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## LINGERING QUESTIONS REGARDING THE DEVISE OF BLACK'S ACRE: HOW MANY WITNESSES ARE REQUIRED TO PROVE THE EXECUTION OF A LOST WILL?

Sarah Shirey

*Abstract:* Prior to the 1994 revisions to Washington's lost will statute, courts required that execution of a lost will be proved by a preponderance of the evidence. In *In re Estate of Black*, the Washington State Supreme Court announced that under the revised lost will statute, execution of a lost will must be shown by clear, cogent, and convincing evidence. However, the *Black* court did not clearly define the quantum of proof necessary to meet this new burden. The dissent in *Black* read the majority opinion as creating a "two witness requirement," necessitating testimony from both attesting witnesses to meet the new burden. This Comment argues that the *Black* majority created a "one witness standard," by which one witness with sufficient personal knowledge of all statutory elements of the lost will's execution may satisfy the clear, cogent, and convincing burden. A careful examination of the *Black* court's evidentiary analysis reveals that rather than searching for two witnesses, the court looked for, but failed to find, a single witness with sufficient personal knowledge to meet the "one witness standard." In addition, those who perceive a two witness requirement confuse the statutory elements for executing a will with the requirements for proving execution of a lost will. Finally, evidentiary standards used in fraud cases under Washington's probate code as well as case law from other jurisdictions support application of the "one witness standard" to prove execution by clear, cogent, and convincing evidence.

Since Washington's territorial days, the proof necessary to admit a lost will to probate has been governed by the lost will statute.<sup>1</sup> Under this original statute, admission of a lost will required proof of the will's existence at the time of the testator's death.<sup>2</sup> This requirement nearly barred the probate of lost wills in Washington.<sup>3</sup> In 1994, Washington removed this requirement and made several other revisions to the statute.<sup>4</sup> Commentators predicted that the removal of this requirement would facilitate the admission of lost wills by significantly diminishing the burden for probate of these wills.<sup>5</sup> However, a recent decision by the

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1. Act of Jan. 27, 1860, ch. 1, § 70, 1860 Wash. Terr. Laws 205 (current version at WASH. REV. CODE § 11.20.070 (2004)).

2. *Id.*

3. See MARK REUTLINGER & WILLIAM C. OLTMAN, WASHINGTON LAW OF WILLS AND INTESTATE SUCCESSION 20 (Supp. 1994) (calling proof of will's existence an "impossible requirement").

4. See Act of April 1, 1994, ch. 221, § 20, 1994 Wash. Sess. Laws 1149.

5. See REUTLINGER & OLTMAN, *supra* note 3, at 20.

Washington State Supreme Court creates another obstacle for probating a lost will.<sup>6</sup>

The Washington State Supreme Court first considered the recent revisions to the lost will statute in *In re Estate of Black*.<sup>7</sup> The court used this opportunity to “clarify” the burden of proof necessary to show proper execution of a lost will.<sup>8</sup> In Washington, a validly executed will must be in writing, signed by the testator, and signed by at least two “attesting” witnesses.<sup>9</sup> The court held that in the absence of an original will, execution of a lost will must be proven by clear, cogent, and convincing evidence.<sup>10</sup> However, *Black* creates confusion regarding the quantum of evidence necessary to meet this new burden.<sup>11</sup> Questions arise as to whether the testimony of one or two witnesses is required to establish valid execution of a lost will under the clear, cogent, and convincing standard.<sup>12</sup>

Because the court found testimony from a single attesting witness insufficient to prove execution of the lost will, the *Black* dissent interpreted the court’s decision as creating a “two witness requirement.”<sup>13</sup> No witness in *Black* possessed sufficient personal knowledge of all the elements required to validly execute a will.<sup>14</sup> Specifically, no testifying witness could adequately identify the second attesting witness.<sup>15</sup> In lieu of direct testimony, circumstantial evidence supported the inference that a notary public acted as the second attesting witness.<sup>16</sup> The *Black* court concluded that this evidence fell short of the clear, cogent, and convincing standard.<sup>17</sup> Justice Richard B. Sanders concluded in his dissent that this holding demands testimony from *two*

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6. See *In re Estate of Black*, 153 Wash. 2d 152, 165, 102 P.3d 796, 803 (2004) (raising evidentiary burden for proving execution of lost will from “preponderance of evidence” standard to “clear, cogent, and convincing” standard).

7. 153 Wash. 2d 152, 102 P.3d 796 (2004).

8. *Id.* at 157, 102 P.3d at 799.

9. WASH. REV. CODE § 11.20.070 (2004).

10. *Black*, 153 Wash. 2d at 163, 102 P.3d at 802.

11. *Id.* at 183, 102 P.3d at 812 (Sanders, J., dissenting).

12. *Id.*

13. *Id.*

14. See *id.* at 167, 102 P.3d at 804 (majority opinion) (finding testimony from one attesting witness who failed to recall name of second attesting witness insufficient to prove will’s execution).

