73629-9

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No. 73629-9-I

THE COURT OF APPEALS, DIVISION I

State of Washington

ELMER WAGNER,
Appellant/Cross-Respondent

Vs.

JILL WRIGHT,
Respondent/Cross-Appellant

CROSS-APPELLANT'S OPENING BRIEF and RESPONSE

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ASSIGNMENTS OF ERROR

The Superior Court erred by allowing Elmer Wagner to recover anything under Liz Wagner's will inasmuch as his assistance in crafting the decedent's will constituted the unauthorized practice of law.

The Superior Court erred in finding that the will was not the product of undue influence on the part of Mr. Wagner.

The Superior Court erred in interpreting a Deed in such as way as to deprive Ms. Archer of any interest in the Federal Way real estate.

The Superior Court erred in determining that Mr. Wagner has an uncompensated "community interest" in the decedent's separate property home and in paying him $52,143 from the estate in compensation.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

Mr. Wagner participated in crafting the decedent's will. He is not licensed as a lawyer. Did Mr. Wagner engage in the unauthorized practice of law?

While his wife was gravely ill, Mr. Wagner assisted her in changing her will. He alone was with her when the

substance of the will was changed and provisions inserted more favorable to Mr. Wagner than in her prior will. Alone with the testator, Mr. Wagner acted as a scrivener putting all of the sometimes inconsistent language into the will, without referring her to independent counsel. Did Mr. Wagner exert undue influence on his wife?

A deed to real property has a granting clause to "A or B." Does such a deed convey *all* interest to A, or does the deed convey an interest in common with both A and B, each holding an undivided one-half interest in the property?

After marriage, husband and wife share for a time wife's separate property home, and for a time rented out the home with rental income going to a community account from which funds were spent to maintain the home. On wife's death, is husband entitled to a "community interest" in the net value of the home if the fair rental value exceeded the amount of community funds expended on maintenance?

STATEMENT OF THE CASE

STANDARD OF REVIEW

This case calls upon the court to review a trial court's determination that Mr. Wagner was not engaged in the

unauthorized practice of law when he assisted Liz Wagner in the preparation of her will. The trial court concluded at its Conclusion no. 2.5 that Mr. Wagner did not engage in the unauthorized practice of law. Questions of law and conclusions of law are reviewed de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003)(citing*Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979)).

This case also calls upon the court to review the trial court's determination that there was no "undue influence" exerted in connection with the making of Liz Wagner's will. The trial court's "Finding" no. 1.24 indicates that there was no evidence a trial to show that the Petitioner exerted undue influence. While identified as a "Finding," that's really a conclusion of law arising from the facts. The fact that a court designates its determination as a "finding" does not make it so if it is in reality a conclusion of law. Under Washington practice, a conclusion of law mislabeled as a finding, will be treated as a conclusion. *McClendon v. Callahan*, 46 Wash.2d 733, 284 P.2d 323 (1955); *Hauser v. Arness*, 44 Wash.2d 358, 267 P.2d 691 (1954); 2 Orland, Wash.Prac., § 311, p. 338, n. 38 (1972). Generally, "undue influence" is inferred from surrounding circumstances because in almost all cases

the person most capable of testifying about undue influence is the decedent. See *In re Estate of Knowles*, 135 Wn.App. 351, 357, 135 Wn.App. 351 (2006). At Conclusion No. 2.5, the court essentially concluded that no undue influence was exerted by Mr. Wagner. Whether the court's conclusion about undue influence fairly follows from the facts is a question that should be reviewed de novo, but the facts and circumstances surrounding the making of the will are unchallenged.

This case also calls upon the court to review the trial court's conclusion about the meaning of a deed conveying real property to "ELIZABETH K. KULESZA OR JILL R. KULESZA, mother and daughter." The trial court concluded at it's Conclusion 2.8 that "Respondent Archer [fka Jill Kulesza] never held any ownership interest in the Federal Way Property." Finding no. 1.39 is to like effect, indicating "However, the evidence at trial demonstrated that Respondent Archer did not, at any time, have a one-third (1/3) ownership interest in the Property." The facts behind that conclusion appear at Findings 1.25 – 1.28 and is based on the trial court interpreting the "to A or B" language as meaning "to A alone, if A is alive." The significance of the language in the deed is a matter of applying the law to the

unchallenged language of the deed, and the trial court's conclusion about the meaning of the deed should be reviewed de novo.

This case also calls on the court to review an award to Mr. Wagner of $52,143.00 representing ½ of a community or equitable lien on the property, which is the decedent's separate property, acquired before marriage. No challenge is take to the court's finding about mortgage payments and improvements in the amount of $104,268 (finding no. 1.34), but the evidence shows that, at time, Mr. Wagner lived in the home rent-free with the decedent and at times, the home was rented out. Under those circumstances, the conclusion that there is a "community or equitable lien" is erroneous, and the existence of such a lien, being a legal question, should be reviewed de novo.

Standard of Review Pertinent to Issues raised by appellant.

At part V of appellant's brief, it is asserted that the trial court decision denying a motion in limine regarding the "will contest" is reviewed for "abuse of discretion," and there's no dispute about that.

At other parts of appellants brief, the standard of review applicable appears to be correctly stated.

IMPORTANT FACTS

The central problem in this case is a will that's full of conflicting statements and undefined terms which, if written by a lawyer, would certainly constitute malpractice.

This case revolves around a will that is, frankly, awful. It is rife with conflicting provisions and undefined terms. It is a case study in why important documents such as wills, particularly when disposing of assets having considerable value, should always be drafted by competent attorneys. This will, if drafted by an attorney, would almost certainly fall below the standard of care and constitute malpractice.

A copy of the full will (trial exhibit 101) is appended as Exhibit 1 to this brief. Page 1 of the will contains this language:

1.Both my husband, Elmer, and I agreed prior to our marriage that assets owned prior to our marriage would be willed to our respective children per each of our individual choice. My premarital assets are as follows:

Testatrix's signature _____ End Page 1 Of 4

There is, though, no identification of any premarital assets. However, the evidence at trial showed that virtually all of the oil money from North Dakota was an asset owned

prior to marriage. (The exeption being set out at finding 1.45.) In addition, the Federal Way home was undeniably owned by Liz Wagner before her marriage to Elmer. See finding No. 2.8.

However, on page 2, paragraph (a) of the will, the home doesn't go to her children, but rather Mr. Wagner is given a life estate, and a ¼ interest in net proceeds from sale of the home.

Also, on page 2, paragraph (b) the oil money is divided equally between Liz Wagner's children and Mr. Wagner.

None of that can be fairly squared with the page one agreement.

One is tempted to use the rule that where a general statute and a subsequent special statute relate to the same subject matter, the provisions of the special statute will prevail unless it appears that the legislature intended expressly to make the general statute controlling. See *Wark v. National Guard*, 87 Wash.2d 864, 867, 557 P.2d 844 (1976); C. Sands, *Statutes and Statutory Construction*, § 51.05 (4th ed. 1973). A similar rule sometimes also finds its way into contract interpretation.

The problem is that the languge on page 1 is as specific as that on page 2. Page 1 specifically indicates that all assets owned prior to marriage would go to each spouse's children to the exclusion of all others. Page 2 just doesn't do that. So, at best, one is left trying to reconcile totally inconsistent

provisions, and the fair conclusion is that the will is just not well-written.

It is precisely to prevent people ending up with such abysmally bad wills that we have laws limiting the practice of writing wills to licensed lawyers. While Mr. Wagner spent a little time at law school, he is not a licensed lawer. RP Vol. 1, page 134 – 136.

