

APPEAL NO. 69845-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

(Whatcom County Court Case No. 10-4-00287-5)

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STATE OF WASHINGTON
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IN RE THE ESTATE OF MICHELLE RENEE WESTER,
Deceased,

SAMANTHA TOWNSON,
Appellant,

vs.

PASTOR ARVIN AND BARBARA WESTER,
Respondents.

Appellant Samantha Townson's Opening Appeal Brief

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ORIGINAL

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I – INTRODUCTION

Appellant Samantha Townson (Townson) and the decedent, Michelle Wester (Wester), were involved in a committed intimate relationship, before 2006, and continuing until the time of Michelle Wester's death on January 16, 2010. RP 271, lines 8-12; Exhibit 2, p. 3. Townson and Wester lived and raised two children together. RP 270-71. Michelle Wester was diagnosed with cancer on or about July 14, 2009. RP 271-72.

On January 6, 2010, Wester met with attorney Keith Bode (Bode) to discuss the preparation of a Power of Attorney, a Will, a Living Trust, and other end of life transfers of property. RP 151. On January 6, 2010, Bode prepared and Wester signed a Durable Power of Attorney. Exhibit 20. On January 13, 2010, Townson was appointed as Wester's attorney-in-fact, with authority to "purchase, receive, take possession of, lease, sell, convey, exchange, endorse, pledge, mortgage, release, hypothecate, encumber, or otherwise dispose of property . . . whether real, personal, mixed, tangible or intangible." Further, Townson was given the power "[t]o complete the funding of any of the Principal's

revocable (living) trusts which may have been established by Principal (Wester)." Exhibit 20.

Between January 6 and January 13, 2010, after meeting with Wester, Bode prepared a Will, a Living Trust, and a Deed for Wester's signature. The trial court prohibited Bode from testifying as to his January 6, 2010 meeting with Wester based on the Dead Man's Statute. RP 210. Had Bode been allowed to testify as to his meeting(s) with Wester and his instructions regarding the Will, Living Trust and Deed, his testimony would have been as follows:

MR. SHEPHERD: Thank you. The testimony would be that when she appeared on January 6 of 2010, she advised Mr. Bode that the documents he prepared (in 2009) were not consistent with her present intent; that he was instructed to prepare the documents that he brought to her instructed by her; to prepare the documents in accordance with the language that he incorporated in the documents that he brought to the hospital room on January 13 of 2010; and that the documents were prepared consistent with her instructions and consistent with what he believed to be her intent and her plan for her assets and her estate.

RP 211.

On January 13, 2010, Bode brought the Will, Living Trust, and Deed he prepared to the hospital for Wester to sign. The Will provided for Townson and Townson's children. Exhibit 21. On

January 13, 2010, Wester, in the presence of Bode, signed the Living Trust Agreement and a Deed. Exhibits 11 and 22. The Deed transferred to the Wester Living Trust all Wester's interest in Lot 36, *Anderson Park*. The Living Trust created a trust with Townson, as trustee, in property itemized on Schedule "A" or any other property that might be added after January 13, 2010. Exhibit 11. The Wester Living Trust further provided that upon Wester's death, Townson was to transfer the trust estate to Townson. Exhibit 11. Bode did not have Wester sign the Will on January 13, 2010, because Wester had a major incontinent event before she could sign her Will. RP 191.

On January 13, 2010, Dr. Lombard, certified that Wester was "physically and/or mentally disabled or incapacitated in that she is incapable of managing her own affairs." Exhibit 20. On January 13, in the morning, Dr. Lombard did a procedure on Wester and his report provided the following information: "No evidence of deterioration of the patient's neurological status." Wester Trial Exhibit 2, pp. 2 & 94. On January 13, in the afternoon, Dr. Lombard charted that Wester's delirium was a bit better and she answered questions fairly. *Id.* at pp. 209 & 94.

That afternoon the spiritual care assessment documented that Wester was "calm and more oriented today." *Id.* at p. 68. On January 14, Wester's confusion had increased but she continued to recognize her friends and family. *Id.* at p. 4.

On January 15, 2010, Townson transferred Wester's interest in an automobile and their home to the Living Trust by execution of documents prepared by Bode. Exhibit 13; Exhibit 24.

Trial was held in Whatcom County Superior Court on December 18 through 20, 2012, regarding the validity of the Michelle R. Wester Living Trust. At the conclusion of trial, the trial court made findings of fact and/or conclusions of law that although the creation of the trust was Michelle Wester's intent on January 6, 2010, when Wester signed the documents on January 13, 2010, she lacked the mental capacity to do so. CP 212.

II – ASSIGNMENTS OF ERROR

Townson assigns error to the following decisions of the trial court:

No. 1. The trial court erred, relying on the Dead Man's Statute and the hearsay rules, when the court prohibited attorney Bode from testifying as to conversations he had with Michelle

Wester before Bode prepared her Living Trust and during the execution of the Living Trust. RP 199, 200 and 208.

