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Court of Appeals No. 69845-1

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

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

IN RE THE ESTATE OF MICHELLE RENEE WESTER,

Deceased,

SAMANTHA TOWNSON,

Appellant,

v.

PASTOR ARVIN WESTER and BARBARA WESTER, husband and
wife,

Respondents.

RESPONDENTS' BRIEF

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ORIGINAL

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I INTRODUCTION

This case, brought under the Trust and Estate Dispute Resolution Act, arises from the tragic loss of Michelle Wester to a battle with cancer. Michelle was only forty-six years of age at the time of her death. Michelle's parents, Arvin and Barbara Wester, Respondents in this appeal, challenged the validity of a "Living Trust Agreement" that Michelle was given to sign just before she died, and after she was certified by one of her treating physicians as physically and mentally "incapacitated." The Westers challenged the Trust Agreement on two separate grounds that are at issue in this appeal: (1) Michelle's lack of the required mental capacity, and (2) the fact that the Trust Agreement presented to Michelle to sign contained no list of the assets to be transferred to the Trust and therefore was incomplete as of the date it was signed.¹ Ultimately, "Exhibit A" to the Trust Agreement, purporting to list the assets to be transferred to the Trust, was signed not by Michelle, but by Appellant Samantha Townson, acting as Michelle's Attorney in Fact. In doing so, Ms. Townson, not Michelle, selected and directed what assets would be transferred to the Trust, of which Ms. Townson was the sole beneficiary.

¹ The Westers also asserted undue influence, which was not ultimately found.

Following a three-day bench trial during which substantial evidence of Michelle's grave condition was presented, Whatcom County Superior Court Judge Steven J. Mura entered Findings of Fact and Conclusions of Law concluding that: (1) Michelle Wester lacked the required mental and physical capacity to sign the Trust Agreement and related deed; and (2) regardless of her capacity, the Trust Agreement was incomplete and invalid at signing, resulting in the invalidation of the Trust, leaving Mr. and Mrs. Wester as Michelle's intestate heirs at law.

Ms. Townson, the sole beneficiary of the invalidated Trust, appeals the trial court's decision. In doing so, Ms. Townson does not and cannot establish that the trial court's Findings of Fact are not supported by substantial evidence, nor that the findings fail to support the trial court's Conclusions of Law. Instead, Ms. Townson asserts that the trial court "got it wrong" without establishing any specific error of law that would support such conclusion.

Because there is no sufficient basis to overturn the trial court's findings and conclusions made after weighing the evidence admitted at trial, the trial court's decision should be affirmed.

II. ISSUES FOR REVIEW

The issues on appeal are more accurately characterized as follows:

A. Were the trial court's evidentiary rulings excluding Attorney Keith Bode's testimony as to statements made by Michelle Wester on January 6, 2010, both as inadmissible hearsay with no applicable exception, and as barred by the Deadman's Statute, RCW 5.60.030, in error as a matter of law?

B. Even if the trial court erred as a matter of law on both separate bases to exclude Mr. Bode's testimony as to statements of Michelle Wester on January 6, 2010, was such error harmless because the trial court ultimately found and concluded that Michelle was competent on January 6, 2010 and able to express her intentions to Mr. Bode, but that such communications were irrelevant to the determination as to whether Michelle had capacity to sign the Trust Agreement and deed on January 13, 2010?

C. Did the testimony of Dr. Lombard, specifically relied on by the trial court, as well as the testimony of Michelle Wester's brother, Rick Wester, who was present in her hospital room while she signed the Trust Agreement and deed, and each of Michelle's parents, together provide substantial evidence to support the trial court's Findings of Fact 2, 5, 6, and 7, challenged by Appellant?

D. Assuming there was substantial evidence to support Findings of Fact 2, 5, 6, and 7, do those findings support the trial

court's conclusions of law that Michelle lacked the required capacity to sign the Trust Agreement and deed on January 13, 2010?

E. Even if Michelle had the requisite capacity to sign the Trust Agreement on January 13, 2010, was the Trust Agreement that she signed that day incomplete and therefore invalid because it did not contain a completed Exhibit A directing what property was to be transferred to the Trust?

F. Even if Michelle had the requisite capacity to execute the Trust Agreement on January 13, 2010, without a completed Exhibit A attached to the signed agreement, did Ms. Townson lack authority to transfer assets to the Trust as Michelle's attorney in fact, where Michelle had not designated in the Trust Agreement, and could not otherwise direct, the assets to be transferred?

G. Did Appellant fail to preserve the issue of the admissibility of Dr. Lombard's testimony on grounds of privilege?

H. Even if Appellant did not waive and properly preserved the issue as to the admissibility of Dr. Lombard's deposition testimony on grounds of physician-patient privilege, did the trial court properly admit Dr. Lombard's deposition (and medical records) based on Mr. and Mrs. Wester's waiver of the physician-patient privilege as heirs of Michelle's estate?

I. Has Appellant established that the trial court abused its discretion in failing to grant her motion for reconsideration based on a new claim of constructive Trust raised for the first time after the trial in the motion for reconsideration, and after Ms. Townson had agreed to the dismissal without prejudice of her counterclaim to establish an intimate, committed relationship.

J. Should the Court exercise its discretion to reimburse Respondents Arvin and Barbara Wester their attorney fees on appeal either pursuant to RCW 11.96A.150, or pursuant to RAP 18.9 for being required to respond to Appellant's frivolous appeal?

III. STATEMENT OF THE CASE

Michelle Wester (herein referred to either as "Michelle Wester" or "Michelle" not to be confused with her mother, "Mrs. Wester") was diagnosed with cancer in approximately July, 2009. Clerk's Papers ("CP") at 7. On January 10, 2010, she was admitted to St. Joseph's Hospital in Bellingham for the last time. Michelle died at St. Joseph's Hospital on January 16, 2010. CP at 8.

A. Estate Planning Documents.

Appellant Samantha Townson, Michelle's roommate and friend, was employed by attorney Keith A. Bode as a receptionist.

RP 124:17-22. After learning that Michelle had been diagnosed with cancer, Ms. Townson's co-worker, Carleen Polinder, a paralegal employed by Mr. Bode, prepared a draft last will and testament and draft powers of attorney in July 2009. See Ex. 4. The draft will provided for a testamentary trust for the benefit of Michelle's godchildren, Alexis and Arianna Townson (Ms. Townson's niece and daughter). Ex. 8. at 4-5. The draft powers of attorney designated Michelle's siblings as her attorneys in fact to make financial and healthcare decisions. Exs. 6 & 7. Michelle's brother, Tim, was designated as the Trustee of the testamentary trust and personal representative. Ex. 8. Ms. Townson was not included in the July 2009 estate planning documents. Ex. 9. Michelle did not sign the 2009 estate planning documents. (Verbatim Report of Proceedings) ("RP") at 136:18-137:8.

On January 5, 2010, Michelle learned that her cancer had significantly progressed. Michelle met with Mr. Bode for the first time on January 6, 2010. Ex. 4. After that meeting, Mr. Bode directed his staff to prepare documents different than those previously prepared, including a power of attorney and a living trust.