The facts and circumstances surrounding the making of Liz Wagner's will have all the earmarks of undue influence.

The trial court found that Liz was not mentally impaired, was relatively healthy, appeared to be in complete control, and that the Decedent wrote her Will approximately ten to eleven months before her death. See Finding 1.22. That finding is not challenged.

Ms. Archer's testimony was that Liz Wagner was "sharp as a tack," "strong willed," and "knew her mind" in 2009 when she wrote her will. See Finding 1.23. That too is not controverted.

Importantly, all these facts essentially go to the issue of *competence*. No one thinks Liz was *incompetent* to make a will.

There are not findings pertinent to undue influence, which is different from competence, and centers instead in part on the existence of a close, confidential or fiduciary

relationship between the testator and beneficiary. The evidence on that is that there was little, if any conflict between the Wagners and they had a long marriage. RP Vol. 2, pages 327-28.

Undue influence also implicates active participation by the beneficiary in procuring or preparing the will. That happened here. See e.g. Finding no. 1.18 and 1.19.

Mr. Wagner testified, and the court found, that he acted as a "scrivener for the Decedent." See Finding No. 1.18 and 1.19. But then, there really was no one around when the will was being prepared save Mr. Wagner and Liz. RP 149 – 157. Accordingly, the only person really in a position to discuss what sort of advice and counsel was being given is Liz (who is dead) and Mr. Wagner who is biased and obviously self-interested in that testimony. What we know for sure is that Mr. Wagner, who stood to inherit a huge bonanza, did not send Liz Wagner off to a real lawyer to get true independent counsel. Had that happened, none of these issues would exist, and we'd probably have a will not full of contradictions.

It's true that Liz Wagner did give the will to her daughter, Ms. Archer, before signing. But, it would be a pretty cold, and callous child who would point out problems, thus risking a rift between Liz and her husband during her dying months or days. The point here is, that Mr. Wagner

being a very substantial beneficiary was the person that *should* have sent Liz to independent counsel.

In all events, what we know is that Mr. Wagner was an active participant in preparing the will. He was not, like all the other children who were beneficiaries, totally unconnected with the preparation of the will.

Undue influence also is implicated when the beneficiary receives an "unnaturally large" part of the estate.

What's important in that regard is that page 1 of the will – mirrored in Mr. Wagner's own will (which is Trial Exhibit 102 and Exhibit 3 to this brief) – says that all assets owned before the marriage would go to the spouses' respective children alone.

That is, at least as to all the oil money, totally consistent with Liz Wagner's earlier will (Trial Exhibit 101, a copy is appended as Exhibit 2). So, basically, what we know is that at a time when Liz was ill (although competent), Mr. Wagner was participating in the preparation of a will that suddenly gave him ¼ of all the oil money, something Liz owned before marriage. That's an unnaturally large benefit given the overall plan expressed on page 1 of the will.

The trial court did not make findings on those factors, but the evidence is very compelling and the inference – really the legal conclusion to be drawn – from the facts is that Mr. Wagner *was* exerting "undue influence," and if he wanted to be the beneficiary of such a substantial change in Liz

Wagner's will, he should have made the changes, not in the privacy of their home, but should have referred her to competent legal counsel.

The Federal Way home is transferred by peculiar deed, but one sufficient to give Jill Archer some interest in the property.

Part of this case involves the question of whether Jill Archer (fka "Jill Wright") is entitled to a separate share of the federal way home. The facts pertinent are that the home was, at one time, deeded to "Elizabeth K. Kulesza or Jill Wright." (Elizabeth is the decedent.)

The trial court interpreted that to mean a deed to Liz if she were alive, or Jill otherwise. See Finding Nos. 1.25 to 1.28. That, of course, is really a legal conclusion, being an interpretation of the deed's language.

The court indicated that "The Decedent was alive and able to take at the time the quit claim deeds [sic] were executed and recorded." See Finding No. 1.28. No one challengs the finding that Liz was alive at the time of the deed, and in fact, lived for a long time after that deed was issued.

Not explained at all by the court is – since it would have been obvious to the grantor that Liz was alive – why the Grantor would have put Jill's name on the deed at all if that were the intent. In all events, no one challenges the facts,

but the legal conclusion that Jill has zero interest in the home is an erroneous legal conclusion.

Mr. Wagner lived in the Federal Way home rent-free for much of the time he was married, and at other times the home was rented out with rental money coming to the marital community; accordingly, there isn't a basis for any an equitable lien.

The court awarded $52,143 to Mr. Wagner, being one-half of a mortgage paid down during the course of the marriage and various improvements made to the home during the course of the marriage. See Finding no. 1.34. No one challenges the fact that a mortgage was paid off and improvements made to the home.

However, what's also true is that Mr. Wagner and his wife, the decedent lived at the home during the course of their marriage and made mortgage payment while living at the home. See Finding No. 1.30 and 1.31. The mortgage payments merely substituted for rent they would have paid if living elsewhere.

For most of the time when not living at the home, the home was rented out, and the Wagners received the rental income. RP 140, line 8 to RP 144. So, while it's true that the marital community paid off the mortgage, that happened basically with the rental income received.

Under these circumstances, there's nothing equitable about awarding to the community some additional "equitable lien."

APPLICABLE LAW AND ARGUMENT

Mr. Wagner was engaged in the unauthorized practice of law and accordingly should be precluded from taking any award under the will.

Mr. Wagner insisted at trial, and the court found, that he had acted as a mere scrivener. However, the question of whether that activity alone, in the context of completing a will, constitutes the unauthorized practice of law is an open question in Washington.

The issue was alluded to in *Perkins v. CTX Mortg. Co.*, 969 P.2d 93, 137 Wn.2d 93 (Wash. 1999), a case that doesn't involved making wills, but where it was held that a mortgage lender did not engage in the unauthorized practice of law by charging a fee for the production and completion of residential home loan documents.

In the *Perkins* case:

> [A]ttorneys selected the loan products, created the documents necessary for each loan product, and supervised the programming of CTX's central computer, which generates form templates in the branch offices. At the branch offices, lay employees entered customer information such as Social Security numbers, employer information, and bank account numbers in response to computer prompts depending on the type of loan the Perkinses had selected. Lay employees also entered the

> loan amount, interest rate, down payment, 137 Wn.2d 97
> and other factual data. Attorneys prepared the other
> documents requiring the exercise of legal judgment. For
> example, the Perkinses' attorneys prepared the purchase
> and sale agreement, the earnest money agreement, the
> HUD-1, the excise tax affidavit, the warranty deed, and the
> escrow instructions.

See *Perkins*, 137 Wn.2d at 96.

The *Perkins* decision is grounded on it's determination that "CTX argues that its activities are authorized because lay employees do not exercise any legal discretion during their participation in the document preparation process. Thus, there is no risk of public harm from incompetent lawyering."

Perkins was criticized in *Dressel v. Ameribank*, 635 N.W.2d 328 (Mich.Ap. 2001). And certainly the present case demonstrates the accuracy of Justice Madsen's dissenting opinion in *Perkins*, where she said:

> Drafting, selecting, and completing legal documents is a
> process that entails the exercise of legal discretion at each
> stage. Indeed, Washington holds that the practice of law
> even includes the selection and completion of preprinted
> 137 Wn.2d 108 form legal documents. Washington State
> Bar Ass'n v. Great W. Union F. Sav. & Loan Ass'n, 91
> Wash.2d 48, 55, 586 P.2d 870 (1978); In re Discipline of
> Droker, 59 Wash.2d 707, 370 P.2d 242 (1962);
> Washington State Bar Ass'n v. Washington Ass'n of
> Realtors, 41 Wash.2d 697, 251 P.2d 619 (1952).
> . . .
> Contrary to the majority's view, however, Washington has
> never held that the practice of law may be severed into two
> categorically separate tasks of legal discretion and
> scrivener-like activities. Such a position construes the
> practice of law as an easily divisible process whereby the
> skill of legal analysis may be divorced from application of
> the facts.