No. 2. The trial court erred in making and entering its Finding of Fact No. 3.13, which read, in part: "Michelle was not capable of reading the documents, and Mr. Bode did not read them to her, but sought to obtain her signature on the Living Trust Agreement." CP 215.

No. 3. The trial court erred in making and entering its Finding of Fact No. 3.15, which reads: "The aforementioned living trust was incomplete when Mr. Bode presented it to Michelle on January 13, 2010. Specifically, Mr. Bode did not bring Exhibit A to the hospital when he presented the living trust agreement to Michelle on that date." CP 216.

No. 4. The trial court erred in making and entering its Finding of Fact No. 3.16, which reads: "According to the evidence presented, including Mr. Bode's computer records and document file names, Exhibit A to the trust was not printed out until *after* the trust agreement was submitted to Michelle by Mr. Bode on January 13, 2010." CP 216.

No. 5. The trial court erred in making and entering its

Finding of Fact No. 3.19, which reads:

A person in Michelle's situation, suffering from delirium, confused, combative and sedated with increasing doses of morphine and Haloperidol, would normally not have the capacity to understand their legal rights and responsibilities related to complicated legal documents such as a living trust, and Michelle lacked capacity on January 13, 2010.

CP 217.

No. 6. The trial court erred in making and entering its

Finding of Fact No. 3.20, which reads:

The substance of the communications between Mr. Bode and Michelle on January 13, 2010, combined with the time it took Mr. Bode to secure two signatures, (at least 45 minutes) also make it clear and convincing that Michelle was not sufficiently lucid during the entire time that Mr. Bode was in the hospital with her to be able to either read, or have read to her, the legal documents she was presented for signature.

CP 217.

No. 7. The trial court erred in making and entering its

Finding of Fact No. 3.21, which read, in part: "At the time of her death, there was no valid trust or will in effect providing for the disposition of her estate." CP 215.

No. 8. The trial court erred in making and entering its

Conclusion of Law No. 4, which reads:

Clear, cogent and convincing evidence has been presented which establishes that:

4.1 Michelle Wester did not, on January 13, 2010, have sufficient mind or reason to enable her to comprehend the nature, terms and effect of the "Michelle R. Wester Living Trust" prepared by attorney, Keith Bode after his meeting with Michelle on January 6, 2010 and presented to her for signature by Mr. Bode on January 13, 2010.

4.2 On January 13, 2010, Michelle R. Wester was not mentally competent and lacked the required mental and physical capacity to execute the aforementioned, "Michelle R. Wester Living Trust."

4.3 On January 13, 2010, Michelle R. Wester lacked the required mental and physical capacity to execute the quitclaim deed which purported to transfer her residential real estate to the "Michelle R. Wester living Trust" on January 13, 2010.

CP 217-18.

No. 9. The trial court erred in making and entering its

Conclusion of Law No. 6, which reads in the erroneous part:

"Michelle at no time in fact knew what was stated on the documents drafted by Mr. Bode, since she never first read them or had them read and explained to her on January 13, 2010." CP 217.

No. 10. The trial court erred in making and entering its

Conclusion of Law No. 7, which reads:

The "Michelle R Wester Living Trust" prepared by Keith Bode after his January 6, 2010 meeting with Michelle is invalid and unenforceable because it was incomplete at the time it was presented to Michelle for signature on January 13, 2010. Specifically, the trust agreement refers to an "Exhibit A" to identify the property that would be subject to the trust agreement. That exhibit was not present when the living trust agreement was submitted to Michelle for signature on January 13, 2010.

CP 218.

No. 11. The trial court erred in making and entering its Conclusion of Law No. 8, which reads: "Even if the living trust was complete at the time of its execution by Michelle, Michelle lacked testamentary capacity at the time of execution by her." CP 219.

No. 12. The trial court erred in making and entering its Conclusion of Law No. 9, which reads: "The Respondent was not authorized to alter, amend or modify Michelle's trust by both preparing and signing an exhibit which identified which of Michelle's assets were to be included in the trust corpus." CP 219.

No. 13. The trial court erred in making and entering its Conclusion of Law No. 10, which reads: "The Michelle R. Wester Living Trust purportedly signed on January 13, 2010 was not properly executed and is invalid. The trust agreement is not enforceable, should be vacated and set aside." CP 219.

No. 14. The trial court erred in making and entering its Conclusion of Law No. 13, which reads: "The quitclaim deed purportedly signed by Michelle Wester on January 13, 2010, is invalid. In addition, the purpose for executing the quitclaim deed was to give effect to the living trust. Since the living trust is invalid and unenforceable, the quitclaim deed should not have been executed and recorded."

No. 15. The trial court erred in making and entering its Conclusion of Law No. 14, which reads in part:

Judgment should be entered in this case providing that:

. . . .

14.2 The Michelle R. Wester Living Trust is void and unenforceable and should be vacated and set aside; and

14.3 The above described quitclaim deed is of no force and effect and the purported transfer of Michelle Wester's residential real estate through the use of that deed is void.