During the meeting with Mr. Bode on January 6, 2010, Michelle signed the durable power of attorney and designated Ms.

Townson as her attorney-in-fact. Ex. 20. The durable power of attorney, by its terms, was to become effective upon receipt by the attorney-in-fact of a “written statement of determination of her disability, to be made by her primary care physician or other qualified person with actual knowledge of her condition.” *Id.* Michelle executed no other estate planning documents at that time.

B. Subsequent Hospitalization and Disability.

On January 7, 2010, Michelle was hospitalized at St. Joseph’s Hospital for multiple conditions related to her cancer. She was released on January 8, 2010, and readmitted to the hospital on January 10, 2010. Michelle died on January 16, 2010. CP at 141 (Deposition of Dr. Lombard “Dr. Lombard Dep.” at 24:2-8).

On January 13, 2010, Dr. William E. Lombard, MD of the St. Joseph Hospital Intensive Care Unit signed a Certificate of Physician, certifying under penalty of perjury that Michelle was physically and/or mentally disabled or incapacitated. Ex. 20. Dr. Lombard is an internal medicine doctor who specializes in nephrology, and was one of Michelle’s treating physicians. CP at 124, 128-29 (Dr. Lombard Dep. at 7:10-18; 11:21-12:9).

C. Revised Estate Planning Documents Signed Same Day.

Later the same day that the Certificate of Physician was signed, on January 13, 2010, Mr. Bode visited Michelle at the hospital in order to have her sign revised estate planning documents. Despite his knowledge of Michelle's grave condition, Mr. Bode did not take any notes or document his observations of her condition or his assessment of her capacity. RP at 176:23-177:2; 179:5-9; 223. Mr. Bode also did not have a standard protocol for assessing capacity. RP at 178:8-15. He did not ask about or attempt to determine what medications had been administered to Michelle before his arrival. RP at 160; 222. He also did not speak with Dr. Lombard, Michelle's treating physician. RP at 160; 222-23.

The estate planning documents to be signed included the Living Trust Agreement, a quitclaim deed, a last will and testament, and a healthcare directive. Exs. 11, 21, 22, 23. The version of the Trust Agreement presented on January 13, 2010, named Ms. Townson as the sole beneficiary, unlike the prior will that had been prepared to provide for Michelle's god-children, Alexis and Ariana. Ex. 11. Only the Trust Agreement and quitclaim deed were signed on January 13; neither document was witnessed. Exs. 11 & 22.

The Trust Agreement was not complete when Michelle signed it on January 13, 2010. At the time of signing, the form "Exhibit A" to the Trust Agreement, which was designed to set forth the list of assets to be transferred to the Trust, was blank. RP at 147:16-20. Michelle was not provided a completed (or draft) "Exhibit A" setting forth the assets to be transferred to the Trust, and it was not even completed prior to Michelle signing the Trust Agreement. RP at 224-25. Therefore, even if Michelle was capable of understanding the significance of the Trust, Michelle never authorized or approved the items of property to be transferred to the Trust; Michelle never saw the completed Exhibit A. See RP at 230:19-24. Mr. Bode did not even know what assets were at issue when he had Michelle sign the Trust Agreement; the only asset of which he was aware at that time or that he discussed with Ms. Wester was the real property. RP at 230:25-231:5. The evidence presented demonstrated that Michelle did not direct what assets be transferred to the Trust, nor did she or could she approve a completed "Exhibit A" to the Trust. RP at 231:6-12; 233:17-23.

Instead, Mr. Bode, with Ms. Townson's information and direction, completed "Exhibit A" on January 15, 2010. On January 15, 2010, Ms. Townson e-mailed account information to Mr. Bode's

staff. Ex. 19. "Exhibit A" was modified on January 15, 2010 at 2:17p.m. Ex. 14; RP at 167:2-15. Mr. Bode's staff e-mailed "Exhibit A" to Ms. Townson on January 15, 2010, and directed in her how to sign it. Ex.17; RP at 227:8-228:6. Ms. Townson signed "Exhibit A" as Michelle Wester's attorney-in-fact later on January 15, 2010, determining for herself what would be transferred to the Trust, of which she was the sole beneficiary. RP at 229:10-16. Ms. Townson signed two versions of "Exhibit A" at two different times, which were submitted at trial as Exhibits 13 and 25. Exs. 13; RP at 230:12-18.

The Trust Agreement Michelle signed on January 13, 2010, names Ms. Townson as the sole beneficiary of the Trust. Ex. 11. Unlike the 2009 draft estate planning documents, the Trust assets were not to be held for the benefit of the godchildren; Ms. Townson received it all. *Id.* None of Michelle's natural family members were named as Trustees or beneficiaries. *Id.* Michelle died three days after signing the Trust Agreement, on January 16, 2010.

D. Evidence of Incapacity.

1. Opinion of Treating Physician Declaring Incapacity.

Dr. William Lombard testified at his video deposition (admitted at trial in lieu of his live testimony, CP at 118-202) that Michelle was re-hospitalized on January 10, 2010, due to an abrupt

and acute change in her mental function diagnosed as “delirium.” CP at 135 (Dr. Lombard Dep. at 18:7-10). Dr. Lombard described delirium as the inability or lack of capacity to recognize what’s going on in the world around you, the inability to recognize people or to conduct conversations. CP at 135-36 (*Id.* at 18:18-24 & 19). Dr. Lombard testified that delirium was not unexpected at this final stage of Michelle’s battle with cancer. *Id.* Her delirium continued throughout her last stay at the hospital. As a result, Michelle was put on anti-psychotic medication with a sedating affect.

On January 13, 2010, Dr. Lombard signed the Certificate of Physician certifying that Michelle Wester was physically and/or mentally disabled or incapacitated on January 13, 2010, before Michelle signed the Trust Agreement and Quitclaim Deed. CP at 144 (Dr. Lombard Dep. at 27:11-17); Ex. 20. Dr. Lombard testified that at the time, Michelle was weak, confused, and only recognized him intermittently. CP at 146 (*Id.* at 29:9-23). He explained that her condition of delirium and related confusion for which she was re-admitted would generally have resulted in her not being mentally competent to manage her own affairs. CP at 147 (*Id.* 30:2-7). Further, the antipsychotic medication created a sedating effect. *Id.*

(30:13-25). Michelle received that medication, Haloperidol, on January 13. CP at 165 (*Id.* at 48:15-25).

Michelle also was receiving morphine for pain, which also had a sedating property. CP at 156 (Dr. Lombard Dep. at 39:16-21). Dr. Lombard testified that both drugs would impair one's judgment, and that together they would have an additive effect on cognition. CP at 167 (*Id.* at 50:14-24).

Between 1:15p.m. and 2:00p.m. on January 13, 2010, Michelle received six milligrams of morphine. Michelle received an additional two milligrams of morphine at 4:15p.m. She received a total of 20 milligrams of morphine over a 12-hour period on January 13, 2010. CP at 159-60 (Dr. Lombard Dep. at 42:20-43:5).