See Maddsen, J., dissenting, 137 Wn.2d at 108-09.

In all events, the *Perkins* case holds that participating in the creation home loan documents, each of which was independently prepared and vetted by attorneys is not the unauthorized practice of law. It's somewhat ironic that the *Perkins* case involved real estate home loans and was decided in 1999. It's certainly an open question whether *Perkins* would be decided the same today in light of the 2008-09 financial services meltdown driven by bad home loans, often poorly documented.

In re Estate of Marks, 91 Wn.App. 325, 957 P.2d 236 (1998) holds specifically that selecting a will kit, discussing the distribution of assets and whether it was fair, obtaining the inventory of investments, typing the will, and arranging for the signing and witnessing of the will did constitute the unauthorized practice of law. That ruling was upheld on appeal because:

> The unauthorized practice of law is generally acknowledged to include "not only the doing or performing of services in the courts of justice, throughout the various stages thereof, but in a larger sense includes legal advice and counsel and the preparation of legal instruments by which legal rights and obligations are established." Hagan & Van Camp v. Kassler Escrow, Inc., 96 Wash.2d 443, 446-47, 635 P.2d 730 (1981) (quoting Washington State Bar Ass'n v. Great W. Union F. Sav. & Loan Ass'n, 91 Wash.2d 48, 54, 586 P.2d 870 (1978)). The selection and completion of preprinted form legal documents is also deemed the "practice of law." Hagan & Van Camp, 96 Wash.2d at 447, 635 P.2d 730.

See *Marks*, 91 Wn.2d at 240.

To be fair, in *Marks*, a trial court's decision that the behavior constituted the unauthorized practice of law was not appealed. The trial court's decision was affirmed, but also the decision as to unauthorized practice of law was not challenged. *Marks* is a Division 3 case.

The *Marks* commentary was criticized by Division 2 in *In re Estate of Knowles*, 135 Wn. App. 351, 143 P.3d 864 (2006). There, Division 2 held that "We disagree with *Marks* to the extent it holds that merely completing a preprinted will form is the practice of law.

The *Knowles* court indicated that merely completing a preprinted will form is the not practice of law." *Knowles*, 135 Wn.App. at 365. Less clear is the implication of making substantial self-serving changes to an existing will.

To some extent, the specific facts of each case play important roles. In *Knowles*, the issue was raised by Vickie Wall when her brother, Randy received the bulk of her father's estate. The evidence showed that the decedent "enjoyed a close relationship with Randy, while he had little contact with his daughters. According to [the attesting witness], Merle claimed not to have a relationship with his daughters and said on numerous occasions that he wanted most of his estate to go to Randy." Several witnesses testified that the decedent had no relationship with Vickie, but

described Randy as "the apple of [the decedent's] eye." There are other factual distinctions between *Knowles* and *Marks*, but it's fair to say that these decisions essentially represent a conflict in how Division 2 and 3 rule on the question of assisting in the completion of wills.

Perkins involves pre-printed home loan forms with substantial lawyer oversight, and so that doesn't answer the question conclusively either.

What seems important here is that Page 1 of the will bequeaths all of Liz Wagner's pre-marital assets to her children alone. That's consistent with Mr. Wagner's will, and it's explained by the Liz Wagner as "Both my husband, Elmer, and I agreed prior to our marriage that assets owned prior to our marriage would be willed to our respective children per each of our individual choice." Mr. Wagner's will indicates that he lived up to that agreement. There is no explanation for why Liz would change that, awarding Mr. Wagner significant portions of her pre-marital assets.

And, so what's completely clear here is that this case demonstrates exactly why lay persons should not be drafting wills where significant assets are being addressed. This case is a textbook example of why lawyers matter. Why the training lawyers receive matters, and why Liz should have been referred to a lawyer – particularly by Elmer if he was going to change Liz's existing will and thereby receive a very large portion of Liz's pre-marital assets.

Knowles and *Marks* are conflicted, and *Perkins* doesn't pertain to preparation of wills. This case differs from *Perkins* in that here there was zero lawyer oversight as to the forms used, and the material inserted was substantive. Part of *Perkins* turned on the bank's assertion that whatever its lay employees did, it was not the practice of law "because lay employees do not exercise any legal discretion during their participation in the document preparation process. Thus, there is no risk of public harm from incompetent lawyering." *Perkins*, 137 Wn.2d at 102.

Here, considerable legal discretion was part of the document preparation process and there was zero legal oversight. The potential harm is very great. Accordingly, the best thinking applicable, and the thinking this court should adopt in this case, is that of Justice Maddsen in her *Perkins* dissent. The court should hold that Elmer Wagner was practing law without a licence.

The appropriate penalty for such behavior is set out in *Marks*: "[T]he court found the Blanfords engaged in the unauthorized practice of law, voided the gifts to them and the religious organization, and removed Mr. Blanford as personal representative. The court awarded the Blanfords their fees from the estate, and denied Hartwell Marks his fees. We affirm the judgment of the trial court."

Here (and this is pertinent also to the appellant's claim that this is an untimely challenge to the will) it's not

appropriate to just void the will and treat this case as one to be decided under the law of intestate succession. Indeed, it might well be that Mr. Wagner would be advantaged if that were the case. The will should be ruled *valid* insofar as it awards property to the balance of the beneficiaries, but all award to Mr. Wagner should be set aside as void.

Only by doing so, can the court send a clear message to the public at large that if you want to be a significant beneficiary to a will, your obligation is to refrain from drafting the will yourself, and instead refer the testator to competent legal counsel. That also protects people against being left with the kind of confused and conflicted will as exists in this case.

The will was the product of undue influence on the part of Mr. Wagner.

A will is the product of undue influence when a party interferes with the testator's free will, preventing the testator from exercising his own judgment and choice. *In re Estate of Smith*, 68 Wash.2d 145, 153, 411 P.2d 879 (1966). Certain circumstances may raise a suspicion, varying in its strength, of undue influence. The most important of these are: (1) a fiduciary or confidential relationship between the testator and the beneficiary, (2) active participation by the beneficiary in preparing or procuring the will, and (3) the

beneficiary's receipt of an unusually or unnaturally large part of the estate. Other appropriate considerations include " 'the age or condition of health and mental vigor of the testator, the nature or degree of relationship between the testator and the beneficiary, the opportunity for exerting undue influence, and the naturalness or unnaturalness of the will.' " *In re Estate of Reilly,* 78 Wash.2d 623, 649, 479 P.2d 1 (1970) (quoting *In re Estate of Schafer*, 8 Wash.2d 517, 521, 113 P.2d 41 (1941)). The presence of these elements will not automatically invalidate a will. Rather, they "appeal to the vigilance of the court and cause it to proceed with caution and carefully to scrutinize the evidence offered to establish the will." *Dean v. Jordan*, 194 Wash. 661, 672, 79 P.2d 331 (1938). The combination of facts may be so suspicious as to raise a presumption of undue influence and, "in the absence of rebuttal evidence, may even be sufficient to overthrow the will." *Dean*, 194 Wash. at 672, 79 P.2d 331

Here, virtually all the indicia of undue influence are present.