No. 16. The trial court erred when it made and entered a Judgment and Order Invalidating the Living Trust, in part, when it:

ORDERED that the Michelle R. Wester Living Trust, purportedly executed on January 13, 2010, is void and unenforceable and the same is hereby vacated and set further in the court's findings of fact and conclusions of law previously entered in this case. It is further

ORDERED that any asset transfers that have been previously made from Michelle R. Wester to the Michelle

R. Wester Living Trust, are void, unenforceable and of no force and effect. It is further

ORDERED that the quit claim deed recorded under Whatcom County Auditor's file number 2100101313 on January 14, 2010, transferring Assessor's parcel number 400119-258417-0000 to Michelle Wester [sic], trustee of the Michelle R. Wester Living Trust is void, unenforceable and of no force and effect.

CP 221-22.

No. 17. The trial court erred in entering the order on January 8, 2013, denying Townson's Motion for Reconsideration.

CP 255.

No. 18. The trial court erred in entering the Order of July 16, 2012, striking Townson's request for a jury trial. CP 52.

No. 19. The trial court erred, claiming Townson had no standing to object to the testimony of Dr. Lombard, in concluding that Dr. Lombard's testimony was not privileged and barred by RCW 5.60.060(4). RP 115-16.

III – ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The issues presented by Townson for review are:

1. Should Bode have been allowed to testify as to his conversations with Michelle Wester on January 6, 2010, and January 13, 2010? (Assignment of Error No. 1.)

2. Did Michelle Wester have testamentary capacity on January 13, 2010? (Assignments of Error 2 through 18.)

3. Was Michelle Wester's living trust funded before her death on January 16, 2010? (Assignments of Error 3, 4, 7, 10.)

4. Did Townson have authority to execute an additional schedule to the living trust on January 15, 2010, completing the funding of the trust before Wester's death? (Assignment of Error No. 12.)

5. Did the trial court err in allowing Dr. Lombard to testify by deposition? (Assignment of Error No. 19.)

6. Did the trial court have, in equity, authority to create a constructive trust?

IV – STATEMENT OF THE CASE

Arvin and Barbara Wester (Wester Parents), through counsel, admitted during trial that Townson and Wester were in a committed intimate relationship: "[M]y clients don't dispute that there was a relationship that could be characterized as committed and intimate in the sense that our courts have been using it." RP 13, lines 21-24.

On January 6, 2010, Wester met with Bode for a second time to discuss her estate planning matters. RP 273-75. At the January 6, 2010 meeting, Bode presented Wester with a series of estate planning documents that he had prepared earlier at her direction. See Exhibits 5, 6, 7, 8; RP 206-07. However, on January 6, 2010, Wester requested that Bode make changes to those documents, mainly making sure Townson got everything upon Wester's death. RP 206-07.

On January 6, 2010, Wester signed a Durable Power of Attorney, designating Townson as her attorney in fact, conditioned on a later medical certification. Exhibit 20. The Durable Power of Attorney gave Townson broad powers, including, but not limited to the following:

4.1 **Property.** To purchase, receive, take possession of, lease, sell, convey, exchange, endorse, pledge, mortgage, release hypothecate, encumber, or otherwise dispose of property or any interest in property (including life insurance and annuity policies), whether real, personal, mixed, tangible or intangible.

Exhibit 20, p. 3, ¶ 4.1;

4.6 **Written Instruments.** To sign, seal, execute, deliver and acknowledge all written instruments and do and perform each and every act and thing whatsoever which may be necessary or

proper in the exercise of the powers and authority granted to the attorney-in-fact as fully as the Principal could do if personally present.

Id. at p. 4, ¶ 4.6;

4.18 **Funding Revocable Trust.** To complete the funding of any of the Principal's revocable (living) trusts which may have been established by the Principal. . . .

Id. at p. 7, ¶ 4.18.

On January 13, 2010, at the request of Townson, Dr. Lombard signed the Certificate of Physician in order for Townson to manage the bank accounts and pay the home mortgage while Wester remained in the hospital. RP 275-76, lines 9-25 and 1-3.

Also on January 13, Bode brought Wester's estate planning documents, which he had prepared consistent with her wishes, as well as the changes she requested be made on January 6, 2010, to her hospital room for her signature. Wester signed both the Living Trust Agreement and the Quitclaim Deed on January 13, 2010. Exhibits 11 and 22. Both documents were witnessed and/or notarized by Bode. *Id.*

Bode testified as follows:

Q. So you took several documents to Michelle's room with the intent that she sign them, but after the time

that you were there it was not possible to get that accomplished because of her physical and mental condition, correct?

A. Towards the end of my time with her, I'll say this delicately, she had a major incontinent event.

Q. A physical reason why she couldn't finish?

A. Yes.

RP 191, lines 17-25.

Q. Where did you get the information to put in those documents, to prepare those documents?

A. I obtained that from Michelle.

RP 196, lines 23-25.

Q. When did you get the information from Michelle to put in those documents?

A. January 6th.

RP 197, lines 1-3.

Q. During the time that Michelle was in your office on January 6th, do you have an opinion as to whether she was of sufficient mind and memory to comprehend what you were discussing?