Dr. Lombard had no reservation about declaring Michelle disabled or incapacitated and incapable of managing her own affairs on January 13, 2010, due to her weakened condition, delirium, and the medication that she was taking and its likely affect on her judgment. CP at 160 (Dr. Lombard Dep. at 43); *see also* CP at 147 (*Id.* at 30:8-12); CP at 161 (*Id.* at 44:16-20). Dr. Lombard confirmed the delirium was present on January 13, 2010. CP at 166 (*Id.* at 49); 183 (*Id.* at 66:14-15).

When asked if Michelle was capable of understanding legal documents on January 13, 2010, Dr. Lombard responded:

“Based on my reading of the progress note and what I said, I don’t know how that could be possible if someone is combative, confused and is sedated with Haloperidol.”

CP at 170 (Dr. Lombard Dep. at 53:14-22).

“My impression from reading the notes and the reason I signed the document granting Samantha durable power of attorney is because I thought she was incapacitated.”

CP at 184 (*Id.* at 67:11-13). He testified that he “did not ever during this hospital stay personally observe lucidity or clearing of her cognitive capacity.” CP at 167 (*Id.* at 59:23-25) (emphasis added).

Because of the severe physical symptoms, her weakened condition, the delirium, and sedating medication affecting Michelle Wester, she did not have the required mental capacity to sign the Trust Agreement or quitclaim deed on January 13, 2010. Michelle’s treating physician testified to Michelle’s incapacity and signed a certification to that effect before Michelle executed the Trust Agreement and deed. Respondent had no expert witness testify at trial to refute Dr. Lombard’s opinion.

2. Opinion of Witness Present at Signing.

Michelle's brother, Rick Wester, was present with Michelle on January 13, 2010, including when she signed the Trust Agreement and deed. His testimony also supported the conclusion that she did not have the requisite capacity to sign.

Rick Wester testified that Michelle was in a great deal of pain starting January 10, 2010, and that she was confused and would say things that did not make sense. RP 91:8-92:7. Rick Wester stayed with his sister the vast majority of her final hospital stay. RP 92-93. By January 12, 2010, Rick Wester testified that Michelle's condition was getting worse, and she was "more confused and in more pain all the time." RP at 94:6-9. Rick Wester testified that Michelle was not able to carry on conversations in that state. RP 94:23-95:1. Rick Wester testified that Michelle slept most of the time on January 12, though she was agitated and in pain, which prompted the administration of sedatives. RP at 95:2-9; 95:16-24.

Rick Wester testified that Michelle's condition was worse on January 13 than it had been the day before. RP at 95:25-97:4. By Wednesday the 13th, Michelle was sleeping most of the time and when she was awake, she was agitated. RP at 97:4-12.

Rick Wester was in the room when Mr. Bode arrived at Michelle's hospital room on January 13. RP at 97:23-24. He testified that Mr. Bode was there approximately one hour. RP at 97:25-98:3. Rick Wester was standing at the foot of Michelle's bed while Mr. Bode was there, and heard their conversation. RP at 98:4-17. He testified that Mr. Bode did not do anything to evaluate with questioning Michelle's capacity. RP at 98:18-22. Rick testified that while Mr. Bode was there, Michelle was generally incoherent:

Most of the time she was either incoherent, sleeping, or at least she was in a sedated state that she couldn't react because most of the time it was spent trying to rouse her enough to get her to sign papers.

RP at 98:25-99:3. Further, Michelle never spoke to Mr. Bode.

Q (By Mr. Skinner) How did Michelle react to Mr. Bode's questions?

A She never spoke, never really acknowledged who was there. Whether or not she knew it was him, I honestly don't know.

Q How would you characterize her appearance at that point beyond just being sedated? Was she confused?

A She would hold her head a lot. I don't know if that was confusion or pain. But she wasn't speaking at that time. And, like I said, she was sedated or, you know, at least most of the time would just kind of lay her head back and rest. And whether or not she was conscious and hearing anything that was going on at this point, I'm not sure.

Q Did she have any kind of a conversation with Mr. Bode? Did she speak in sentences?

A No, she did not.

RP at 99:8-24.

Q Did she ever answer any questions that he may have put to her?

A No, sir. I don't remember her ever saying anything at the time that we were there.

Q Did he go through any kind of procedure of questions that were designed to measure her mental status?

A No, sir. He just came in and said who he was and that these were papers that they had previously discussed and that she needed to sign them. But they never discussed what those papers were. He never read them to her, she never read them. It was just opened to where she needed to sign.

Q You were in the room the entire time he was there?

A Yes, sir.

RP at 267:12-23. Rick Wester confirmed that Michelle was not at the point of "rallying" on January 13, 2010. RP at 100:2-5.

Rick Wester's testimony also confirmed that Mr. Bode did not explain the Trust Agreement or deed to Michelle or to read the documents to Michelle, nor did she independently review them; she was simply asked to sign. RP at 100:10-19. She "never really looked at the paperwork." RP at 101:15-24.

3. Consistent Testimony by Michelle's Parents.

Michelle Wester's father, Arvin Wester, similarly confirmed Michelle's lack of mental capacity on January 13, 2010, and did so based on his special experience as a minister supporting families through death, and considering acuity in that process. RP at 2-20.

Q. How would you describe Michelle's condition on that day, the 13th of January?

A Michelle was unconscious most of the day. Occasionally made a little response by wanting to take off her oxygen mask or would wave a hand. But no conversation did I hold with Michelle that day.

Q. Would you have had conversations if she was physically capable?

A. Absolutely.

RP at 243:24-244:7.

Q Immediately before Mr. Bode went into Michelle's room and you were asked to leave, did you have a chance to take a good look at Michelle and see what she was doing and how her condition may have changed either for the worse or for the better?

A Not exactly. I guess I could describe that particular moment, as I said previously, she was just not there.

Q Mentally?

A Mentally. Yes.

Q Based on your experience watching people in this situation and knowing what you know about your daughter, do you believe she was in any condition to either make a decision about an important legal matter or sign a document pertaining to an important legal matter?

A She was in no condition.

Q Why do you say that?

A Simply because she was basically immobile.

Q Was she conscious at all or able to communicate very well as far as you could tell?

A. No.

RP at 244:23-244:18.

Michelle's mother, Mrs. Wester, confirmed Michelle's grave condition and incapacitated state.

A . . . I had spoken on the phone with Michelle perhaps at twelve-thirty or one o'clock [January 10, 2010] after church and when I hung up I said to her father, Dad, Michelle's not herself at all, there's something wrong with Michelle. . . . She would say things that didn't make sense or she'd ask me the same thing maybe three different times. . . .

Q Did that get better or worse?

A Yes, Definitely worse.

Q Worse on the 11th than the 10th?

A Yes. Every day.

Q Worse on the 12th?

A It got worse.

Q Worse on the 13th than the 11th and 12th?

A Yes. By the 13th we could not carry on a conversation anymore. Even on the 12th it was very, very limited. She was heavily sedated. Whether she was conscious or just sleeping from the sedation and the morphine and so forth I don't know. But she did a great deal of sleeping and there was very little conversing with here already on Tuesday. And very

agitated, wanting to take the oxygen mask and, yeah, ripping at her intravenous.

Q on the 13th, which is a Wednesday?

A Correct.