15. See *id.*

16. See *id.*

17. *Id.* at 167–68, 102 P.3d at 804–05.

attesting witnesses to prove the execution of a lost will.<sup>18</sup>

This Comment argues that *Black* adopts only a “one witness standard” to establish valid execution of a lost will by clear, cogent, and convincing evidence. Under this “one witness standard” a party may prove proper execution of a lost will through the testimony of a single witness with sufficient personal knowledge that the will was in writing, signed by the testator, and witnessed by two witnesses.<sup>19</sup> The *Black* court employed a “one witness standard” in its evidentiary analysis, searching for a single witness with sufficient personal knowledge of the lost will’s execution rather than two witnesses.<sup>20</sup> Those who believe the court used a “two witness requirement” confuse the statutory elements required to validly execute a will with the requirements to prove a will’s execution after the original will has been lost.<sup>21</sup> Additionally, reading *Black* to adopt a “one witness standard” is consistent with the use of the same clear, cogent, and convincing evidentiary standard in other Washington probate contexts.<sup>22</sup> Finally, the “one witness standard” interpretation is in accord with cases from other jurisdictions that apply similar evidentiary standards to the execution of lost wills.<sup>23</sup>

Part I introduces Washington’s lost will statute and its evolution, and discusses the common law development related to it. Part II presents *Black*, the Washington State Supreme Court’s first consideration of the recent revisions to the lost will statute. Part III analogizes the evidence presented in *Black* with evidence used to satisfy the clear, cogent, and convincing standards in other Washington probate contexts and in lost will cases from other jurisdictions. Part IV argues that, contrary to the dissent’s interpretation, proof of proper execution may be shown by one witness with sufficient personal knowledge under Washington’s new clear, cogent, and convincing standard. This Comment concludes that *Black*’s one witness standard, while less burdensome than a two witness requirement, contravenes the intent of the legislature by creating a new

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18. *Id.* at 183, 102 P.3d at 812 (Sanders, J., dissenting).

19. *See infra* Part IV.A.

20. *See Black*, 153 Wash. 2d at 167, 102 P.3d at 804 (finding testimony from one attesting witness who failed to recall name of second attesting witness insufficient to prove will’s execution).

21. *See id.* at 183, 102 P.3d at 812 (Sanders, J., dissenting).

22. *See In re Estate of Lint*, 135 Wash. 2d 518, 533, 957 P.2d 755, 763 (1998); *In re Estate of Mumby*, 97 Wash. App. 385, 391, 982 P.2d 1219, 1223 (1999); *In re Estate of Kessler*, 95 Wash. App. 358, 375–76, 977 P.2d 591, 602 (1999).

23. *See In re Estate of Mecello*, 633 N.W.2d 892, 899 (Neb. 2001); *In re Will of McCauley*, 565 S.E.2d 88, 95 (N.C. 2002).

evidentiary obstacle to the admission of lost wills.

## I. THE LOST WILL STATUTE DICTATES THE EVIDENTIARY BURDEN FOR ADMITTING A LOST WILL TO PROBATE

Washington's first lost will statute appears in the territorial laws of 1860.<sup>24</sup> Throughout the 1900s, the Washington State Supreme Court developed a body of common law related to the lost will statute.<sup>25</sup> The court determined that valid execution of a lost will must be shown by a preponderance of the evidence.<sup>26</sup> However, the statutory requirement calling for proof of the existence of a lost will at the time of the testator's death barred the admission of many lost wills.<sup>27</sup> Although it still contains remnants of the original, the lost will statute underwent a major revision in 1994 in order to make it easier for parties wishing to probate lost wills.<sup>28</sup>

### A. *The Prior Lost Will Statute Contained Three Evidentiary Requirements for Admitting a Lost Will to Probate*

In Washington, the statutory requirements to execute a will are minimal.<sup>29</sup> A will is validly executed if it is "(1) in writing, (2) signed by the testator, and (3) attested by two or more competent witnesses, by subscribing their names to the will, or by signing an affidavit that

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24. Act of Jan. 27, 1860 ch. 1, § 70, 1860 Wash. Terr. Laws (current version at WASH. REV. CODE § 11.20.070 (2004)).

25. See, e.g., *In re Estate of Nelson*, 85 Wash. 2d 602, 605, 537 P.2d 765, 768 (1975) (allowing probate of lost will because circumstances surrounding decedent's death showed that will had been stolen); *In re Gardner's Estate*, 69 Wash. 2d 229, 235, 417 P.2d 948, 952 (1966) (admitting lost will to probate where only one attesting witness could recall witnessing will); *In re Neubert's Estate*, 59 Wash. 2d 678, 685, 369 P.2d 838, 843 (1962) (allowing proof of office practices to prove valid execution of lost will); *In re Peters' Estate*, 43 Wash. 2d 846, 860, 264 P.2d 1109, 1117 (1953) (stating that proof of execution of lost will may only be shown by preponderance of evidence); *In re Borrow*, 123 Wash. 128, 130, 212 P. 149, 150 (1923) (finding that proof of execution of lost will must be shown by clear and convincing evidence).

26. See *Peters*, 43 Wash. 2d at 860, 264 P.2d at 1117 (finding that clear and distinct proof referred to in lost will statute only referred to provisions of instrument and not execution).

27. *Neubert*, 59 Wash. 2d at 687, 369 P.2d at 843-44; See *In re Kerckhof's Estate*, 13 Wash. 2d 469, 482, 125 P.2d 284, 290 (1942).

28. See Act of April 1, 1994, ch. 221, § 20, 1994 Wash. Sess. Laws 1149 (removing requirement of proof that lost will existed at time of testator's death).