A. Yes.

Q. What is your opinion?

A. She was one feisty, feisty gal fighting cancer.

Q. I don't know if that answers whether you believed.

A. She was well-aware of her circumstances and what she was doing.

Q. Do you have an opinion as to whether she understood the general nature and extent of her property when she was in your office of January 6th?

A. Absolutely.

Q. Do you have an opinion that she was able to recollect the objects of her bounty or the people she loved?

A. Yes.

Q. In your opinion she had a clear understanding who she wanted to leave her property to?

A. Yes.

RP 197-98.

Q. When she signed the (POA) document was she of sufficient mind and memory to comprehend the document?

A. Yes.

Q. In your opinion did she know what she was doing?

A. Yes.

RP 201-202, lines 22-25 and line 1.

Q. In preparing the documents that you prepared after talking to Michelle Renee Wester on January 6 of 2010, did you prepare them in accordance with instructions that you received from anybody other than Michelle Renee Wester?

A. No.

RP 205, lines 18-23.

Bode was erroneously barred from testifying about his conversations with Wester based on the Deadman's Statute. RP 198-201.

THE COURT: Sustained. It's a violation of the dead man statute, I think. Unless you can find some authority.

MR. SHEPHERD: He is not a recipient?

THE COURT: It's a business transaction between he (sic) and the decedent, is it not?

MR. SHEPHERD: He doesn't benefit from the testimony.

THE COURT: He is getting paid for the work. I don't know. I need to see some case law, Mr. Shepherd. I

think it's a business transaction between he and the client. But, again, I may be wrong. I want to see some authority on that.

Mr. Shepherd: Can I make an offer of proof then and have the answer on the record?

THE COURT: Sure.

Q. (By Mr. Shepherd) who did she want to leave her assets to?

MR. SKINNER: Objection.

THE COURT: You can make the offer of proof, but I want to see some authority before he testifies to it.

MR. SHEPHERD: It'll go up on appeal, Your Honor.

THE COURT: You're going to appeal it only if you don't find authority that you're correct. Let's take the horse before the cart.

RP 199.

After receiving additional briefing from the parties, the trial court ruled as follows regarding the application of the Dead Man's Statute to attorney Keith Bode's testimony:

THE COURT: I'm going to sustain the objections to the questions that are asked of Mr. Bode with regard to things that Ms. Wester said to him on the grounds of hearsay and the dead man statute. This is a unique situation where the dead man statute applies because typically we are talking about a party who is a party to the actual litigation. However, in this case there's testimony in the record from Mr. Bode that he is concerned that he will be sued for malpractice depending upon the outcome of this case. Therefore his dealings and transactions with Ms. Wester make him a party in interest and the court finds that the dead man statute does apply in this particular case.

RP 209, lines 4-17. In response to the Court's ruling, Townson made the following offer of proof regarding Mr. Bode's testimony:

MR. SHEPHERD: Thank you. The testimony would be that when she appeared on January 6 of 2010, she advised Mr. Bode that the documents he prepared were not consistent with her present intent; that he was instructed to prepare the documents that he brought to her instructed by her; to prepare the documents in accordance with the language that he incorporated in the documents that he brought to the hospital room on January 13 of 2010; and that the documents were prepared consistent with her instructions and consistent with what he believed to be her intent and her plan for her assets and her estate.

RP 211, lines 13-24.

On January 15, 2010, Townson, as attorney in fact for Wester, and consistent with her fiduciary duty as such, signed Exhibit A to the Living Trust, completing funding of the trust consistent with Wester's wishes. Exhibit 13; RP 284. Also on that date, Townson signed the vehicle title transfer as attorney in fact. Exhibit 24.

Wester's brother, the only lay witness present at the time of the execution of the Deed and Living Trust, was, at best, vague on capacity. His testimony was as follows:

Q. What about her mental acuity? Did you notice any changes in that that were starting to occur?

A. Later on toward the end of life you could notice some differences. She was confused, complained about headaches, things like that.

Q. How would you describe the way that she acted mentally compared to when you knew her back in California? Is there a way to quantify that?

A. She wasn't near as mentally sharp. She would still joke with us and be her fun-loving self as much as she could. But you could tell things were more of a struggle as she fought through processes and stuff.

RP 85, lines 3-14.

Q. (By Mr. Skinner) Just using your common experience, did she act like somebody that might be under the influence of drugs or alcohol?

A. Yes, at times.

RP 101, lines 15-18.

Dr. Lombard, one of Michelle Wester's treating doctors, was allowed to testify by way perpetuation deposition over the objection of Townson.

MR. SHEPHERD: I just want to put it on the record I believe the whole testimony is irrelevant.

The second thing I want to point out is that it is an examination of a doctor and I don't know who waived the privilege but it's really interesting that the examination occurred. I don't know how it comes in.

RP 107, lines 20-25.

MR. SHEPHERD: Except I don't believe there's an appropriate waiver of the physician-patient privilege for the witness to testify.

RP 115, lines 17-19.

THE COURT: Yes. We dealt with Mr. Bode. The petitioner has no standing to object.