...

Q Were you present when Samantha had Dr. Lombard sign the certification of incapacity?

A No. My husband and I were in the practice of getting there about maybe 8:30 in the morning and this happened prior to our arriving at the hospital.

Q Were you in the area when Mr. Bode showed up?

A We were in Michelle's room.

Q I take it that you left with your husband as asked?

A Very reluctantly, Yes, I did. . . .

Q At that moment when you were asked to leave, had you had a chance to take a look at Michelle and kind of make a mental note of how she appeared and what her mental acuity might have been?

A Oh, yes, I was right by her side. She was just like I said, either unconscious or sedated to the point where she was mostly sleeping. She was much more peaceful, she wasn't as agitated on that Wednesday, and she slept.

Q Had you been talking to her shortly before Mr. Bode walked in?

A Not that I can recall because there was no having a conversation with her on that day.

...

Q Based on what you saw of Michelle shortly before or at the time Mr. Bode arrived in the hospital, did you think from what you saw she was capable of either

understanding or even signing an important legal document?

A My daughter was not capable of that at all.

Q Based on what?

A Based on her physical incapacities but mostly her mental state and her sedation.

RP at -257:9.

IV. PROCEDURAL HISTORY

Michelle Wester's parents, Arvin and Barbara Wester, filed this Petition under the Trust and Estate Dispute Resolution Act ("TEDRA") in July 2010. CP at 6-23. On August 6, 2010, the parties entered an agreed order ordering in part that Respondent was temporarily enjoined from disposing of assets and that she provide an accounting of the Trust from its inception. CP at 26-28.

Mr. and Mrs. Wester moved to strike Ms. Townson's request for a jury trial, which was not opposed by Ms. Townson. CP at 46-51. Ms. Townson agreed to the entry of an order to striking the request for jury trial on July 16, 2012. CP at 52-53 (noting that the order was approved for entry and waiving notice of presentation); RP at 12:4-20. Ms. Townson then attempted to disqualify the assigned trial judge after the court refused to enter a "scheduling order" she proposed. CP at 59-61. Mr. and Mrs. Wester opposed

that motion. CP at 62-65. The parties stipulated to Ms. Townson's withdrawal of that motion during the first day of trial, December 18, 2012. RP (12/18/12) at 46:16-49:25.

Following two-and-a-half days of trial, the trial court entered an oral ruling on December 20, 2012. RP at 306-317.²

THE COURT: By way of some of the facts that I need to enter here, I do first want to say that as far as the court's view of the analysis that I must make, the TEDRA action is an equitable action. When a case is one in equity, there must be, equity does not mean that the court can do whatever it thinks is fair.

...

There are issues in this case which I must decide with regard to the competency of Michelle Wester which require that I apply legal principles, not just what I think is fair. With regard to what fairness consideration should be made, those are issues for the parties to deal with.

...

The court must in deciding this case is bound to determine what the competency was of Ms. Wester on the 13th of January 2010 when she was hospitalized and was present with Mr. Bode at the time of the execution of the Trust Agreement.

With regard to the Trust Agreement, I do find that Exhibit A was not present, and I find that based upon the computer records because the memory of the computer is much better than the memories of any

² It is important to note that Appellant has mischaracterized the court's ruling as somehow acknowledging that the court did not act in equity merely because it was constrained by legal principles. App's Br. at 23. The trial court made clear that it was sitting in equity in considering the TEDRA action, and yet, as this court well knows, it could not simply do what might be considered "fair" merely because it was acting in equity; the trial court still was constrained by statutory and common law legal principles. See RP at 306.

individual who was present. And that computer record satisfies this court that Exhibit A was not yet printed out. It had been worked on by Mr. Bode but it was not printed out until after the Trust Agreement was signed. So when Mr. Bode went to the hospital, he had the Trust document, but not Exhibit A with him.

...
... Mr. Bode acknowledges that he neither read the agreement to [Michelle Wester] in the hospital room, nor did she read it herself. There are no facts here which indicate to me that either of those events occurred.

Now, in order for her on the 13th of January to be able to understand and contemplate the content of this Trust Agreement without either having read it herself in the hospital room, or without Mr. Bode having read it to her and asking her if she understood it and had any questions, Ms. Wester would have to have been of the state of mind on the 13th of January that I recall the specifics of the discussions we had a week ago, and I Trust you, Mr. Bode, that these documents, this document was put together in accordance with what I expressed to you was my desire.

...
Competency, as I say, must be determined as of the time of the signing. Not based upon desires at a prior point in time.

...
In considering, and I did take Dr. Lombard's deposition home and read through it, I read through it a couple of time. And by way of factual findings, it is clear that when Michelle went to the hospital and was admitted to the hospital that she did suffer from deliriums, and there's no dispute as to what the effect of deliriums are. She was at times unable to recognize people; she would be confused And Dr. Lombard is clear that the deliriums are accentuated when a person is under the effect of haloperidol and the morphine that Michelle was administered. And my conclusions, from taking all of

Dr. Lombard's testimony together in its entirety, is that on the 13th of January that the dosages that Michelle was getting of the morphine and the haloperidol were increasing because of the pain she was experiencing and her agitation. And when I look at the substance of the communications between Mr. Bode and Michelle on the 13th of January, it's clear to me that Michelle was not lucid during the time, the whole time that Mr. Bode was in that hospital room.

. . .
Now, and I also find that [during Michelle's last hospital stay] . . . Dr. Lombard never observed Michelle in a period of lucidity or where she was cognitive, in charge of her faculties. That's not to say that there weren't times that she wasn't, but Dr. Lombard never saw that during her hospitalization. And while I believe that on January 6th Michelle wanted to do what, or close to what Mr. Bode prepared for her, I can't find on the 13th that she was competent. And that finding is clear and convincing to me. Therefore I find that the Trust document does fail for that reason.

I also find that because there was no Exhibit A, that the Trust document, if she was competent, the Trust document was not complete as far as what she wanted in that Trust. There were no discussions with Mr. Bode between Mr. Bode and Michelle on the 13th as to whether or not this is the property that you want to go into the Trust.

RP at 306:3-20; 307:25-308:14; 309:9-23; 311:5-7; 311:11-312:7; 313:5-25.

The trial court subsequently entered Findings of Fact and Conclusions of Law on January 3, 2013. CP at 212-220.

V. ARGUMENT

A. **The Trial Court's Evidentiary Rulings Were Not in Error, and Even If They Were in Error, They Were Harmless.**

Conclusions of law are generally reviewed de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879–80, 73 P.3d 369 (2003). However, admission of improper evidence is harmless if there is no reasonable probability that the error materially affected the trial's outcome. *State v. Gresham*, 173 Wash.2d 405, 433, 269 P.3d 207 (2012). "Where a case is heard by a judge without a jury, a new trial should not be granted for error in the admission of evidence, if there remains substantial admissible evidence to support the findings, unless it appears that the findings are based on the evidence which should have been excluded." *State v. Ryan*, 48 Wn.2d 304, 308, 293 P.2d 399 (1956). A trial court commits reversible error only when a party can show that the verdict would have been different but for the evidentiary error. *State v. Read*, 147 Wn.2d 238, 245–46, 53 P.3d 26 (2002); *State v. Gower*, 172 Wn. App. 31, 38-40, 288 P.3d 665 (2012).