29. *In re Estate of Black*, 153 Wash. 2d 152, 180, 102 P.3d 796, 811 (2004) (Sanders, J., dissenting).

complies with RCW 11.20.020(2).”<sup>30</sup> Satisfying these requirements serves as prima facie evidence to admit a will.<sup>31</sup> However, the question arises of how to prove these three elements in order to probate a will that has been lost or destroyed. Washington’s lost will statute was adopted to address this issue.<sup>32</sup>

The original lost will statute of 1860 contained three basic requirements to prove the existence of a lost will.<sup>33</sup> First, proof of execution and validity of the will had to be in writing and signed by the witnesses.<sup>34</sup> Second, the will’s provisions had to be proved “clearly and distinctly” by at least two credible witnesses.<sup>35</sup> And finally, the will had to be shown to have either been in existence at the time of the testator’s death or fraudulently destroyed.<sup>36</sup>

*B. Courts Interpreting the Original Lost Will Statute Demonstrated that the Execution of a Lost Will May Be Shown by a Preponderance of the Evidence*

Early decisions interpreting the original lost will statute evoked the statute’s common law roots to determine the proper evidentiary standard for establishing valid execution.<sup>37</sup> The case law dates back to 1895 with *Harris v. Harris*,<sup>38</sup> where the court stated that evidence to prove execution of a lost will must be “cogent and satisfactory.”<sup>39</sup> Eight years later, in *In re Borrow*,<sup>40</sup> the court went further, specifying that the evidence of a lost will’s execution must be “clear and convincing.”<sup>41</sup> The *Borrow* court cited *Clark v. Turner*,<sup>42</sup> an 1897 Nebraska Supreme Court

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30. WASH. REV. CODE § 11.20.070 (2004).

31. *Black*, 153 Wash. 2d at 181, 102 P.3d at 811 (Sanders, J., dissenting).

32. *Id.* at 164, 102 P.3d at 802 (majority opinion).

33. Act of Jan. 27, 1860, ch. 1, § 70, 1860 Wash. Terr. Laws (current version at WASH. REV. CODE § 11.20.070).

34. *See id.*

35. *Id.*

36. *Id.*

37. *See In re Borrow*, 123 Wash. 128, 130, 212 P. 149, 150 (1923); *Harris v. Harris*, 10 Wash. 555, 561, 39 P. 148, 151 (1895).

38. 10 Wash. 555, 39 P. 148 (1895).

39. *Id.* at 559, 39 P. at 150.

40. 123 Wash. 128, 212 P. 149 (1923).

41. *Id.* at 130, 212 P. at 150.

42. 69 N.W. 843 (Neb. 1897).

opinion, as the relevant authority on lost will evidentiary questions.<sup>43</sup> The Nebraska court compared the policies underlying the evidentiary burdens set forth in lost wills statutes with the policies underlying the statute of frauds, explaining how both statutes mandate strict evidentiary requirements to meet the clear and convincing burden.<sup>44</sup> The *Clark* court explained that the lost wills statute, like the statute of frauds, mandates the use of direct rather than circumstantial evidence.<sup>45</sup> Anything less would frustrate the legislative intent behind the statutes.<sup>46</sup>

In 1953, the Washington State Supreme Court, interpreting the original lost will statute, stated that “preponderance of the evidence” was the proper standard for proving execution, while the “clear and cogent” standard only applied to proof of the lost will’s provisions.<sup>47</sup> Following this decision, several courts found that testifying witnesses need not have “personal knowledge” of a lost will’s execution to be capable of satisfying the “preponderance” burden.<sup>48</sup> For instance, in *In re Neubert’s Estate*,<sup>49</sup> the court found a secretary’s testimony sufficient to prove a lost will’s proper execution,<sup>50</sup> even though the secretary had no personal knowledge of the will-signing.<sup>51</sup> Instead, the secretary testified to her firm’s office practices for recording executed wills.<sup>52</sup> Likewise, in *In re Gardner’s Estate*,<sup>53</sup> the court found proper execution where only one witness could recall executing the will.<sup>54</sup> The other witness could not definitively recall signing the will, but testified to having signed a variety of documents for the testatrix over the years.<sup>55</sup> The court found sufficient evidence to show proper execution by a preponderance of the

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43. *Borrow*, 123 Wash. at 130, 212 P. at 150 (citing *Clark*, 69 N.W. at 846) (noting *Clark* court’s discussion of how policies underlying evidentiary rules relating to statute of frauds should be applied in lost will cases to prevent submission of false wills).

44. *Clark*, 69 N.W. at 846.

45. *Id.*

46. *Id.*

47. *In re Peters’ Estate*, 43 Wash. 2d 846, 860–61, 264 P.2d 1109, 1117 (1953).

48. See *In re Gardner’s Estate*, 69 Wash. 2d 229, 235, 417 P.2d 948, 952 (1966); *In re Neubert’s Estate*, 59 Wash. 2d 678, 685, 369 P.2d 838, 843 (1962).

49. 59 Wash. 2d 678, 369 P.2d 838 (1962).

50. See *id.* at 685, 369 P.2d at 843.

51. *Id.* at 683, 369 P.2d at 841.

52. *Id.*

53. 69 Wash. 2d 229, 417 P.2d 948 (1966).

54. *Id.* at 236, 417 P.2d at 952.

55. See *id.*

evidence despite the lack of definitive testimony.<sup>56</sup>

*C. The Washington Legislature Modified the Original Lost Wills Statute to Make it Easier for Proponents of Lost Wills*

The decisions interpreting Washington's lost will statute demonstrate that the third requirement—proof of the will's existence at the time of the testator's death—proved to be a near bar to those attempting to probate a lost will.<sup>57</sup> Failure to show the actual physical existence of the will at the time of the testator's death raised the presumption that the testator destroyed the will with the intention of revoking it.<sup>58</sup> As a result, without clear and distinct evidence of a lost will's existence and location at the time of death, the will could not be probated.<sup>59</sup> Given that most lost wills went missing during the testator's lifetime, evidence of the will's existence at the time of death proved very difficult to establish.<sup>60</sup>

In 1994, the legislature attempted to make the statute more accessible by removing the third requirement—proof of existence of the will at the time of death.<sup>61</sup> The resulting statute contains two basic requirements for admitting a lost or destroyed will.<sup>62</sup> First, "any" witnesses who have testified to the execution and validity of the will must put their testimony in writing.<sup>63</sup> Second, the provisions of a lost or destroyed will must be

56. *See id.*

57. *See In re Kerckhof's Estate*, 13 Wash. 2d 469, 476–77, 125 P.2d 284, 287 (1942); *Neubert*, 59 Wash. 2d at 687, 369 P.2d at 843–44.