Mr. Wagner has a close or confidential relationship with his wife due to their long marriage. He actively participated in preparing or procuring the will. He received an unusually large portion of the estate particularly in light of the agreement between he and Liz Wagner expressed on page 1 of the will. Whatever can be said of Liz Wagner's "mental vigor," she was quite ill, and therefore dependent on

Mr. Wagner so that it would have been hard to make him angry or even to go to her children with concerns that might lead Mr. Wagner to become upset. The opportunity to exercise undue influence was high as they were, obviously, alone often and he had the ability in ways, large and small, to make her life more difficult.

Most importantly, there is no explanation by Mr. Wagner for why Liz would suddenly change their long-standing agreement and why Liz would, in her last months, significantly alter her older will. The ***only*** changes were those that ended up benefiting Mr. Wagner.

Whether Liz *genuinely* wanted to make such substantial changes will never really be known, but if Mr. Wagner wanted to reap the benefits of that "change in heart," then it was incumbent on him to send Liz to an independent attorney.

The trial court evidently relied on the evidence showing that Liz was mentally alert – and she was, but that does little more than prove she would have known the havoc Elmer might have wreaked on her life when they were alone. All of that goes to mental *competence*, not undue influence. The trial court's conclusion that there was no undue influence – absent some plausible explanation from Mr. Wagner about why the change in heart and why Liz would not go to an independent lawyer if recommended by him – is not supported by the evidence taken as a whole.

The court erred in its interpretation of the deed granting Ms. Archer an interest in the Federal Way home.

This case involves a very peculiar deed. The granting clause is to "ELIZABETH K. KULESZA OR JILL R. KULESZA." That's a granting clause that makes no logical sense.

The trial court interpreted it to mean to Liz unless she were dead at the time the deed was made, and in that event, to Jill.

That might be defensible if any of the Grantors were alive to testify about intent, but without anything other than the face of the deed, it makes no sense. One might as well read into as "To Liz, unless she is divorced, and in that event to Jill." Or, "To Liz, unless she has won the lottery, and in that even to Jill."

Even more puzzling about the court's interpretation is that at the time the deed was made and delivered, everyone knew Liz was alive. She died July 21, 2010 (Finding 1.12) and the Deed was made in 1984 – five years before Liz even married Elmer. So, if the grant to Jill was contingent on Liz being alive, why not just write the deed to Liz and leave off entirely the part about Jill?

More generally, the conjunctive "or" does not imply a rank of priorities. The court might as well have interpreted this to be a grant to Liz, unless Jill were alive, and in that event to Jill.

Mostly likely, this is just another example of sloppy Deed drafting.

RCW 64.28.020 assists. It says:

> (1) Every interest created in favor of two or more persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint tenancy, as provided in RCW 64.28.010, or unless acquired by executors or trustees.

The statute talks about an interest "created in favor of two or more persons," without regard to whether the names are separated by the word "and," a comma, a hyphen, the word "or," a semi-colon, a virgule, an ampersand, or any other conjunctive or disjuntive language or character.

Unless it's acquired by the persons in partnership or declared to be a joint tenancy, the parties whose names appear all acquire as tenants in common.

Here, Jill owned an interest in the property in common with her mother, the decedent, and the court erred in determing that, by virtue of the fact that Liz was alive at the time of the grant, Jill's separate interest in the home was zero. That determination should be reversed, with instructions to adjust awards based on Jill's separate

ownership of a ½ undivided interest in common with Liz according to the deed.

There is no basis for any community equitable lien against the Federal Way home and the separate award to Mr. Wagner of $52,143 should be reversed.

RCW 26.16.120 requires that community property agreements must be "by the execution of an instrument in writing under their hands and seals, and to be witnessed, acknowledged and certified in the same manner as deeds to real estate."

What Mr. Wagner is trying to accomplish with a claim to some community interest in the Federal Way home is to make an "end run" around RCW 26.16.120 – dispensing with any writing, any witness and any notary as required by the statute – and instead asking the court to, on its own, simply crafting a community property agreement where one was never executed by Ms. Wagner.

Basic Washington community property law principles and presumptions hold that the character of property as separate or community property is determined at the date of acquisition, and it depends on whether it was acquired by community funds and community credit or by separate funds and separate credit. *In re Estate of Borghi*, 167 Wn.2d 480,

484, 219 P.3d 932 (2009); *Cummings v. Anderson*, 94 Wn.2d 135, 139, 614 P.2d 1283 (1980).

Once the separate character of property is established, it is presumed that the property remains separate property absent "direct and positive evidence to the contrary." *Borghi*, 167 Wn.2d at 484 (citing *Guye v. Guye*, 63 Wash. 340, 352, 115 P. 731 (1911)). Any increase in value of the separate property is also presumed separate property. *In re Marriage of Elam*, 97 Wn.2d 811, 816, 650 P.2d 213 (1982).

Given that, what we have unquestionably is a separate asset belonging to Liz Wagner, in which Mr. Wagner or the "marital community" has no interest.

A court may impose an equitable lien to protect a person's right to reimbursement "whenever property of one of the three characters (separate property of husband, separate property of wife, or community property) is used to improve property of either of the other two sorts." *In re Estate of Trierweiler*, 5 Wn.App. 17, 22-23, 486 P.2d 314 (1971).

However, in analyzing the equity of imposing a lien the court should credit Liz Wagner's separate estate for the reasonable rental value of the property when occupied by Mr. Wagner. See e.g. *Miracle v. Miracle*, 675 P.2d 1229, 101 Wn.2d 137 (Wash. 1984)

> We believe that the trial court properly refused to impose an equitable lien in favor of the community in view of the

> finding that the community had been adequately compensated for its expenditures by its beneficial use of the premises. An equitable lien is a remedy intended to protect one party's right to reimbursement. In re Marriage of Harshman, 18 Wash.App. 116, 567 P.2d 667 (1977); Cross, The Community Property Law in Washington, 49 Wash.L.Rev. 729, 776 (1974). A right to reimbursement may not arise if the contributing spouse received a reciprocal [675 P.2d 1231] benefit flowing from the use of the property. Merkel v. Merkel, 39 Wash.2d 102, 234 P.2d 857 (1951); In re Woodburn's Estate, 190 Wash. 141, 66 P.2d 1138 (1937); In re Marriage of Johnson, 28 Wash.App. 574, 625 P.2d 720 (1981); In re Marriage of Harshman, supra. In that case, equity will find that the contributing spouse has already been reimbursed. Cross, 49 Wash.L.Rev. at 777 n. 220, 779.

Miracle, 675 P.2d at 1230-31. During the marriage, Liz Wagner's home was either being lived in by Mr. Wagner rent-free or it was being rented out. RP 140 - 142. If there is any claim to equitable reimbursement, it has to be the amount paid, less the rental income received, less the fair rental value Mr. Wagner received, which was itself a reimbursement to the community.

No one disputes the trial court finding no. 1.34 that $104,268 in community funds were expended on the home, but equity demands that the court offset income to the community derived from rent, and the reasonable rental value received by the community for free use of Liz's separate property home. The trial court erred in ignoring those offsetting payments to the community.

The trial court properly refused to limit the evidence which, in some sense, "challenged the will."

Mr. Wagner asserts that claims of undue influence and of unauthorized practice of law constitute untimely challenges to the will. He relies on RCW 11.24.010 and cases such as *Miles v. Jepsen*.