Appellant asserts that the trial court erred by prohibiting the attorney who prepared the Trust Agreement and deed at issue, Keith Bode, from testifying as to who the decedent said on January 6, 2010, that she wanted to leave her property to based, on

evidentiary rulings under the Deadman's Statute, RCW 5.60.030, and the hearsay rule, ER 802. App's Br. at 4-5 (Assignment of Error No. 1); 27. Specifically, the trial court ruled as follows:

Q When she was in your office [on January 6, 2010] before she asked you to invite Samantha in, who did she tell you she wanted to leave her property to?

MR. SKINNER: Objection, hearsay. It's an out-of-court statement.

MR. SHEPHERD: The person is deceased, Your Honor. It's an exception to the hearsay rule.

MR. SKINNER: Still hearsay.

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 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. SKINNER: In addition to the dead man statute, it violates the hearsay rule under 801 and 802 regardless of the dead man statute because it's an out-of-court statement being offered for the truth.

MR. SHEPHERD: And I agree with that except the declarant is dead and that's one of the exceptions to hearsay.

MR. SKINNER: No, it's not. The declarant creates other exceptions but by virtue of being deceased that's not an exception by itself. In fact, the rules are designed to prevent people from taking advantage of a person's death in court which is why the hearsay rule is even more compelling.

THE COURT: It's ER 804 where the declarant's not available. I don't think it's an exception to the hearsay rule under 804 where the declarant is unavailable. So if you can give me case law on it, I will allow the question to be asked and answered. But at this point I believe it's an objectionable question.

RP (12/19/12) at 198:18-201:3.

Following additional briefing on the issue, the trial court affirmed the rejection of the evidence as inadmissible both under the hearsay rule, ER 802, and under the dead man's statute.

THE COURT: I have reviewed the materials that you have both submitted. 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 at 209:3-17.

The Deadman's Statute, RCW 5.60.030, states in part that:

[I]n an action or proceeding where the adverse party sues or defends . . . as deriving right or title by, through or from 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

The statute prevents parties in interest from testifying about transactions with or statements made by the deceased. *Estate of Lennon v. Lennon*, 108 Wn. App. 167, 174, 29 P.3d 1258 (2001). The purpose of the deadman's statute is to prevent interested parties from giving self-serving testimony regarding transactions with a decedent. *Thompson v. Henderson*, 22 Wn. App. 373, 379-80, 591 P.2d 784 (1979).

A person is a party in interest for purposes of RCW 5.60.030 when he or she stands to gain or lose in the action in question. *In re Estate of Shaughnessy*, 97 Wn.2d 652, 656, 648 P.2d 427 (1982). When there was a transaction with the deceased, and the testimony offered concerns the transaction and tends to show either what did or did not take place, it must be excluded. *Martin v. Shaen*, 26 Wn.2d 346, 352, 173 P.2d 968 (1946). A "transaction" is broadly defined as "the doing or performing of some business between parties, or the management of any affair." *In re Estate o f*

Wind, 27 Wn.2d 4321, 426, 178 P.2d 731 (1947). The test of transactions with a decedent is whether the decedent, if living, could contradict the witness of his own knowledge. *Id.*

The trial court correctly concluded that Mr. Bode, who had admitted he stood to gain or lose in the connection with the litigation, was a party in interest. Mr. Bode represented the decedent in drafting and signing her estate planning documents, and therefore had a business transaction with the decedent. Mr. Bode was interested in the litigation because he faced potential liability if the Trust Agreement was declared invalid. Appellant cites no case law contrary to the trial court's conclusion.

Further, the trial court provided a second, independent basis for prohibiting Mr. Bode from testifying as to Michelle Wester's statements on January 6, 2010—that such testimony was inadmissible hearsay. RP at 209; see ER 801, 802. The statements at issue, offered for their truth, did not satisfy any of the exceptions to the hearsay rule under ER 803 or 804. Appellant has failed even to address this separate, independent basis for the trial court's evidentiary ruling. See App's Br. at 27-29.

Finally, even if the trial court's ruling was in error, any such error was harmless. Ultimately, the trial court found and concluded

that Michelle Wester was competent on January 6, 2010, and able to express her intentions to Mr. Bode, and that Mr. Bode drafted estate planning documents that he believed were consistent with her wishes. CP at 263 (Finding of Fact 3.6; 3.7). The trial court concluded that the primary legal issue was Michelle's capacity on January 13, 2010, which she signed the Trust Agreement, not when she met with Mr. Bode on January 6, 2010.

Competency, in connection with the execution of estate planning documents, is to be determined as of the time that the documents are executed and not as of the time of discussions between a decedent and the decedent's attorney at the planning state and conference. While Mr. Bode believes that the documents he prepared were in accordance with Michelle's stated wishes on January 6, 2010, Michelle at no time in fact knew what was stated in 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 at 267 (Conclusion of Law 6) (emphasis added).

Michelle's communications as to her wishes were irrelevant to the determination as to whether Michelle Wester was competent to sign the revised estate planning documents on January 13, 2010. Further, Michelle's communications as to her wishes also were irrelevant to the trial court's second, independent basis to invalidate the Trust—that it was incomplete when signed on

January 13, 2010. Any error in excluding Bode's testimony as to statements by Michelle as to her wishes was harmless error.

B. Appellant Did Not Preserve the Issues Challenged in Assignment of Error No. 19.

Appellant's Assignment of Error No. 19 states that:

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).

Appellant has waived and failed to preserve such assignment of error, or the underlying assertion of the privilege.

First, Appellant did not object to the taking of Dr. Lombard's deposition based on the physician-patient privilege, at which time the privilege was first waived, despite the fact that the deposition was noted as a deposition to be offered in lieu of trial testimony.³ Second, Appellant did not make a motion in limine to preclude the admission of Dr. Lombard's deposition transcript or medical records on physician-patient privilege grounds. Third, Appellant did not object to the admission of Ms. Wester's medical records on privilege grounds, the same privilege that Appellant asserts was not properly waived in admitting Dr. Lombard's deposition transcript.

³ The notice of deposition has been designated in the Westers' Supplemental Designation of Clerk's Papers.

RP at 109:1-16 (counsel noting no objection to the admission of medical records).

Further, Appellant's counsel Mr. Shepherd specifically said that he wanted to have Dr. Lombard testify and was not objecting to the waiver of the physician-patient privilege. RP at 115.

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

THE COURT: Didn't we just go over an issue where you were objecting to their claiming a privilege and now you're saying you want to raise a privilege? You can't have it both ways. Which is it?

MR. SHEPHERD: **I can't waive the privilege. I'd like to have this doctor testify. I'd like to go forward.** There's been no waiver of the privilege. I just wanted to put that on the record.

...

MR. SHEPHERD: I don't believe it's a privilege that belongs to . . . my client.

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

RP at 115:17-116:20.