58. *See Kerckhof*, 13 Wash. 2d at 477, 125 P.2d at 287.

59. *Id.* at 482, 125 P.2d at 290.

60. *See* REUTLINGER & OLTMAN, *supra* note 3, at 20.

61. *See id.*

62. *See* WASH. REV. CODE § 11.20.070 (2004). Proof of a lost or destroyed will requires a showing of the following:

(1) If a will has been lost or destroyed under circumstances such that the loss or destruction does not have the effect of revoking the will, the court may take proof of the execution and validity of the will and establish it, notice to all persons interested having been first given. The proof must be reduced to writing and signed by any witnesses who have testified as to the execution and validity, and must be filed with the clerk of the court.

(2) The provisions of a lost or destroyed will must be proved by clear, cogent, and convincing evidence, consisting at least in part of a witness to either its contents or the authenticity of a copy of the will.

(3) When a lost or destroyed will is established under subsections (1) and (2) of this section, its provisions must be distinctly stated in the judgment establishing it, and the judgment must be recorded as wills are required to be recorded. A personal representative may be appointed by the court in the same manner as is herein provided with reference to original wills presented to the court for probate.

*Id.*

63. *Id.* § 11.20.070(1).



proved by clear, cogent, and convincing evidence consisting of at least "a" witness to either its contents or the authenticity of a copy of the will.<sup>64</sup>

In sum, the lost will statute has long governed the proof necessary to admit a lost will in Washington. Under the original statute, proof of execution had to be shown by a preponderance of the evidence. In practice, the requirement to prove a lost will's existence at the time of the testator's death acted as a near bar to the admission of lost wills. In 1994, the Washington State Legislature attempted to facilitate admission of lost wills by removing evidentiary obstacles, including proof of existence at the time of death.

## II. THE *BLACK* COURT CLARIFIED THE EVIDENTIARY STANDARD FOR PROVING EXECUTION OF A LOST WILL

In 2004, the Washington State Supreme Court visited the revised lost wills statute for the first time, announcing that proper execution of a lost will must be shown by "clear, cogent, and convincing" evidence.<sup>65</sup> In *Black*, the court examined evidence surrounding the alleged execution of Margaret Black's lost will.<sup>66</sup> The court found the evidence failed to prove valid execution by clear, cogent, and convincing evidence.<sup>67</sup> Two Justices dissented, arguing that the court's failure to admit the lost will created a "two witness requirement" to meet the new standard.<sup>68</sup>

### A. *The Black Court Considered the Alleged Execution of Margaret Black's Lost Will*

The *Black* case involved a lost will allegedly executed by Margaret Black in August 1993.<sup>69</sup> Upon Margaret's death in October 2000, neither the original will nor an executed copy could be found.<sup>70</sup> The beneficiary of the lost will, Margaret's daughter, Myrna Black, petitioned to have an unsigned copy of the will admitted to probate under the lost will

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64. *Id.* § 11.20.070(2).

65. *In re Estate of Black*, 153 Wash. 2d 152, 161–63, 102 P.3d 796, 801–02 (2004) (explaining that since court's last ruling on lost will statute, legislature has amended statute and revised requirements).

66. *See id.* at 156–57, 102 P.3d at 799.

67. *Id.* at 174, 102 P.3d at 808.

68. *Id.* at 175, 102 P.3d at 808 (Sanders, J., dissenting).

69. *See id.* at 157, 102 P.3d at 799 (majority opinion).

70. *See id.* at 159, 102 P.3d at 800.

statute.<sup>71</sup> Beneficiaries of another will, executed by Margaret in 1992, objected to Myrna's petition on the grounds that Myrna failed to prove proper execution of the 1993 will.<sup>72</sup> The trial court admitted the lost will to probate, finding as a matter of law that Myrna met the requirements of the lost will statute.<sup>73</sup> The Washington State Court of Appeals reversed the order to admit the will and remanded the case.<sup>74</sup> The Washington State Supreme Court affirmed, holding that the circumstantial evidence surrounding the identity of the second attesting witness to the alleged lost will failed to meet the "clear, cogent, and convincing" standard provided in the revised lost will statute.<sup>75</sup>

*B. The Evidence Presented by Myrna Black Was Insufficient to Prove Valid Execution of the Lost Will by Clear, Cogent, and Convincing Evidence*

The *Black* court held that Myrna failed to show proper execution of the 1993 will by clear, cogent, and convincing evidence.<sup>76</sup> In order to prove execution, the court considered affidavits from three witnesses.<sup>77</sup> The first, Paul Blauert, served as the attorney who prepared the will.<sup>78</sup> Blauert testified that he prepared the 1993 will at Myrna's request, and that the provisions in the unsigned copy of the will attached to his affidavit matched those he gave to Myrna in August 1993.<sup>79</sup> Blauert stated he was not present at the will-signing, but that when Myrna returned the will to him after the signing, he noticed that Margaret had executed the will on August 14, 1993, and that it was signed by two attesting witnesses.<sup>80</sup> Blauert could not recall the names of the attesting witnesses.<sup>81</sup> After Margaret's death, Blauert could not find the will.<sup>82</sup> He

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71. See *id.* at 157, 102 P.3d at 799.