The problem is that this is **not** Ms. Archer's "challenge to the will." It is a TEDRA petition ***brought by Mr. Wagner***. Mr. Wagner filed the case. Absent Mr. Wagner's filing, the defendants in this action would have simply allowed the assets to be distributed according to the will.

In substance, Mr. Wagner is asserting that, once filed, he was entitled to proceed without any real objection or defenses being raised. However, TEDRA empowers the court with full and ample power and authority to administer and settle all matters concerning the estates and assets of incapacitated, missing, and deceased persons, including matters involving nonprobate assets. RCW 11.96A.020(1). TEDRA defines a "matter" as the "determination of any question arising in the administration of an estate or trust, or with respect to any nonprobate asset, or with respect to any other asset or property interest passing at death." RCW 11.96A.030(2)(c). The legislature imbued the court with the "full power and authority to proceed with such

administration and settlement in any manner and way that to the court seems right and proper." RCW 11.96A.020(2). Mr. Wagner cannot invoke the court's equitable authority to fully and fairly resolve all issues pertinent to distribution of assets in a probate, but then simultaneously limit the scope of the inquiry so that the court cannot address all issues bearing on administration of the estate. See *In re Estate of Hayes*, 185 Wn.App. 567, 606, 342 P.3d 1161 (Wash.App. Div. 3 2015)

The trial court properly rejected application of the "no contest" provisions of the will.

In Washington, clauses barring a beneficiary who contests a trust or will are valid and enforceable, but such a clause does not operate where the contest is brought in good faith and with probable cause. *In re Estate of Mumby*, 97 Wn.App. 385, 393, 982 P.2d 1219 (1999). If a contestant brings an action or defends one on the advice of counsel, after fully and fairly disclosing all material facts, he or she will be deemed to have acted in good faith and for probable cause. *In re Estate of Kubick*, 9 Wn.App. 413, 420, 513 P.2d 76 (1973). This determination is to be made upon a preponderance standard. *Estate of Black*, 116 Wn.App. 476, 484, 66 P.3d 670 (2003).

There is no question that, after Mr. Wagner brought this action, Jill Archer, the estate administrator has, at all time, proceeded according to the advice and counsel of attorneys in defending Mr. Wagner's claims. Largely, she was successful. In light of that, it is apparent that, regardless of whether the defense prevailed on all claims, or merely some claims, the defense was presented in good faith and accordingly there was no error in the trial court's discretionary determination that the "no contest" clause of the will did not apply.

In connection with that question, it is again important to observe that the defense isn't asking the court to invalidate the will and its provisions on distribution, except insofar as the trial court has erred in interpreting the will, and insofar as the trial court erred in determining that Mr. Wagner should be divested of his share under the will for unlicensed practice of law and for exerting undue influence on the decedent.

The trial court did not err in refusing to removce Ms. Archer on account of her residence in Chicago.

All parties agree that the trial court has authority under RCW 11.28.250 to remove an administrator and to

revoke Letters of Administration for a variety of reasons, mostly relating to malfeasance, neglect, wasting of estate assets or other wrongdoings. The court also has authority to remove an executor who is "permanently removed from the state."

However, nothing in the statute *requires* the Superior Court to disrupt administration by removing an executor *merely* because the administrator has a residence outside the state. All of that is a matter of discretion. Here, in light of Ms. Archer's efforts to follow the instructions of attorneys and to fully and fairly administer a complex estate at minimal cost to the beneficiaries, the court declined to remove her merely because she resides often in Chicago. The trial court did not abuse its discretion by retaining Ms. Archer to administer the estate.

The trial court did not improperly force Elmer Wagner to pay anything.

Mr. Wagner's opening brief repeats a complex analysis whereby he asserts that he was not properly paid according to the court's rulings. As to that, the trial court simply followed the advice of Mr. Deaton – the court appointed accountant. The short response to Mr. Wagner's

argument is that the accountant is right, Mr. Wagner is wrong. CP 1058-64, 1065-68, RP 6-4-2015 pages 5-18.

The cross-appellant requests fees on appeal.

Fees are requested as authorized by RCW 11.96A.150. Mr. Wagner's opening brief also requests fees under RCW 11.24.050, which pertains to unsuccessful will contests. While we agree that the statute applies to unsuccessful will contests, this is not an action brought under Ch. 11.24 RCW by Ms. Archer "challenging" the validity of the will; it's an action brought by Mr. Wagner under Ch. 11.96A RCW; it's a TEDRA action. Accordingly, RCW 11.24.050 doesn't apply and is not a proper basis for the award of fees.

CONCLUSION

This is not a "will contest" under Ch. 11.24 RCW; it was filed and brought by Mr. Wagner under Ch. 11.96A RCW, which vests the Superior Court with plenary authority to equitably decide all issues pertinent to administration of the estate. Included in that are issues of undue influence and unauthorized practice of law that may have been perpetrated by Mr. Wagner. The court did not err in considering all those

issue as being timely raised. Mr. Wagner is not entitled to a defense-free presentation of his arguments.

While the question of whether preparation of wills is the unauthorized practice of law is somewhat undecided and while Division 2 and 3 have somewhat different approached, on the facts of this case, the reasoning of Justice Maddsen in the *Perkins* case most accurately reflects the best thinking. "Washington has never held that the practice of law may be severed into two categorically separate tasks of legal discretion and scrivener-like activities," and this case demonstrates well why people are likely to be harmed if there is not independent review and advice on wills from a competent lawyer, not seeking to acquire very substantial assets under the will. The court should rule that Mr. Wagner was engaged in the unlawful practice of law, therefore should be divested of all benefits under the will, and the trial court's determination to the contrary should be reversed with instructions to re-allocate the estate assets, Mr. Wagner to take nothing.

The case also presents all of the classic indicia of undue influence. While no one disputes that Liz Wagner was competent – in that sense "sharp as a tack," the plain fact is that her will was crafted at a time when she was dependent

on Mr. Wagner and the will was crafted while Mr. Wagner was alone with the decedent, and he very clearly made changes to her earlier will that gave him significant assets, inconsistent with a long-standing agreement between the spouses. There is no plausible explanation for why Liz would want to suddenly make those changes. While none of that should mean she cannot make the changes, public policy demands that Mr. Wagner be able to obtain those assets only if Liz has truly independent, competent counsel to advise her on the subject. A quiet change of this magnitude, made in the privacy of the home, can't be condoned, and that's exactly what the law of undue influence is designed to prevent.

If the court is not inclined to deny Mr. Wagner all the benefits of the will amended shortly before Liz Wagner's death, then still the trial court should be reversed insofar as it denied Ms. Archer any interest in the Federal Way home because her name appearing on the deed conveyed some interest in the home, and by statute, all parties identified as Grantees hold as tenants in common.

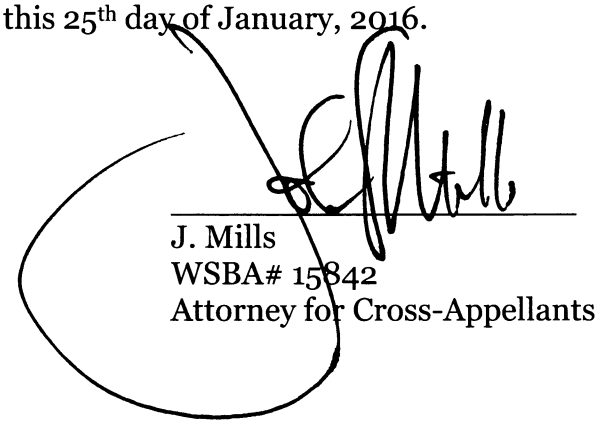
And, if the court is not inclined to deny Mr. Wagner all the benefits of the will, then still the $52,143 awarded Mr. Wagner as an "equitable lien" should be reversed because the trial court failed to offset the rents received and the

reasonable rental value of the home when occupied by M.r Wagner from community funds expended on the home.