MR. SHEPHERD: I don't believe it's a privilege that belongs to the plaintiff, I mean, with my client.

THE COURT: She has no standing to raise that objection. So let's proceed.

MR. SHEPHERD: I just find it interesting --

THE COURT: We don't have time to deal with things that are interesting in this case to both sides. We need to get to the facts.

RP 116, lines 13-22.

Dr. Lombard's deposition testimony was also uncertain on

the issue of capacity:

Q. Okay. So given what you know about her condition on that day, she -- it's possible, but you cannot say for sure. You cannot offer a medical opinion as to whether she could make that kind of decision?

A. I cannot.

Deposition of Lombard, p. 69, lines 13-17.

Q. So on January 13th and I'm talking about throughout the course of the day, your understanding of Michelle's condition is that -- and I guess I'm repeating just to start off here. Again, we had a break. But that she may have had periods of lucidity, but you did not observe them?

A. That's correct.

Id. at 68, lines 11-16.

Q. Okay. And we've looked at some chart notes. And I believe and -- so tell me if I'm going too far, putting words in your mouth. I understand that in Michelle's condition it would be common or expected or anticipated that she would wax and wane cognitively?

A. Yes. Correct.

Q. She would have periods of lucidity at times and then at other times periods of confusion?

A. Yes. As I mentioned, that's characteristic of delirium to have periods where cognition fluctuates.

Id. at p. 66, lines 4-13.

Q. During her course of treatment was -- did you talk to her directly at times and have coherent, lucid conversation?

A. During this hospitalization?

Q. Yes.

A. This hospital stay?

Q. This one, yes.

A. I did, yes.

Id. at p. 59, lines 12-18.

Bode's testimony was clear regarding Wester's actions and

legal capacity on January 13, 2010:

Q. (By Mr. Shepherd) Now, you took the documents to the hospital on January 13 of 2010; is that correct?

A. Yes. The documents that were not already signed on January 6. One of the documents you took to the hospital on January 13 of 2010 is Exhibit 20, the Power of Attorney, correct?

A. No, that's not correct.

Q. No? Exhibit 20 is the --

A. That's the Durable Power of Attorney.

Q. Excuse me. Let's start with 22. One of the documents you took was Exhibit 22, the Quitclaim Deed, correct?

A. Yes.

Q. At the time you took it there, was it signed when you first took it there?

A. I'm sorry, I didn't catch that.

Q. When you first took it there, was it signed?

A. No, it was blank.

Q. Did you discuss that document with Michelle Wester?

A. Yes.

Q. Was that one of the documents you discussed with her during the 45 minutes that you were there?

A. Yes.

Q. Before she signed it did you believe or form an opinion as to whether she was of sufficient mind and memory to comprehend what the document was intended to do?

A. Yes.

Q. What was your opinion?

A. I thought she understood the nature and extent of what she was doing.

Q. Did you form an opinion that you believed it was a voluntary act in signing that document?

A. Yes.

Q. What was your opinion?

A. It was her voluntary act.

Q. At the time that she signed Exhibit 22, did you believe she understood the general nature and extent of her property?

A. Yes.

Q. At the time she signed Exhibit 22, do you believe she understood and recollected the objects of her bounty who she wanted to have that house?

A. Yes.

Q. I'm going to hand you what's been marked as Exhibit 11. When you went there that day did you have that document with you?

A. Yes, I did.

Q. Is that a document that you got Michelle Wester to sign on January 13, 2010?

A. Yes.

Q. At the time that you had Michelle Wester sign it, did you believe she was of sufficient mind and memory to comprehend what the document was?

A. Yes.

Q. Did you believe she understood the general nature and extent of her property?

A. Yes.

Q. Did you believe she recollected the objects of her bounty? Did you believe she had the legal capacity to execute Exhibit 11?

A. Yes, I do.

Q. Did you believe she had the legal capacity to execute the quitclaim deed?

A. Yes, I do.

RP 214-217.

Since the issues of capacity and undue influence were raised by the pleadings, Townson requested a jury trial. The Wester Parents, by motion, argued that the pleadings invoked the jurisdiction of equity and equity prohibited a jury trial. CP 47. The Wester Parents, in their motion to strike the jury, argued: "Where an action is purely equitable in nature, there is no right to a jury trial." CP 49. Further, they argued that a probate court is a court of equity. CP 50. Before trial, Wester Parents received an order from the trial court, based on the above arguments, granting their

motion to deny Townson's request for a jury trial. CP 53-4.

The trial court, in its decision, determined it could not do what equity required, but was bound by the law. "THE COURT: As I say, I'm compelled under the decision I have based upon the law and not upon equity because I just don't do, I can't do what I think should be done." RP 316. After, incorrectly accepting the earlier argument that all the issues for trial were equitable, the trial court felt compelled to share with the parties what his decision would be if he were in equity.