72. *Id.* at 159, 102 P.3d at 800.

73. *Id.* at 157, 102 P.3d at 799.

74. *Id.*

75. *Id.* at 174, 102 P.3d at 808.

76. *Id.*

77. *Id.* at 158, 102 P.3d at 799.

78. See *id.* While the court discussed Robert Reiter's affidavit first and last, this Comment considers it last.

79. See *id.* at 158–59, 102 P.3d at 800.

80. See *id.* at 159, 102 P.3d at 800.

81. See *id.* at 167, 102 P.3d at 804.

82. See *id.* at 159, 102 P.3d at 800.

therefore provided an electronic copy of the will to Myrna.<sup>83</sup>

Taylor, the notary public, served as the second witness.<sup>84</sup> Taylor could neither recall witnessing the will nor meeting Myrna or the others involved in the alleged execution.<sup>85</sup> However, Taylor did notarize a power of attorney document for Margaret on August 14, 1993, the same day Margaret allegedly executed the lost will.<sup>86</sup> Taylor testified that she must have “personally witnessed” Margaret sign the power of attorney document, because she only notarized documents in the presence of the signing party.<sup>87</sup> Taylor, therefore, speculated that she may have also witnessed a will for Margaret that same day, but she could not recall the event.<sup>88</sup>

The third witness, Robert Reiter, an attorney and friend of the beneficiary, testified that he accompanied Myrna on her trip from California to Washington to visit Margaret in August 1993.<sup>89</sup> Reiter testified that he and Myrna received the unexecuted will from Blauert in Seattle before driving to Margaret’s home in Walla Walla, Washington.<sup>90</sup> Reiter stated that on August 14, 1993, he read the will to Margaret and verified its provisions with her.<sup>91</sup> He then witnessed her initial each page and sign the will in his presence and in the presence of a notary public.<sup>92</sup> He could not recall the name of the notary public who served as the second attesting witness, but relied on the power of attorney document notarized by Taylor on the same day to infer that Taylor served as the second attesting witness.<sup>93</sup>

In considering the witness testimony, the court first clarified the use of witness testimony to prove proper execution of a lost will: “Absent a signed attestation clause, execution may also be proved if witnesses testify they signed the document in the presence of the testator and testify to facts showing attestation as a matter of law.”<sup>94</sup> The court

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83. *See id.*

84. *See id.*

85. *See id.*

86. *See id.*

87. *See id.*

88. *See id.* at 183, 102 P.3d at 812 (Sanders, J., dissenting).

89. *See id.* at 158, 102 P.3d at 799 (majority opinion).

90. *See id.*

91. *See id.*

92. *See id.*

93. *See id.*

94. *Id.* at 166, 102 P.3d at 803.

explained that under the lost will statute a witness is “one who has personal knowledge of the fact that the will was signed by the testator.”<sup>95</sup> Citing the Federal Rules of Evidence, the court further specified that a witness may only testify to “events within his or her personal knowledge.”<sup>96</sup>

Using this carefully crafted definition of “witness,” the court concluded that the evidence of valid execution was insufficient to satisfy the clear, cogent, and convincing standard.<sup>97</sup> First, the court determined that Blauert’s testimony was insufficient because he neither witnessed the execution nor recalled the names of the attesting witnesses.<sup>98</sup> Next, because Taylor lacked any personal knowledge of the will-signing, the court determined Taylor’s testimony to be inadequate to show she served as the second attesting witness.<sup>99</sup> Finally, while the court found Reiter’s testimony sufficient to prove that he acted as the first attesting witness, his testimony could not prove the presence of a second witness by clear, cogent, and convincing evidence because he failed to recall the identity of the second witness.<sup>100</sup> The court found Reiter’s testimony insufficient to prove that Taylor acted as the second witness because Reiter relied on circumstantial evidence.<sup>101</sup> The court determined that just because Taylor notarized a power of attorney document on the same day the lost will was allegedly executed did not mean Taylor witnessed the will.<sup>102</sup>

C. *The Dissent Interpreted Black as Creating a “Two Witness Requirement” to Prove the Execution of a Lost Will*

Dissenting in *Black*, Justice Sanders, joined by Justice Tom Chambers, argued that the court erred in finding that proper execution was not proved as a matter of law.<sup>103</sup> The dissent asserted that the majority’s failure to probate the lost 1993 will conflicted with prior case law by creating a “two witness requirement.”<sup>104</sup> Citing both *Neubert* and

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95. *Id.* (citations omitted).

96. *Id.* at 166, 102 P.3d at 804.

97. *Id.* at 167 n.9, 102 P.3d at 804 n.9.

98. *See id.*

99. *See id.* at 168, 102 P.3d at 805.

100. *See id.* at 167, 102 P.3d at 804.

101. *See id.* at 167, 102 P.3d at 805.

102. *See id.*

103. *Id.* at 175, 102 P.3d at 808 (Sanders, J., dissenting).

104. *See id.* at 183, 102 P.3d at 812.