In all events, the court should affirm the trial court's ruling that rejected the removal of Ms. Archer because that is within the discretion of the trial court even if she lives in Chicago.

Fees should be awarded as authorized by RCW 11.96A.150.

DATED this 25th day of January, 2016.



J. Mills
WSBA# 15842
Attorney for Cross-Appellants

EXHIBIT 1
(Trial Exhibit 1, decedent's will)

EXP04

Last will and Testament
Of
Elizabeth K. Wagner

10-4-05043-1 KNT

I, **Elizabeth K. Wagner**, of -KING County, Washington, being of sound and disposing mind and memory, of legal age, and not acting under duress, menace, fraud or the undue influence of any person whomsoever, do hereby make, publish and declare this to be my LAST WILL AND TESTAMENT, and hereby revoke all prior wills and codicils made by me.

ARTICLE I
IDENTIFICATION OF FAMILY

I hereby declare that:

A. I am married, my husband is Elmer R. Wagner

B. I have three children from a previous marriage namely, Jill Robin Kulesza (Lavelle) Wright, born 9/13/60, Kurt Michael Kulesza born 1/19/63 and Todd Philip Kulesza, born 2/14/66. I have one deceased child Kristi Kulesza. I have eight (8) grandchildren born of my said children. Leah Lavelle, Kieran Lavelle, Sean Lavelle, Katie Kulesza, Amy Kulesza, Blake Kulesza, Chad Kulesza and Caree Kulesza.

C. My husband has 4 children by a previous marriage namely, Michele D. Marsh, Margaret J. Kohler, Lisa A. Hayes, and Stephen H. Wagner. I further declare that he has no deceased children. I declare that he has six (6) grandchildren born of said children. Michael Wagner Marsh, Jennifer Marsh, Lauren Kohler, Claire Kohler, Jessica Hayes, and Justin Hayes.

D. I make no provision in this will for anyone except as specifically set forth hereinafter.

ARTICLE II
DISPOSITION OF ESTATE

I may or may not execute a writing in my own handwriting and/or signed by me regarding the disposition of tangible personal property not otherwise specifically disposed of by this, my LAST WILL AND TESTAMENT.

All of the rest, residue and remainder of my estate, both real and personal, to which I may be entitled or to which I may have the power to dispose of at my decease, I hereby give devise and bequeath as follows:

1.Both my husband, Elmer, and I agreed prior to our marriage that assets owned prior to our marriage would be willed to our respective children per each of our individual choice. My premarital assets are as follows:

Testatrix's signature _____

End Page 1 Of 4

DIPOSITION OF ESTATE (continued)

a) The house at 30326 10th Ave is held jointly by Elizabeth K. Wagner and Jill R. Wright. To my husband Elmer R. Wagner is given a life estate if I predecease him. The life estate is granted as long as this is his primary residence, he pays and provides proof of payment the King County property taxes and property insurance, and the property is not vacated more than 90 days. When the life estate has ended the house is to be sold. If the life estate is terminated before Elmer's death, the total net proceed of the sale are to be divided equally between my husband and my children, Elmer Wagner, Jill Wright, Kurt Kulesza, and Todd Kulesza; each shall receive one fourth of the its value after expenses. If Elmer predeceases me, then the house is to be sold and the proceeds shared equally by my children, Jill Wright, Kurt Kulesza, and Todd Kulesza.

b) The proceeds from the Tvedt/Murphy estate trust . The proceeds from the Tvedt/Murphy estate trust be shall be held in trust by my oldest living child and shall divided equally between Jill Wright, Kurt Kulesza, Todd Kulesza, and my husband, Elmer R. Wagner. Each shall receive one fourth of all monies derived from it and shall pay the taxes on their portion. The portion held in trust for the benefit of my husband, Elmer Wagner, shall be in the form of a living life estate. When the life estate has ended his portion shall be divided equally to my children or their heirs. The trust may be concluded and divided by my children or their heirs after the life estate requirements are no longer applicable. Interest in this trust may be sold or transferred only to other members of the trust. The trust may be dissolved by majority agreement of all heirs holding any portion of the trust after the living estate portion is no longer applicable. One vote per person.

c) Household effects-are left solely to my husband unless he predeceases me. Otherwise they are considered personal property and shall be listed as such.

d) All the rest, residue and remainder of my estate, both **real and personal, I give to my husband Elmer R. Wagner. Should he preceded me in death, all these remaining** assets shall be equally distributed to our seven children, Jill Wright, Kurt Kulesza, Todd Kulesza, Michele Marsh, Margaret Kohler, Lisa Hayes and Stephen Wagner.

3. In the event that any beneficiary above named shall predecease or dies within 30 days of the date of my death, then and in that event, I direct that one's share be distributed to his or her children share and share alike.

Testatrix's signature Elizabeth Kulesza Wagner

End Page 2 Of 4

ARTICLE III
NOMINATION OF PERSONAL REPRESENTATIVE

I nominate and appoint Jill Wright, my daughter as Personal Representative of this, my LAST WILL AND TESTAMENT, to act without bond.

If Jill Wright is unable or unwilling to act as Personal Representative, I then nominate and appoint my Sons Kurt M. Kulesza and Todd P. Kulesza, jointly or severally as Personal Representatives of this, my LAST Will AND TESTAMENT, to act without bond.

ARTICLP IV
TAXES AND EXPENSES

I further direct my Personal Representative to pay all obligations required by law to be paid, the costs of administration, any federal estate taxes, state inheritance Tax or any succession taxes occasioned or payable by reason of my death, whether attributable to property subject to probate administration or outside transfers, from the residue of my estate without contribution from any heir.

ARTICLE V
POWERS OF PERSONAL REPRESENTATIVE

I further direct that my estate be settled without the intervention of any court, except to the extent required by law, and that my Personal Representative settle my estate in such manner as shall seem best and most convenient to my said personal Representative, and I hereby empower my Personal Representative to mortgage, lease, sell, exchange and convey the personal and real property of my estate without an order of court for that purpose and without notice, approval or confirmation and in all other respects to administer and settle my estate without the intervention of court.

ARTICLE VI
NO CONTEST

In the event that any devisee, legatee or beneficiary under this will, or any one of my heirs shall begin or maintain any proceeding to challenge or deny any provision of this Will, any share or interest given to that person shall lapse and go into the residue of my estate and my Personal Representative is directed and required to refrain from making any distribution of any sums whatsoever to that person, if any, who shall seek to contest this will or any of its provisions.

Testatrix's signature _____ **End Page 3 Of 4**

In witness whereof, I have set my hand this 26 day of Aug, 2009 to this my last will and testament.

Elizabeth Tuley Wagner
Testatrix's signature

AFFIDAVIT OF SUBSCRIBING WITNESSES

Each of the undersigned, being first duly sworn, upon oath, states as follows:

1) I am over the age of eighteen (18) years and am competent to be a witness.

2) The Testatrix has signed this will at the end and on each other septet page, and has declared or signified in our presence that it is her last will and testament and in the presence of the Testatrix and each other we have hereto subscribed our names this _____ day of _____, 20_____.