Now, when this case is over, I don't know where this is going to go and I am in my comments not advocating what anyone should do. But, Mr. and Ms. Wester, you're going to be seeing your daughter soon. It's not going to be long in the overall scheme of things. And when you see her, you're going to have to deal with the issue of whether or not you did what she wanted. And I'm not telling you how you should consider that. But you need to look at that. Because I know that you want and would like for this case to be resolved in a way that would be in accordance with Michelle's wishes as well as the rest of the family's wishes. And I just ask that you think about that. I'm not trying to tell you which way to go. I'm not saying that you should do anything with this property other than if in fact in a probate it's awarded to yourselves, you can do whatever you want with it, but it's something you should ponder and think about before you act.

RP 314-15.

V – SUMMARY OF ARGUMENT

The trial court erroneously determined that Wester lacked the requisite capacity when she signed the documents on January 13, 2010. The Wester Parents failed to meet their burden of clear, cogent, and convincing evidence that Wester did not have testamentary capacity on January 13, 2010. *In re Mitchell's Estate*, 41 Wn.2d 326, 350, 249 P.2d 385 (1952).

Medical and legal authorities recognize that a person may be insane with reference to a certain subject or subjects and have one or more delusions, but notwithstanding such deficiencies may have testamentary capacity either during lucid intervals or if the delusions do not furnish the guide to his testamentary act.

In re O'Neil's Estate, 35 Wn.2d 325, 333-34, 212 P.2d 823 (1950).

The trial court erroneously excluded relevant and probative testimony of Bode under the Dead Man's Statute, including Bode's testimony regarding his conversations with Wester on January 6 and 13, 2010. Testimony of the estate planning attorney is not barred by the deadman's statute, as the attorney is not a party in interest. *Estate of Lennon v. Lennon*, 108 Wn.App. 167, 181, 29 P.3d 1258 (Div. 1, 2001).

There was no clear, cogent and convincing testimony at trial that Wester did not have testamentary capacity at the time she signed the living trust documents on January 13, 2010. “[S]anity and mental competency are presumed to have existed until the contrary is established by competent proofs.” *In re Murphy’s Estate*, 98 Wash. 548, 554, 168 P. 175 (1917).

Furthermore, the trial court erred in finding and concluding that Wester’s living trust was not properly funded before her death on January 16, 2010. Townson was explicitly given the power to fund any living trusts of Wester as Wester’s attorney-in-fact. Exhibit 13. Townson, consistent with Wester’s intentions and in keeping with Townson’s fiduciary duty as Wester’s attorney-in-fact, completed the funding of the Wester Living Trust on January 15, 2010, by executing Exhibit A to the Trust and transferring the vehicle to the trust. Exhibits 13 and 24; *see also* 26 Wash. Prac. 2d. § 2.35, Elder Law and Practice with Forms (2012).

Even assuming a lack of capacity, the trial court had the power in equity, to create a constructive trust consistent with what it found were Wester’s intentions on January 6, 2010, thereby avoiding the Wester Parents receiving the estate assets, which “in

equity and good conscience [they] should not be permitted to hold." *Schweickert, Inc. v. Venwest Yachts*, 142 Wn.App. 886, 898 (fn. 5), 176 P.3d 577 (Div. I, 2008).

The trial court also erred in allowing Dr. Lombard, one of Wester's treating doctors, to testify via perpetuation deposition, where there had been no waiver of the physician-patient privilege. *See* RCW 5.60.060 (4).

VI – ARGUMENT

A. Standard of Review

Findings of fact are usually reviewed for substantial evidence which supports the finding. "Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the declared premise." *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010). Review of mixed questions of law and fact is de novo. *Clayton v. Wilson*, 168 Wn.2d 57, 62, 227 P.3d 278 (2010). "We review conclusions of law under the same de novo standard." *Id.* The trial court's application of law to the facts in this case should be reviewed de novo. *Wash. Imaging v. Revenue*, 171 Wn.2d 548, 555, 252 P.3d 885 (2011).

Trial court decisions granting or denying motions for reconsideration are reviewed for an abuse of discretion. *Palmer v. Jensen*, 132 Wn.2d 193, 198, 937 P.2d 597 (1997). It is an abuse of discretion to deny a motion for reconsideration where the decision is contrary to the evidence. *Id.*

B. The Trial Court Erroneously Applied the Dead Man's Statute to Bode's Testimony

No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, **That in an action or proceeding where the adverse party sues or defends as executor**, administrator or legal representative of any deceased person. . . then a party in interest or to the record, **shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased. . .**

RCW 5.60.030. [Emphasis added].

"The purpose of RCW 5.60.030 is to prevent interested parties from giving self-serving testimony about conversations or transactions with the decedent." *Wildman v. Taylor*, 46 Wn.App. 546, 549, 731 P.2d 541 (Div. 3, 1987). "The inhibition is for the benefit of the estate to shield it from the enforcement of claims

that otherwise could not be defended against." *In re Cunningham's Estate*, 94 Wash. 191, 193, 161 P. 1193 (1917). Further, the statute "renders the interested litigant or witness incompetent to testify against the estate about either a transaction with the deceased or a statement made to him by the deceased." *Wildman v. Taylor*, 46 Wn.App. at 549. The test of whether a person is a 'party-in-interest' is whether they will gain or lose from the judgment. *In re Tate's Estate*, 32 Wn.2d 252, 254, 201 P.2d 182 (1949).