*Gardner*, Justice Sanders pointed out, “we have not once, but twice held execution of a lost will was sufficiently proved by *less than two witnesses* affirmatively testifying to the execution of the will.”<sup>105</sup> In *Neubert*, the court found proper execution, although “*not one* attesting witness testified to the actual execution of the lost will.”<sup>106</sup> In *Gardner*, the court found sufficient evidence of proper execution of a lost will where only one witness could recall with any certainty attesting to the lost will.<sup>107</sup> Justice Sanders stated that “the majority discount[ed] these authorities claiming ‘only one attesting witness testified.’”<sup>108</sup> The dissent found that the majority’s “attempted distinction based on ‘one’ witness’s testimony” ignored precedent by requiring that *two* witnesses affirmatively testify to the execution of the lost will.<sup>109</sup> The dissent concluded that taken together, the evidence in *Black* led to but one conclusion: Taylor served as the second attesting witness.<sup>110</sup>

In sum, the majority adopted a new standard to require that the execution of a lost will must be shown by clear, cogent, and convincing evidence. The facts in *Black* suggest that Margaret properly executed a lost will in 1993; however, the court found that the evidence presented failed to establish proper execution by clear, cogent, and convincing evidence. The dissent in *Black* not only disagreed with the outcome of the case, but also raised concerns that the majority disregarded prior Washington probate law by creating a “two witness requirement” under the clear, cogent, and convincing burden.

### III. THE NEW BURDEN RESEMBLES STANDARDS USED IN OTHER CONTEXTS AND JURISDICTIONS

By adopting the clear, cogent, and convincing standard, the *Black* court aligned proof of a lost will’s execution with the evidentiary standards set forth in other Washington probate contexts, as well as those used in other jurisdictions.<sup>111</sup> First, Washington requires that the

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105. See *id.* (emphasis added) (citing *In re Neubert’s Estate*, 59 Wash. 2d 678, 685, 369 P.2d 838, 843 (1962)); *In re Gardner’s Estate*, 69 Wash. 2d 229, 235, 417 P.2d 948, 952 (1966)).

106. See *Black*, 153 Wash. 2d at 183, 102 P.3d at 812 (Sanders, J., dissenting) (emphasis in original) (citations omitted).

107. See *Gardner*, 69 Wash. at 236, 417 P.2d at 952.

108. *Black*, 153 Wash. 2d at 183, 102 P.3d at 812 (Sanders, J., dissenting).

109. See *id.* (emphasis added).

110. See *id.* at 184–85, 102 P.3d at 813.

111. See *infra* Part IV.C.

elements of fraudulent inducement of a will be shown by clear, cogent, and convincing evidence.<sup>112</sup> Second, several other states require that the proof of valid execution of a lost will be shown by clear and convincing evidence.<sup>113</sup>

*A. Washington Courts Employ the Clear, Cogent, and Convincing Standard in Other Probate Contexts, Including Fraud*

The Washington Probate Code applies the clear, cogent, and convincing standard in several types of will contests.<sup>114</sup> Will contestants must show undue influence,<sup>115</sup> lack of testamentary capacity,<sup>116</sup> and fraudulent inducement<sup>117</sup> by clear, cogent, and convincing evidence to successfully challenge a will. Findings of undue influence and lack of capacity turn on the testator's state of mind,<sup>118</sup> requiring courts to look into circumstantial evidence<sup>119</sup> or expert testimony.<sup>120</sup> In contrast, fraudulent inducement requires a showing of nine elements<sup>121</sup> to prove that the testator was deceived when executing a will.<sup>122</sup> Among these

112. *In re Estate of Lint*, 135 Wash. 2d 518, 533, 957 P.2d 755, 763 (1998).

113. See *In re Estate of Mecello*, 633 N.W.2d 892, 899 (Neb. 2001); *In re Will of McCauley*, 565 S.E.2d 88, 95 (N.C. 2002).

114. See WASH. REV. CODE § 11.12.091 (2004) (setting forth elements necessary to prove intentional omission of minor child from will); *id.* § 11.12.095 (setting forth elements necessary to prove intentional omission of surviving spouse from will); *id.* § 11.20.070 (setting forth elements necessary to prove provisions of lost will).

115. *Lint*, 135 Wash. 2d at 535, 957 P.2d at 764.

116. See *In re Peters' Estate*, 43 Wash. 2d 846, 861, 264 P.2d 1109, 1117 (1953).

117. *Lint*, 135 Wash. 2d at 533, 957 P.2d at 763.

118. See *Peters*, 43 Wash. 2d at 861, 264 P.2d at 1117; *Lint*, 135 Wash. 2d at 535, 957 P.2d at 764; *In re Dand's Estate*, 41 Wash. 2d 158, 164, 247 P.2d 1016, 1020 (1952).

119. See *Lint*, 135 Wash. 2d at 535, 957 P.2d at 764; *Dand*, 41 Wash. 2d at 163, 247 P.2d at 1020. Proof of undue influence by clear, cogent, and convincing evidence requires courts to view the circumstances and conditions surrounding the execution of a will to show that the testator's mind was "coerced." See *Lint*, 135 Wash. 2d at 535, 957 P.2d at 764; *Dand*, 41 Wash. 2d at 163, 247 P.2d at 1020.

120. See *Peters*, 43 Wash. 2d at 862, 264 P.2d at 1118. Showing lack of testamentary capacity also differs from proof of execution because it requires expert medical testimony to demonstrate by clear, cogent, and convincing evidence that the testator lacked the requisite capacity. See *id.*

121. See *Lint*, 135 Wash. 2d at 535 n.4, 957 P.2d at 763 n.4. The elements of fraud are:

(1) representation of an existing fact; (2) materiality of the representation; (3) falsity of the representation; (4) knowledge of the falsity or reckless disregard as to its truth; (5) intent to induce reliance on the representation; (6) ignorance of the falsity; (7) reliance on the truth of the representation; (8) justifiable reliance; and (9) damages.

See *id.* (citing *Farrell v. Score*, 67 Wash. 2d 957, 958–59, 411 P.2d 146, 148 (1966)).

