawdry (and partial) description of events at La Paz Regional Hospital in January 2012 conveniently omit his caregiver's physical assessment that Bert was "talking to a friend and stating he wants to leave the hospital". *CD-ROM @ Bates # 214; CP-1612.* The discharge planner on the same day, less than a month before he died, said there were no signs of abuse or neglect, Bert had no thought of hurting himself and his discharge destination was "home". *CD ROM @ Bates #201.* This assessment was entirely consistent with the same La Paz Regional Hospital Discharge Planner observations in November 2011. A Patient's Condition Assessment reflects the caregiver being told that Bert had a few goals to complete as one of his "end of life tasks", one of which was "to complete a will." *CD-ROM @ Bates #97.* On the day he signed his will, February 13, 2012, Hospice of Havasu indicated on its Authorization to Obtain Information that Bert did not lack decision-making capacity and willingly signed the document. *CD-ROM @ Bates #59.* While attending Bert in his dying days, Hospice of Havasu also indicated in its medical report that Bert's "judgment/insight were intact," *(CD-ROM @ Bates #30),* his "mood and affect normal" and that he was "oriented to person, place, time and situation", although lethargic and sad. *Id.* The records indicate Bert's "desired place to live out his life" was his "own residence," *Id.,* and that he knew he was very ill and "not a surgical candidate for repair of his heart". *Id.* Tri-Valley Medical Center records further show that they had "ruled out dementia". *CD-ROM @ Bates #2.* And, despite Mr. Hook's contention that they he had a close relationship with Bert, the records say that Bert stated "he does not talk to" his only living relative, his brother. *CD-ROM @ Bates #215.*[17]

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[17] In *In Re Miller's Estate,* 10 Wn.2d 258, 116 P.2d 526 (1941), and its abundant progeny, our state Supreme Court categorically rejected the argument that a facially valid last will could be overcome by mere allegations or insinuations of incapacity, undue

(8) At page 34 of Response Brief, Mr. Hook asks the court not to rely "on doubtful Arizona precedent", referring to *Estate of Jung, 109 P.3d 97 (Arizona, 2005).* *Jung* is not doubtful precedent; it is mandatory Arizona authority directly on point.

(9) At page 37 of Response Brief, Mr. Hook says Mr. Atkinson urged the court that the proper execution of a will is a "mere technicality". This is false. It was not Mr. Atkinson who claimed execution is just a technicality, it was the trial court. *VRP-10,l.22* ("*the case turns on a technicality*").

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influence or even "delusions or hallucinations." Said the *Miller* court, that type of evidence must establish that the will itself was the creature or product of hallucinations or delusions. *Miller, supra @ 274.* There is no evidence of this in the record of this case, just tawdry insinuation.