A witness may testify as to his impressions and/or beliefs. *Jacobs v. Brock*, 73 Wn.2d 234, 237-238, 437 P.3d 920 (1968).

When upon a reading of the will in its entirety and any uncertainty arises as to the testator's true intention, it is well accepted that extrinsic facts and circumstances may be admitted for the purpose of explaining the language of the will. When there is an ambiguity in a will, the testimony of the drafter may be admitted to assist in resolving the problem.

Matter of Estate of Bergau, 103 Wn.2d 431, 436, 693 P.2d 703 (1985). (Citations omitted).

"A witness who personally observes an event can state an opinion, conclusion, or impression as to the event and may testify 'about the state of mind of another, so long as the witness

personally witnessed events or heard statements that are relevant to prove the other person's state of mind." *In re the Estate of Black*, 153 Wn.2d 152, 167, 102 P.3d 796 (2004). (Citations omitted).

The deadman's statute, RCW 5.60.030, bars testimony by a "party in interest" regarding "transactions" with the decedent or statements made to him by the decedent. A "party in interest" under RCW 5.60.030 is "one who stands to gain or lose in the action in question." A "transaction" under the deadman's statute is broadly defined as "the doing or performing of some business between parties, or the management of any affair." "[T]he matter concerning which the testimony is given must involve some act by and between the parties for the benefit or detriment of one or both of the parties."

Estate of Lennon v. Lennon, 108 Wn.App. at 174-175.

The Dead Man's Statute is not applicable to Bode as he is not a party in interest. Bode did not have anything to gain or lose from the judgment in this matter.

C. Michelle Wester Had Testamentary Capacity On January 13, 2010

[A] person is possessed of testamentary capacity if at the time [she] assumes to execute a will [she] has sufficient mind and memory to understand the transaction in which [she] is then engaged, to comprehend generally the nature and extent of the property which constitutes [her] estate and of which [she] is contemplating disposition, and to recollect the

objects of [her] bounty. This is the standard by which the courts must measure the facts of each case in which it is contended that an instrument offered or accepted as the will of decedent was executed at a time when the testator lacked capacity to make a valid testamentary disposition of [her] property.

In re Bottger's Estate, 14 Wn.2d 676, 685, 129 P.2d 518 (1942).

"The right to dispose of one's property by will is not only a valuable right, but one protected by statute; it will be sustained whenever possible." *In re Mitchell's Estate*, 41 Wn.2d at 350. (Citing *In re Hamilton's Estate*, 26 Wn.2d 363, 174 P.2d 301 (1946); *In re Martinson's Estate*, 29 Wn.2d 912, 190 P.2d 96 (1948)).

"[S]anity and mental competency are presumed to have existed until the contrary is established by competent proofs." *In re Murphy's Estate*, 98 Wash. at 554. Testamentary capacity is presumed from a document which is lucid on its face. The "evidence necessary to set aside a will must be clear, cogent and convincing." *In re Mitchell's Estate*, 41 Wn.2d at 350.

It is generally agreed that most, if not all, of the following elements are essential for testamentary capacity;

1. General knowledge of the nature and extend of the property owned;
2. Awareness of the nature and effect of the act of signing it;
3. Knowledge of the planned disposition; and
4. Knowledge of the natural objects of bounty and their relation to the testator.

62 Am.Jur. Proof of Facts 3d. 197.

Our Supreme Court stated that often "while sick, a person desires to make a will" and evidence that the person has been prescribed "a sedative or some medicine to ease pain or reduce nervousness ... is not, of itself, proof or even weighty evidence of testamentary incapacity." *In re Kinssies' Estate*, 35 Wash.2d 723, 734, 214 P.2d 693 (1950).

In re Estate of Bussler, 160 Wn.App. 449, 463, 247 P.3d 821 (Div. 2, 2011).

D. Wester's Living Trust Was Funded Before Her Death On January 16, 2010.

The undersigned attorney could find no Washington case on when funding needed to be accomplished for a living trust. The few other jurisdictions that have looked at the issue, in dicta, say the funding must be accomplished during the lifetime of the trustor. A trust is created when you have a manifestation of an intention to create a trust, a trustee, a designated beneficiary, a disclosed purpose and delivery of trust property to the trust. 76

Am.Jur.2d Trusts, § 40 (2012). Washington Practice, in a footnote, reads that a living trust must be funded and administered during the lifetime of the trustor and not at the time of its creation. 26 Wash.Prac.2d. § 2.35, Elder Law and Practice with Forms (2012). However, Wester's interest in the home was placed into the trust at the same time as the creation of the Living Trust via Quit Claim Deed. Exhibit 22. Assuming, Wester had failed to place her interest in the home into the Trust, Townson did so on January 15, 2010, via the execution of Exhibit A to the Trust. Exhibit 13.