122. See *Dand*, 41 Wash. 2d at 164, 247 P.2d at 1020.

nine elements, a party must show that a person benefiting from the contested will made a false representation to the testator.<sup>123</sup> Washington courts require direct rather than circumstantial evidence that this false representation took place.<sup>124</sup>

In *In re Estate of Lint*,<sup>125</sup> the court articulated the application of the clear, cogent, and convincing standard to prove fraudulent representation.<sup>126</sup> *Lint* involved a will contest in which opponents of a will claimed the beneficiary, Christian Lint, fraudulently procured the will of Estelle Lint.<sup>127</sup> Christian, a man eighteen years younger than Estelle, courted Estelle in the years before her death.<sup>128</sup> The trial court found that the opponents of the will presented clear, cogent, and convincing evidence of the elements of fraud because Christian falsely represented to Estelle that he loved her.<sup>129</sup> Christian appealed on the grounds that "a person's statements of love for another cannot be held to be a fraudulent misrepresentation because such a determination requires the trial court to plumb human emotions and make judgments about feelings that are entirely subjective."<sup>130</sup> Despite acknowledging the trial court's findings that the facts taken together supported fraudulent representation, the Washington State Supreme Court stated that the clear, cogent, and convincing burden requires more than merely circumstantial evidence.<sup>131</sup> Thus, even the fact that Christian was seeing other women at the time he professed his love to Estelle could not sufficiently prove that his "expressions of love for Estelle were less than sincere."<sup>132</sup> The court stated that opponents of the will must present direct evidence to prove false representation by clear, cogent, and convincing evidence.<sup>133</sup> For instance, false representation may have been

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123. *Id.* at 163, 247 P.2d at 1020.

124. *See Lint*, 135 Wash. 2d at 534, 957 P.2d at 763; *In re Estate of Mumby*, 97 Wash. App. 385, 392-93, 982 P.2d 1219, 1224 (1999); *In re Estate of Kessler*, 95 Wash. App. 358, 375-76, 977 P.2d 591, 602 (1999).

125. 135 Wash. 2d 518, 957 P.2d 755 (1998).

126. *See id.* at 533, 957 P.2d at 763.

127. *Id.* at 521, 957 P.2d at 757.

128. *Id.* at 522, 957 P.2d at 757.

129. *See id.* at 533, 957 P.2d at 763.

130. *Id.* at 534, 957 P.2d at 763.

131. *See id.* (explaining that although facts seemed to indicate that Christian was not sincere in expressing his love, the clear, cogent, and convincing standard requires direct evidence of misrepresentation).

132. *Id.*

133. *See id.*

shown if a witness had overheard Christian admit that he lied to Estelle about his feelings toward her.<sup>134</sup> The court explained that only such direct evidence “might well withstand a challenge that it was not supported by sufficient quantum of evidence.”<sup>135</sup>

Similarly, in *In re Estate of Kessler*,<sup>136</sup> the court applied the clear, cogent, and convincing standard in the fraudulent inducement context.<sup>137</sup> In *Kessler*, Frances and Thomas Trimm, opponents of Lavina Kessler’s will, claimed that the beneficiary, Tami Davis, fraudulently induced Kessler to write a new will.<sup>138</sup> The Trimmes claimed that Davis told Kessler that the Trimmes were mishandling her money.<sup>139</sup> According to the testimony of Kessler’s guardian ad litem, Kessler believed that the Trimmes were not honest people.<sup>140</sup> Furthermore, Kessler told her guardian that she had this belief because Davis had told her so.<sup>141</sup> Acknowledging that such testimony supported the inference of fraudulent inducement, the court found that the testimony failed to clearly, cogently, and convincingly prove false representation by the beneficiary.<sup>142</sup> The court inferred that in order to show false representation, the Trimmes needed to come forward with a witness who overheard Davis tell Kessler that the Trimmes were not honest people.<sup>143</sup> Given Kessler’s vulnerable mental state at the time, the court determined that the evidence presented could not definitively establish that Davis ever made such a statement to Kessler.<sup>144</sup>

The court again applied the clear, cogent, and convincing standard in *In re Estate of Mumby*<sup>145</sup> to find that a living trust was not the product of fraud.<sup>146</sup> *Mumby* involved a living trust and a pour-over will that Darlene

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134. *See id.*

135. *Id.*

136. 95 Wash. App. 358, 977 P.2d 591 (1999).

137. *Id.* at 374, 977 P.2d at 601.

138. *See id.* at 374–75, 977 P.2d at 601.

139. *See id.*

140. *See id.* at 375, 977 P.2d at 601–02.

141. *See id.* at 375, 977 P.2d at 601.

142. *See id.* at 375–76, 977 P.2d at 602.

143. *See id.*

144. *See id.* at 376, 977 P. 2d at 602 (explaining that testatrix was found to be suffering from dementia, and thus her claim that Davis had told her about Trimmes could not be considered factual by court).

145. 97 Wash. App. 385, 982 P.2d 1219 (1999).

146. *Id.* at 387, 982 P.2d at 1221.