3) I believe the Testatrix to be of sound mind and not acting under any duress, menace, or undue influence.

Joanne A Moore — P.O. Box 1971 Milton Wa. 98354
Witness Signature **Address**

Toni Moore — Toni Moore P.O. Box 1971 Milton, WA. 98354
Witness Signature **Address**

Toni Mo

Acknowledgement

STATE OF WASHINGTON
County of King } ss.

I certify that I know or have satisfactory evidence that Elizabeth Wagner are/is the person(s) who appeared before me, and said person(s) acknowledged that he/she/they signed this instrument and acknowledged it to be free and voluntary act for the uses and purposes mentioned in the instrument.

Dated this August 26, 2009 day of August, 2009

Print Name Stephanie M Fly
Notary Public in and for the State of Washington
My appointment expires: 02-25-12

Testatrix's signature Elizabeth Tuley Wagner **End Page 4 Of 4**

STEPHANIE M. FLY
STATE OF WASHINGTON
NOTARY PUBLIC
MY COMMISSION EXPIRES
02-25-12

EXHIBIT 2
(Trial Exhibit 101 Liz's prior will)

Last will and Testament
Of
Elizabeth K. Wagner

I, **Elizabeth K. Wagner**, of -KING County, Washington, being of sound and disposing mind and memory, of legal age, and not acting under duress, menace, fraud or the undue influence of any person whomsoever, do hereby make, publish and declare this to be my LAST WILL AND TESTAMENT, and hereby revoke all prior wills and codicils made by me.

ARTICLE I
IDENTIFICATION OF FAMILY

I hereby declare that:

A. I am married, my husband is Elmer R. Wagner

B. I have three children from a previous marriage namely, Jill Robin Kulesza (Lavelle) Wright, born 9/13/60, Kurt Michael Kulesza born 1/19/63 and Todd Philip Kulesza, born 2/14/66. I have one deceased child Kristi Kulesza. I have eight (8) grandchildren born of my said children. Leah Lavelle, Kieran Lavelle, Sean Lavelle, Katie Kulesza, Amy Kulesza, Blake Kulesza, Chad Kulesza and Caree Kulesza.

C. My husband has 4 children by a previous marriage namely, Michele D. Marsh, Margaret J. Kohler, Lisa A. Hayes, and Stephen H. Wagner. I further declare that he has no deceased children. I declare that he has six (6) grandchildren born of said children. Michael Wagner Marsh, Jennifer Marsh, Lauren Kohler, Claire Kohler, Jessica Hayes, and Justin Hayes.

I make no provision in this will for my children nor for my husband's children named herein, or hereafter born to or adopted by me or my husband, except as specifically set forth hereinafter.

ARTICLE II
DISPOSITION OF ESTATE

I may or may not execute a writing in my own handwriting and/or signed by me regarding the disposition of tangible personal property not otherwise specifically disposed of by this, my LAST WILL AND TESTAMENT.

All of the rest, residue and remainder of my estate, both real and personal, to which I may be entitled or to which I may have the power to dispose of at my decease, I hereby give devise and bequeath as follows:

1.Both my husband, Elmer, and I agreed prior to our marriage that assets owned prior to our marriage would be willed to our respective children per each of our individual choice. My premarital assets are as follows:

Testatrix's signature _____

SITION OF ESTATE (continued)

a) The house at 30326 10th Ave is held jointly by Elizabeth K. Wagner and Jill R. Wright. To my husband Elmer R. Wagner is given a life estate if I predecease him. The life estate is granted as long as this is his primary residence and it is not vacated more than 60 days. When the life estate has ended the house is to be sold. If the life estate is terminated before Elmer's death, the total net proceed of the sale are to be divided equally between my husband and my children, Elmer Wagner, Jill Wright, Kurt Kulesza, and Todd Kulesza. If Elmer predeceases me, then the house is to be sold and the proceeds shared equally by my children, Jill Wright, Kurt Kulesza, and Todd Kulesza.

b) All proceeds from the Tvedt/Murphy estate trust shall be divided equally between Jill Wright, Kurt Kulesza, and Todd Kulesza.

c) Household effects-are left solely to my husband unless he predeceases me. Otherwise they are considered personal property and shall be listed as such.

d) All the rest, residue and remainder of my estate, both real and personal, I give to my husband Elmer R. Wagner. Should he preceded me in death, all these remaining assets shall be equally distributed to our seven children, Jill Wright, Kurt Kulesza, Todd Kulesza, Michele Marsh, Margaret Kohler, Lisa Hayes and Stephen Wagner.

3. In the event that any beneficiary above named shall predecease or dies within 30 days of the date of my death, then and in that event, I direct that one's share be distributed to his or her children share and share alike.

ARTICLE III

NOMINATION OF PERSONAL REPRESENTATIVE

I nominate and appoint Jill Wright, my daughter as Personal Representative of this, my LAST WILL AND TESTAMENT, to act without bond.

If Jill Wright is unable or unwilling to act as Personal Representative, I then nominate and appoint my Sons Kurt M. Kulesza and Todd P. Kulesza, jointly or severally as Personal Representatives of this, my LAST Will AND TESTAMENT, to act without bond.

Testatrix's signature _____ End Page 2 Of 4

ARTICLP IV

TAXES AND EXPENSES

I further direct my Personal Representative to pay all obligations required by law to be paid, the costs of administration, any federal estate taxes, state inheritance Tax or any succession taxes occasioned or payable by reason of my death, whether attributable to property subject to probate administration or outside transfers, from the residue of my estate without contribution from any heir.

ARTICLE V

POWERS OF PERSONAL REPRESENTATIVE

I further direct that my estate be settled without the intervention of any court, except to the extent required by law, and that my Personal Representative settle my estate in such manner as shall seem best and most convenient to my said personal Representative, and I hereby empower my Personal Representative to mortgage, lease, sell, exchange and convey the personal and real property of my estate without an order of court for that purpose and without notice, approval or confirmation and in all other respects to administer and settle my estate without the intervention of court.

ARTICLE VI

NO CONTEST

In the event that any devisee, legatee or beneficiary under this will, or any one of my heirs shall begin or maintain any proceeding to challenge or deny any provision of this Will, any share or interest given to that person shall lapse and go into the residue of my estate and my Personal Representative is directed and required to refrain from making any distribution of any sums whatsoever to that person, if any, who shall seek to contest this will or any of its provisions.

Testatrix's signature _____ **End Page 3 Of 4**

In witness whereof, I have set my hand this 21 day of June, 2004 to this my last will and testament.

Elizabeth Kubaczewski
Testatrix's signature

AFFIDAVIT OF SUBSCRIBING WITNESSES

Each of the undersigned, being first duly sworn, upon oath, states as follows:

1) I am over the age of eighteen (18) years and am competent to be a witness.

2) The Testatrix has signed this will at the end and on each other septet page, and has declared or signified in our presence that it is her last will and testament and in the presence of the Testatrix and each other we have hereto subscribed our names this _____ day of _____, 20_____.

3) I believe the Testatrix to be of sound mind and not acting under any duress, menace, or undue influence.

Georgia Barroso Witness Signature	4387 15 NE Seattle WA 98105 Address
Antonyuk Natasha Witness Signature	31007 Pac. HWY S. Fed Way WA 98003 Address
_____ Witness Signature	_____ Address

Acknowledgement

STATE OF WASHINGTON
County of King } ss.