Appellant's counsel therefore waived any objection based on the physician-patient privilege, if his client had the right to raise it, by not objecting to the production or admission of Ms. Wester's medical records from physician Dr. Lombard, and by failing to object to the taking of Dr. Lombard's deposition for the express

purpose of offering it at trial in lieu of live testimony. Appellant failed to preserve any challenge for appeal or invited any error. See RAP 2.5(a); *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). Further, Mr. Shepherd admitted that his client did not have authority to waive the privilege, and therefore would not have standing to object to the testimony based on lack of waiver.

In addition, regardless of whether Appellant preserved the error, Mr. and Mrs. Wester, Michelle's parents, as Michelle's heirs at law, had the authority to waive the physician-patient privilege and waived it by requesting Michelle's medical records, taking Dr. Lombard's deposition, and admitting those records and deposition transcript at trial. *In re Thomas' Estate*, 165 Wash. 42, 60, 4 P.2d 837 (1931) (heir of the deceased had the right and the power to waive the physician-patient privilege, and did so by gathering and presenting testimony by treating physicians in a will contest case).

C. Appellant Has Not and Cannot Establish that No Substantial Evidence Was Admitted to Support the Trial Court's Findings of Fact or that the Findings Do Not Support the Court's Conclusions of Law.

Appellant has challenged portions of Findings of Fact 3.13, 3.15, 3.16, 3.19, 3.20, 3.21. See App's Br. at 5-6. Appellant has challenged portions of Conclusions of Law 4, 6, 7, 8, 9, 10, 13, and

14, as well as the trial court's judgment and order, and the denial of Ms. Townson's motion for reconsideration. App's Br. at 7-10.

1. Standard of Review.

Where the trial court weighed the evidence, the Court of Appeals' review is limited to whether substantial evidence supports the trial court's findings and, if so, whether the findings in turn support the conclusions of law and the judgment.⁴ *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 980 P.2d 1234 (1999) ; *City of Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991); *Pierce County v. State*, 144 Wn. App. 783, 847, 185 P.3d 594 (2008).

If the evidence satisfies this standard of review, the Court of Appeals should not substitute its judgment for the trial court's, even though it may have resolved disputed facts differently. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879–80, 73 P.3d 369 (2003). Substantial evidence is evidence sufficient to persuade

⁴ "Substantial evidence' does not define the burden of proof applied by the trier of fact, as the appellate court must look for 'substantial evidence' no matter what the burden of proof was below." *State v. N.B.* 127, Wn. App. 776, 780, 112 P.3d 579 (2005) (citing *In re Dependency of C.B.*, 61 Wn. App. 280, 282, 810 P.2d 518 (1991); *Colonial Imports v. Carlton Northwest*, 121 Wn.2d 726, 734–35, 853 P.2d 913 (1993), and holding that the use of the "substantial evidence" standard to review the reasons supporting a manifest injustice disposition was not inconsistent with the use of the "clear and convincing" burden of proof at the trial court level).

a fair-minded person of the truth of the finding. *Fred Hutchinson Ctr. v. Holman*, 107 Wn.2d 693, 712, 732 P.2d 974 (1987).

“A challenge to the sufficiency of the evidence admits the truth of [the opposing party's] evidence and any inference drawn therefrom and requires that the evidence be viewed in a light most favorable to [the opposing party].” *Bott v. Rockwell Int'l*, 80 Wn. App. 326, 332, 908 P.2d 909 (1996). The appellate court is not entitled to weigh the evidence or the credibility of witnesses even it disagrees with the trial court in either regard. *In re Marriage of Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999); *In re Welfare of Sego*, 82 Wn.2d 736, 739–40, 513 P.2d 831 (1973).

Unchallenged findings of fact are verities on appeal. *Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); RAP 10.3(g).

2. Appellant Failed to Establish that the Challenged Findings Are Not Supported by Substantial Evidence.

Appellant makes no effort, let alone establishes in her opening brief, that the challenged findings are not supported by substantial evidence. Instead, Appellant ignores that burden, and argues merely that “[t]he trial court’s application of law to the facts in this case should be reviewed de novo.” App’s Br. at 26.

There is no question that each of the challenged findings with respect to Michelle's lack of capacity to execute the Trust Agreement and deed on January 13, 2010 (Findings 3.13, 3.19, 3.20, 3.21) were supported by substantial evidence. Dr. Lombard's testimony *alone* is sufficient to substantiate the findings. In addition to Dr. Lombard's testimony, the record contains testimony from Rick Wester, Michelle's brother, who witnessed the entire interaction between Michelle and Mr. Bode and signing on January 13, 2010, as well as the testimony of Michelle's parents as to Michelle's condition on January 13, 2010.

Similarly, the record is replete with evidence sufficient to support the trial court's Findings of Fact that Exhibit A to the Trust Agreement was not present or complete when Michelle signed the Trust Agreement (Findings 3.15, 3.16). As the summarized testimony in the statement of the case indicates, Mr. Bode *admitted* that he did not have the completed Exhibit A to the Trust Agreement present at the hospital on January 13, 2010 when he asked Michelle Wester to sign the Trust Agreement. Further, Exhibit 19 expressly establishes that the information contained in Exhibit A to the Trust Agreement was not provided to Mr. Bode until January 15, 2010, after the Trust Agreement was signed. Ex. 19.

Exhibit 17 demonstrates that Ms. Townson did not receive Exhibit A until the afternoon of January 15, 2010, after the Trust Agreement was signed. Finally, Exhibit A shows that Ms. Townson, not Michelle Wester signed Exhibit A to the Trust Agreement. Ex. 13.

There is a plethora of evidence to support the challenged Findings of Fact, and enough to satisfy the substantial evidence standard. The Court of Appeals is not entitled to assess credibility of witnesses, weigh the evidence, or substitute its judgment.

3. The Court's Conclusions of Law are Supported by the Findings, and Appellant Has Not and Cannot Establish An Error of Law Requiring Reversal.

Conclusions of law, and whether they are supported by the findings of fact, are reviewed de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879–80, 73 P.3d 369 (2003). Appellant has not established that the Findings of Fact fail to support the trial court's Conclusions of Law, nor has Appellant established an error of law in the trial court's reasoning that would independently require reversal. Instead, Appellant asserts without factual or legal support that the trial court "got it wrong."

a. Lack of Required Capacity.

Testamentary capacity to make a will requires that the testator "has sufficient mind and memory to understand the

transaction in which he in then engaged, to comprehend generally the nature and extent of the property which constitutes his estate and of which he is contemplating disposition, and to recollect the objects of his bounty.” *Estate of Eubank*, 50 Wn. App. 611, 618, 749 P.2d 691 (1988) (quoting *In re Estate of Bottger*, 14 Wn.2d 676, 685, 129 P.2d 518 (1942)). Incapacity must be established by clear, cogent, and convincing evidence. *Id.* at 617.

The standard for capacity to contract, which would include the Trust Agreement contract, is only slightly different. “The rule relative to mental capacity to contract . . . is whether the contractor possessed sufficient mind or reason to enable him to comprehend the nature, terms and effect of the contract in issue.” *Page v. Prudential Life Ins. Co. of Am.*, 12 Wn.2d 101, 108-09, 120 P.2d 527 (1942) (discussing and relying on 17 C.J.S., Contracts§ 133). Incapacity to contract also must be established by clear, cogent and convincing evidence. *Id.* at 109.