E. Townson Had the Authority and Fiduciary Duty as Attorney In Fact to Execute Schedule A to the Living Trust.

Townson owed a fiduciary duty to Wester. *In re Estate of Haviland*, 162 Wn.App. 548, 566, 255 P.3d 854 (Div. I, 2011). One of Townson's duties was to act consistent, not inconsistent, with Wester's expressed intentions or instructions. *State v. Wallace*, 97 Wn.2d 846, 851, 651 P.2d 201 (1982).

F. The Trial Court Erred In Allowing Dr. Lombard to Testify Where the Physician-Patient Privilege Had Not Been Waived

The rule is universal that the privilege against examination of a witness upon matters of confidential communication is personal to the client, patient, or other person to whom the privilege is extended. *McCarthy v. McCarthy*, 116 Wash. 360, 199 P. 733 (1921); *Williamson v. Williamson*, 183 Wash. 71, 48 P.2d 588 (1935); *State v. McGinty*, 14 Wn.2d 71, 126 P.2d 1086 (1942).

The statute is clear. Dr. Lombard could not be examined without the consent of Wester regarding his treatment of Wester.

A physician . . . shall not, without the consent of his . . . patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him . . . to prescribe or action for the patient, except as follows:

(a) In any judicial proceedings regarding a child's injury, neglect, or sexual abuse or the cause thereof; and (b) Ninety days after filing an action for personal injuries or wrongful death, the claimant shall be deemed to waive the physician-patient privilege. Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions, subject to such limitations as a court may impose pursuant to court rules.

RCW 5.60.060(4). Neither exception existed in this matter.

G. The Trial Court, Acting in Equity Should Have Created a Constructive Trust

[E]quitable claims must be analyzed under the specific facts presented in each case. Even when we recognize 'factors' to guide the court's determination of the equitable issues presented, these considerations are not exclusive, but are intended to reach all relevant evidence.

Vasquez v. Hawthorne, 145 Wn.2d 103, 107-108, 33 P.3d 735 (2001).

"Equity regards substance rather than form.' 'Equity will in no case permit the veil of form to hide the true effect or intent of the transaction.'" *Lloyd v. Sichler*, 94 Wash. 611, 613, 162 P. 979 (1917) (*citing* *Fetter, Equity*, p. 23). "Looking through the form and into the substance, equity should intervene to prevent this unconscionable advantage to the appellant and irremediable injustice to the respondents." *In re Braden's Estate*, 122 Wash. 669, 671-672, 211 P. 743 (1923).

"Equity requires that to be done which ought to have been done." *Paullus v. Fowler*, 59 Wn.2d 204, 214, 367 P.2d 130 (1961) (*citing* *Ketner Bros. v. Nichols*, 52 Wn.2d 353, 324 P.2d 1093 (1958)).

Alternatively, the trial court could have and should have determined that it would unjust for Michelle Wester's estate to have any right title or interest in the home or vehicle, creating a constructive trust. "A constructive trust is an equitable remedy that compels restoration where a party gains something for [herself] which, 'in equity and good conscience, [she] should not be permitted to hold.'" *Schweickert, Inc. v. Venwest Yachts*, 142 Wn.App. at 898 (fn. 5).

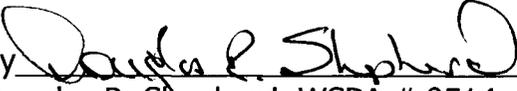
A resulting or constructive trust arises where a person makes or causes to be made a disposition of property under circumstances which raise an inference that she does not intend that the person taking or holding the property should have the beneficial interest in the property. *Engel v. Breske*, 37 Wn.App. 526, 528, 681 P.2d 263, (Div. 1, 1984) *review denied*, 102 Wn.2d 1025 (1984).

VII – CONCLUSION

Wester's Living Trust, at the time of her death, contained her interests in the home and one car. This Court should reverse the trial court and hold that upon Wester's death, title to the home and car belonged to Townson, by virtue of the Wester Living Trust.

Respectfully submitted this 3rd day of June 2013.

SHEPHERD AND ABBOTT

By 

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APPENDIX A

RCW 5.60.060(4)

Who is disqualified – Privileged communications.

(4) Subject to the limitations under RCW 70.96A.140 or 71.05.360 (8) and (9), a physician or surgeon or osteopathic physician or surgeon or podiatric physician or surgeon shall not, without the consent of his or her patient, be examined in a civil action as to any information acquired in attending such patient, which was necessary to enable him or her to prescribe or act for the patient, except as follows:

(a) In any judicial proceedings regarding a child's injury, neglect, or sexual abuse or the cause thereof; and

(b) Ninety days after filing an action for personal injuries or wrongful death, the claimant shall be deemed to waive the physician-patient privilege. Waiver of the physician-patient privilege for any one physician or condition constitutes a waiver of the privilege as to all physicians or conditions, subject to such limitations as a court may impose pursuant to court rules.

APPENDIX B

RCW 5.60.030

Not excluded on grounds of interest – Exception – Transaction with person since deceased.

No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or limited guardian of the estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person, or by any such minor under the age of fourteen years: PROVIDED FURTHER, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action.