I certify that I know or have satisfactory evidence that Elizabeth K. Wagner Georgia Barroso Natasha Antonyuk are/is the person(s) who appeared before me, and said person(s) acknowledged that he/she/they signed this instrument and acknowledged it to be free and voluntary act for the uses and purposes mentioned in the instrument.

Dated this 21 day of June, 2004

Maria L. Galvan
Print Name Maria L. Galvan
Notary Public in and for the State of Washington
My appointment expires: Sept 28, 2005

Elizabeth Kubaczewski Wagner

End Page 4 Of 4

EXHIBIT 3
(Trial Exhibit 102, Mr. Wagner's will)

Last will and Testament
Of
Elmer R. Wagner

I, **Elmer R. Wagner**, of -KING County, Washington, being of sound and disposing mind and memory, of legal age, and not acting under duress, menace, fraud or the undue influence of any person whomsoever, do hereby make, publish and declare this to be my LAST WILL AND TESTAMENT, and hereby revoke all prior wills and codicils made by me.

ARTICLE I
IDENTIFICATION OF FAMILY

A. I hereby declare that I am married; my Wife is Elizabeth K. Wagner

B. I have four children from a previous marriage namely, Michele D. Marsh (6/22/64), Margaret J. Kohler (1/14/66), Lisa A. Hayes (3/3/67), and Stephen H. Wagner (5/21/69). I further declare that I have no deceased children. I declare that I have six (6) grandchildren born of my said children, Michael Wagner Marsh, Jennifer Marsh, Lauren Kohler, Claire Kohler, Jessica Hayes, and Justin Hayes.

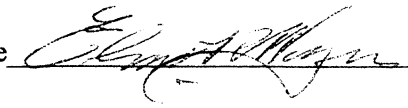
C. My wife has 3 living children by a previous marriage namely, Jill Robin Kulesza (LAVELLE) Wright, born 9/13/60, Kurt Michael Kulesza born 1/19/63 and Todd Philip Kulesza, born 2/14/66. I further declare that she has one deceased child.

I declare that she has eight (8) grandchildren born of said children Leah Lavelle, Kieran Lavelle Sean Lavelle Katie Kulesza, Amy Kulesza, Blake Kulesza, Chad Kulesza and Caree Kulesza.

I make no provision in this will for anyone **except as specifically set forth hereinafter.**

ARTICLE II
DISPOSITION OF ESTATE

I may or may not execute a writing in my own handwriting and/or signed by me regarding the disposition of tangible personal property not otherwise specifically disposed of by this, my LAST WILL AND TESTAMENT.

Tester's signature  **End Page 1 Of 4**

DISPOSITION OF ESTATE (continued) My wife, Elizabeth, and I agreed prior to our marriage that assets owned prior to our marriage would be willed to our respective children per each of our individual choice. My premarital assets are as follows:

To my children, Michele, Margaret, Lisa, and Stephen, I bequeath equal interest in:

a) in the residue of my IRA account with Scottrade (Account # 833469316) or subsequent account(s) derived from these assets (listed on a codicil to this will)

b) in any interest in the property in Michigan at Berry Lake owned jointly with my brother or the proceeds and residue thereof.

c) Personal effects as listed on a codicil to this will

All of the rest, residue and remainder of my estate, both real and personal, to which I may be entitled or to which I may have the power to dispose of at my decease, I hereby give devise and bequeath as follows: My wife, Elizabeth K Wagner, without reservation, is to receive all remaining values in our checking accounts, Boeing IRA, and Boeing retirement, and any other property not specified otherwise. All the rest, residue and remainder of my estate, both real and personal, I give to my wife Elizabeth K. Wagner. Should she preceded me in death, all these remaining assets shall be equally distributed to our seven children, Jill Wright, Kurt Kulesza, Todd Kulesza, Michele Marsh, Margaret Kohler, Lisa Hayes, and Stephen Wagner.

In the event that any of our children named in the previous paragraph shall predecease or dies within 30 days of the date of my death, then and in that event, I direct that one's share be distributed to his or her children share and share alike.

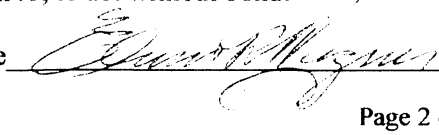
Assets acquired after the date of this will and not listed and/or distributed by a codicil to this will are to be distributed in accordance with the previous paragraphs.

ARTICLE III

NOMINATION OF PERSONAL REPRESENTATIVE

I nominate and appoint my son Stephen Wagner **as Personal Representative of this, my** LAST WILL AND TESTAMENT, to act without bond.

If my son, Stephen Wagner, is unable or unwilling to act as Personal Representative, I then nominate and appoint our children Lisa Hayes and Jill Wright as Personal Representatives of this, my LAST WILL AND TESTAMENT, to act without bond.

Tester's signature  **End Page 2 Of 4**

ARTICLP IV
TAXES AND EXPENSES

I further direct my Personal Representative to pay all obligations required by law to be paid, the costs of administration, any federal estate taxes, state inheritance Tax or any succession taxes occasioned or payable by reason of my death, whether attributable to property subject to probate administration or outside transfers, from the residue of my estate without contribution from any heir.

ARTICLE V
POWERS OF PERSONAL REPRESENTATIVE

I further direct that my estate be settled without the intervention of any court, except to the extent required by law, and that my Personal Representative(s) settle my estate in such manner as shall seem best and most convenient to my said Personal Representative(s), and I hereby empower my Personal representative to mortgage, lease, sell, exchange and convey the personal and real property of my estate without an order of court for that purpose and without notice, approval or confirmation and in all other respects to administer and settle my estate without the intervention of court.

ARTICLE VI
NO CONTEST

In the event that any devisee, legatee or beneficiary under this will, or any one of my heirs shall begin or maintain any proceeding to challenge or deny any provision of this will, any share or interest given to that person shall lapse and go into the residue of my estate and my Personal Representative is directed and required to refrain from making any distribution of any sums whatsoever to that person, if any, who shall seek to contest this will or any of its provisions.

Tester's signature _____ **End Page 3 Of 4**

In witness whereof, I have set my hand this 26 day of August, 2009 to this my last will and testament.

Elmer K Wagner

Tester's signature

AFFIDAVIT OF SUBSCRIBING WITNESSES

Each of the undersigned, being first duly sworn, upon oath, states as follows:

1) I am over the age of eighteen (18) years and am competent to be a witness.

2) The Tester has signed this will at the end and on each other separate page, and has declared or signified in our presence that it is her last will and testament and in the presence of the Tester and each other we have hereto subscribed our names this _____ day of _____, 20_____.

3) I believe the Tester to be of sound mind and not acting under any duress, menace, or undue influence.

Janet A Moore — P.O. Box 1971 Milton WA 98354

Witness Signature **Address**

Teri M Moore — P.O. Box 1971 Milton, WA. 98354

Witness Signature **Address**

Acknowledgement

STATE OF WASHINGTON
County of King } ss.

I certify that I know or have satisfactory evidence that Elmer Wagner _____ _____ are/is the person(s) who appeared before me, and said person(s) acknowledged that he/she/they signed this instrument and acknowledged it to be free and voluntary act for the uses and purposes mentioned in the instrument.

Dated this 26th day of August 2009

,_____

_____

Stephanie M. Fly

Print Name

Notary Public in and for the State of Washington
My appointment expires: 02-25-12

_____

Tester's signature Elmer K Wagner **End Page 4 Of 4**

STEPHANIE M. FLY
STATE OF WASHINGTON
NOTARY PUBLIC
MY COMMISSION EXPIRES
02-25-12