An attending physician’s opinion as to mental capacity is given special consideration in a legal determination of capacity. *In re Estate of Miller*, 10 Wn.2d 258, 271-72, 116 P.2d 526 (1941); *Estate of Eubank*, 50 Wn. App. at 618. Testimony by an attending or treating physician that in his or her professional opinion, the

testator was not able to understand the legal document raises a presumption of incapacity. *Estate of Eubank*, 50 Wn. App. at 619. Similarly, “when mental incapacity at and about the time of the gift or transfer of the property is shown, then a presumption arises against the validity of the transaction, and the burden of the proof rests upon the party claiming the benefit of the conveyance or contract to show its perfect fairness and the capacity of the other party.” *Hackett v. Whitley*, 150 Wash. 529, 538, 273 P. 752 (1929) (emphasis added); see also *Dean v. Jordan*, 194 Wash. 661, 669, 79 P.2d 331 (1938) (“where a condition of general insanity which is not of a temporary kind is once shown to exist, it is presumed to continue, and the burden of overcoming such presumption by proving mental restoration or a lucid interval rests upon him who asserts such facts.”). The proof in rebuttal of the presumption of incapacity “should be clear and satisfactory to the trier of the fact.” *Dean*, 194 Wash. at 670.

In the *Eubank* case, the husband and wife executed identical wills in 1977. *Eubank*, 50 Wn. App. at 613. They executed new wills in 1984, substantially changing the beneficiary designations. *Id.* In a subsequent will challenge asserting incapacity and undue influence, the trial court concluded that there was insufficient

capacity to make the wills; the Court of Appeals affirmed. *Id.* at 617-19. Important to the Court of Appeals' analysis in *Eubank* was testimony by the couple's treating physician regarding his assessment of the husband's mental state following surgery for the husband's broken hip. *See id.* at 614-16. The treating physician testified that following the husband's surgery, the husband became "confused, disoriented, and agitated," and that the physician therefore prescribed tranquilizers. *Id.* at 614. The physician testified that as of three days after the execution of the 1984 wills, the husband "was not competent" and "could not understand or execute a legal document" and "could not comprehend the nature and extent of his holdings nor the objects of his bounty." *Id.* In response, the proponents of the will presented testimony about the husband and wife's abilities to talk about "everyday matters." *Id.* at 616. The proponents also provided testimony by a physician that the confusion following surgery should have been only transient. *Id.* The Court of Appeals held that the medical testimony that the husband was not able to understand the legal document created a presumption of incapacity and that the testimony as to the ability to talk about "everyday matters and gardening" was insufficient to overcome the trial court's determination of incapacity. *Id.* at 619.

A person executing a living Trust Agreement must understand the purpose and effect of the agreement, as well as its terms. A physician's opinion as to incapacity near the time of the execution creates a presumption of incapacity. Testimony as to general conversations is not enough to overcome the presumption.

Here, Appellant challenges the trial court's conclusions that:

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

4.1 Michelle Wester did not 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 at 217-18 (COL 4).

"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 at 218 (COL 6);

"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 at 218 (COL 8)

“The Michelle R. Wester Living Trust purportedly signed on January 13, 219 was not properly executed and is invalid. The trust agreement is not enforceable, should be vacated and set aside.” CPat219 (COL 10).

“The quitclaim deed purportedly signed by Michelle Wester on January 13,2010, is invalid. ...” CP at 219 (COL 13).

App’s Br. at. 7-9. Appellant further challenges the resulting judgment and order. App’s Br. at 9-10.

Appellant wholly fails to establish that the trial court erred in applying its Findings of Fact to the case law cited above to conclude that Michelle lacked the required mental capacity to execute the Trust Agreement and deed on January 13, 2010. See App’s Br. at 29-31. Appellant fails even to address Dr. Lombard’s testimony or the presumption of incapacity that arose based on Dr. Lombard’s conclusions. Again, Appellant points to no error of law, and simply restates the basic principles and standards for capacity and concludes that the trial court “got it wrong.” Those arguments are insufficient to satisfy Appellant’s substantial burden to overturn the conclusions of the trial court following a full trial.

- b. Even if Michelle Wester Had Capacity, the Court Separately Concluded that It Was Incomplete When Signed and Invalid.**

A Living Trust Agreement is a contract between the Trustor and Trustee. For a contract to exist, there must be a mutual intention or "meeting of the minds" on the essential terms of the agreement. *Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wn. App. 846, 851, 22 P.3d 804 (2001). The burden of proving a contract is on the party asserting it. *Id.*

Perhaps the most essential term of a Trust Agreement is the identification of what property will be transferred to the Trust to form its *corpus*. That term may either be delineated within the Trust or in an exhibit attached thereto. Without the Trustor's express statement of intent regarding what assets are to be subject to Trust administration, it is not possible for a third party to subsequently fund the Trust through the use of transfer instruments. That is precisely what occurred in this case.

Michelle Wester signed the Living Trust Agreement on January 13, 2010. Keith Bode, the sole witness and drafter, admits that he did not have an exhibit delineating the property to be transferred to the Trust attached to the document when Michelle signed it. RP at 230:19-231:5. The exhibit delineating the property that would be subject to Trust administration and disposition was prepared after Michelle signed the Trust Agreement and was

neither reviewed, nor approved, nor signed by Michelle. *Id.*; see also Exs. 14, 17, 19. Instead, two days later, “Exhibit A” was signed by Respondent, the Trust’s sole beneficiary, acting in her own interest and as Michelle’s Attorney in Fact. Ex. 13.

Without the completed and attached Exhibit A, the Trust Agreement was incomplete when Michelle signed it and was not a valid contract, as the Court properly concluded. Appellant did not have authority as Attorney in Fact to select the property to be transferred to the Trust .

Appellant improperly characterizes this issue as whether she had authority as Attorney in Fact to “fund” the Trust. App’s Br. at 31-32. While the Power of Attorney did give the Attorney in Fact authority to “complete funding of any of the Principal’s revocable (living) Trusts which may have been established by the Principal,” it did not give the Attorney in Fact authority to *determine what property should be transferred to the Trust*. This is an important distinction because that determination, unlike the act of merely transferring property already listed in the Trust Agreement, is akin to making or altering an estate distribution on the Principal’s behalf.

RCW 11.94.050 specifically addresses this situation:

Attorney or agent granted principal's powers —

Powers to be specifically provided for — Transfer of resources by principal's attorney or agent.

(1) Although a designated attorney-in-fact or agent has all powers of absolute ownership of the principal, or the document has language to indicate that the attorney-in-fact or agent shall have all the powers the principal would have if alive and competent, the attorney-in-fact or agent shall not have the power to make, amend, alter, or revoke the principal's wills or codicils, **and shall not have the power, unless specifically provided otherwise in the document: To make, amend, alter, or revoke any of the principal's life insurance, annuity, or similar contract beneficiary designations, employee benefit plan beneficiary designations, Trust Agreements,** registration of the principal's securities in beneficiary form, payable on death or transfer on death beneficiary designations, designation of persons as joint tenants with right of survivorship with the principal with respect to any of the principal's property, community property agreements, or any other provisions for nonprobate transfer at death contained in nontestamentary instruments described in RCW 11.02.091; to make any gifts of property owned by the principal; to exercise the principal's rights to distribute property in Trust or cause a Trustee to distribute property in Trust to the extent consistent with the terms of the Trust Agreement; to make transfers of property to any Trust (whether or not created by the principal) unless the Trust benefits the principal alone and does not have dispositive provisions which are different from those which would have governed the property had it not been transferred into the Trust; or to disclaim property.

(2) Nothing in subsection (1) of this section prohibits an attorney-in-fact or agent from making any transfer of resources not prohibited under chapter 74.09 RCW when the transfer is for the purpose of qualifying the principal for medical assistance or the limited casualty program for the medically needy.

(Emphasis added).

Contrary to the statute, Ms. Townson amended the living Trust Agreement when she “filled out” Exhibit A on January 15, 2010 and then signed the exhibit as Michelle’s attorney in fact, without express approval and direction from Michelle. This completion and signing of Exhibit A was an entirely different action than merely “funding the Trust” by transferring already identified assets into the Trust based on its terms.

Appellant challenges the following Conclusions of Law:

“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 (COL 7).

“[Ms. Townson] 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 at 219 (COL 9).

App’s Br. at 7-8.

Again, Appellant cites no case law establishing that the trial court erred in making the relevant Conclusions of Law to support this second, independent basis to invalidate the Trust Agreement,

or that the Findings of Fact fail to support those Conclusions of Law. App's Br. at 31-32. Instead, Appellant simply argues that she had authority as Attorney in Fact to fund the Trust, and that the Trust was funded before Michelle's death. *Id.* Those arguments are insufficient to satisfy the substantial burden to overturn the conclusions of the trial court following a full trial.

D. Appellant Agreed to Strike Her Request for Jury Trial and Cannot Assert Error in the Same.

Appellant asserts an assignment of error in the trial court striking her request for a jury trial. App's Br. at 10 (Assignment of Error No. 18). However, Appellant neither identifies an issue with respect to such assignment of error, nor does she provide argument to support the same. Given those failures, this issue is not properly before the court. See RAP 10.3(4), (6). Nonetheless, Respondents will briefly address its lack of merit.

Mr. and Mrs. Wester moved to strike Ms. Townson's request for a jury trial. CP at 46-51. That motion was not opposed by Ms. Townson. Further, Ms. Townson agreed to the entry of an order to striking the request for jury trial on July 16, 2012. CP at 52-53 (noting that the order was approved for entry and waiving notice of presentation); RP at 12:4-20.

Therefore, not only did Appellant not *preserve* this asserted error for appeal, she *invited* any error by agreeing to the order striking the jury trial. See RAP 2.5(a); *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). Further, the implication that there was somehow a right to a jury trial because the judge did not ultimately rule in equity or because the Westers asserted that the Trust Agreement also was incomplete is specious.

E. Appellant Has Not and Cannot Establish An Abuse of Discretion in Denying Her Motion for Reconsideration.

By bringing a motion for reconsideration under CR 59, a party may preserve an issue for appeal that is closely related to a position previously asserted and does not depend upon new facts. *Newcomer v. Masini*, 45 Wn. App. 284, 287, 724 P.2d 1122 (1986); *Reitz v. Knight*, 62 Wn. App. 575, 581 n. 4, 814 P.2d 1212 (1991). However, the trial court's decision on the motion for reconsideration is reviewed for an abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 684–85, 41 P.3d 1175 (2002). The trial court's discretion extends to refusing to consider an argument raised for the first time on reconsideration absent a good excuse. *Rosenfeld*

v. U.S. Dep't of Justice, 57 F.3d 803, 811 (9th Cir.1995) (applying parallel federal rule).

Here, Ms. Townsons' motion for reconsideration asserted a wholly new claim—constructive trust—without having moved to amend the pleadings or presented evidence at trial to support said claim. Further, the primary substance supporting the alleged constructive trust, was the assertion that there was a committed, intimate relationship between Ms. Townson and Michelle Wester. However, Ms. Townson agreed to the dismissal of her counterclaim for committed, intimate relationship in this proceeding, in favor of alleging it in the intestate administration of Ms. Wester's estate. Therefore, there is no basis to find an abuse of the trial court's discretion in denying the motion for reconsideration to introduce an untimely new counterclaim unsupported by the evidence.

F. Respondents Are Entitled to Attorney Fees on Appeal.

Pursuant to RCW 11.96A.150, the Court has discretion to award attorney fees as part of the costs in estate disputes, both at trial and on appeal, especially where the appeal is baseless. RCW 11.96A.150; *See also In re Estate of Fitzgerald*, 172 Wn. App. 437, 453-454, 294 P.3d 720 (2012).

Further, RAP 18.9(a) empowers an appellate court on its own initiative or on a motion of a party, to assess sanctions, including attorneys' fees, against a party filing a frivolous appeal. See, e.g., *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691-92, 732 P.2d 510 (1987). An appeal is frivolous under RAP 18.9 if it "raises no debatable issues." *Id.*; *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 905, 969 P.2d 64 (1998); *Andrus v. State Dep't of Transp.*, 128 Wn. App. 895, 900, 117 P.3d 1152 (2005).

The Court of Appeals in *Andrus v. State Dep't of Transp.*, 128 Wn. App. 895, 900, 117 P.3d 1152 (2005), held that "the decision to file a court action in this matter was unfounded." In *Fidelity Mortgage Corp. v. Seattle Times Co.*, 131 Wn. App. 462, 473-74, 128 P.3d 621 (2005), this Court awarded attorney fees because the appeal was "not based on subtle or even gross distinctions of law," despite the fact that the trial court analyzed the issues at length.

Here, Appellant has raised no debatable issue, nor has she even attempted to satisfy the applicable standards or her burden on appeal. Respondents ask the Court to exercise its discretion to

order the reimbursement of their attorney fees on appeal both under TEDRA, as well as RAP 18.9.

VI. CONCLUSION

Appellant has not satisfied her substantial burden to overcome the trial court's weighing of the evidence, findings of fact, and application of findings of fact to well-settled law. Respondents Wester therefore ask the Court of Appeals to affirm the trial court's decision invalidating the Living Trust Agreement of Michelle Renee Wester signed on January 13, 2010.

Respectfully submitted this 1th day of August, 2013.


CHRISTON C. SKINNER, WSBA # 9515
KATHRYN C. LORING, WSBA # 37662
Attorneys for Respondents

DECLARATION OF SERVICE

UNDER PENALTY OF PERJURY AND PURSUANT TO THE LAWS OF THE STATE OF WASHINGTON, I CERTIFY THE FOLLOWING TO BE TRUE AND CORRECT:

On August 7, 2013, I caused to be served copies of the following documents:

1. Brief of Respondents; and
2. Declaration of Service

To the individuals named below in the specific manner indicated:

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DATED this ____ day of August, 2013, at Friday Harbor,
Washington.

Lisa Henderson