Wood, the daughter of the testator, Samuel Wood, claimed had been procured by fraud.<sup>147</sup> Darlene contended that James Caldwell, the beneficiary of the trust, made false representations to Samuel.<sup>148</sup> Darlene believed that Caldwell told Samuel that Darlene intended to clear-cut Samuel's 38-acre parcel of land.<sup>149</sup> Despite testimony from one witness stating that Samuel attributed his belief to comments made by Caldwell that Darlene would log his land, the court found the evidence insufficient to show fraudulent inducement by clear, cogent, and convincing evidence.<sup>150</sup>

*B. Other Jurisdictions Apply a Clear and Convincing Standard in the Execution of a Lost Will*

Many jurisdictions in the United States impose some form of the clear and convincing standard to prove proper execution of a lost will.<sup>151</sup> The state supreme courts of Nebraska and North Carolina recently applied the clear and convincing standard in lost will cases.<sup>152</sup> In *In re Will of McCauley*,<sup>153</sup> the Supreme Court of North Carolina found witness testimony insufficient to prove execution by clear, strong, and convincing proof.<sup>154</sup> The witness, a secretary at a law firm, oversaw the will-signing but did not sign the will as an attesting witness.<sup>155</sup> The secretary recalled the name of one attesting witness but could not remember the identity of the second attesting witness.<sup>156</sup> In finding the witness's testimony insufficient, the North Carolina court was careful to stipulate that it was not creating a "two witness requirement."<sup>157</sup> The court explained the distinction between the two witnesses required for

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147. *Id.* at 388, 982 P.2d at 1221–22.

148. *See id.* at 392, 982 P.2d 1224.

149. *See id.*

150. *See id.*

151. At least fifteen states use a clear and convincing standard, including Arkansas, Georgia, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, New Jersey, Ohio, Oregon, Pennsylvania, Tennessee, and Washington. R.D. Hursh, Annotation, *Proof of Due Execution of Lost Will*, 41 A.L.R. 2d 393, § 4 (Supp. 2005).

152. *See In re Estate of Mecello*, 633 N.W.2d 892, 899 (Neb. 2001); *In re Will of McCauley*, 565 S.E.2d 88, 95 (N.C. 2002).

153. 565 S.E.2d 88 (N.C. 2002).

154. *See id.* at 95.

155. *Id.* at 90.

156. *Id.*

157. *Id.* at 92.

properly executing a will and the requirements for proving that a lost will was duly executed.<sup>158</sup> The court stated that “[w]hile only one attesting witness to a will would not be sufficient for valid execution, one witness’ testimony that the will was attested by two witnesses may be sufficient to show that the will was duly executed.”<sup>159</sup> Thus, the North Carolina court refused to admit the lost will, not because only one witness testified to the execution, but because the evidence presented by that witness was insufficient to show valid execution.<sup>160</sup>

Similarly, in *In re Estate of Mecello*,<sup>161</sup> the Supreme Court of Nebraska found that proof of execution may be shown by secondary evidence that is direct, clear, and convincing.<sup>162</sup> In addition to testifying to his own attestation of the will, the only testifying witness could recall the name and presence of the notary who notarized the will but not the name of the second attesting witness.<sup>163</sup> The court found this testimony sufficient to meet the direct, clear, and convincing standard, in part because it was unclear whether the notary could have also served as a second attesting witness, meeting Nebraska’s will execution requirements.<sup>164</sup>

In sum, by applying the clear, cogent, and convincing standard of proof to a lost will’s execution in *Black*, the court adopted an evidentiary standard familiar to Washington probate law and similar to other states’ standards of proof for execution of a lost will. The application of the clear, cogent, and convincing standard is commonly used in Washington to prove the inducement of a will through fraud. Many other states employ some form of the clear and convincing burden in admitting lost wills. Two of these states have recently clarified their clear and convincing standards in circumstances similar to those in *Black*.

#### IV. TESTIMONY FROM ONLY ONE WITNESS MAY SATISFY THE CLEAR, COGENT, AND CONVINCING STANDARD

After *Black*, testimony from a single witness with sufficient personal knowledge can prove the valid execution of a lost will. Yet ambiguity in

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158. *Id.*

159. *Id.*

160. *See id.*

161. 633 N.W.2d 892 (Neb. 2001).

162. *Id.* at 900–01.

163. *Id.* at 896.

164. *See id.* at 900–01.

the *Black* court's dicta has led some to interpret the clear, cogent, and convincing standard as creating a "two witness requirement," demanding testimony from both attesting witnesses.<sup>165</sup> However, the *Black* court's evidentiary analysis reveals that the court adopted only a "one witness standard."<sup>166</sup> Although the evidence presented in *Black* did not satisfy the clear, cogent, and convincing standard, a single testifying witness with sufficient personal knowledge could prove valid execution of a lost will.<sup>167</sup> Those who interpret *Black* as creating a "two witness requirement"<sup>168</sup> conflate the distinction between the statutory requirements for validly executing a will, and the requirements for proving execution of a will that has been lost.<sup>169</sup> Moreover, reading *Black* to adopt a "one witness standard" is consistent with Washington case law interpreting the "clear and convincing" standard in other probate contexts, as well as lost will cases from other jurisdictions with similar standards.<sup>170</sup>

A. *The Black Court's Evidentiary Analysis Demonstrates That a Single Witness With Sufficient Personal Knowledge Would Have Proven the Valid Execution of the Lost Will*

The evidentiary analysis in *Black* indicates that the court adopted a "one witness standard."<sup>171</sup> The court rejected the combination of testimony from one attesting witness, Reiter, and strong circumstantial evidence from a second witness, Taylor.<sup>172</sup> Based upon this rejection, proponents of the "two witness requirement" conclude that the court

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165. See *In re Estate of Black*, 153 Wash. 2d 152, 183, 102 P.3d 796, 812 (2004) (Sanders, J., dissenting). This Comment assumes that because Justices Sanders and Chambers interpreted *Black* to require two witnesses, others will share this interpretation.

166. See *id.* at 167, 102 P.3d at 804 (majority opinion) (finding testimony of only one attesting witness insufficient to prove proper execution of lost will because he could not recall identity of second attesting witness).

167. See *id.*

168. See *id.* at 179, 102 P.3d at 810 (Sanders, J., dissenting) (arguing that because legislature changed lost will statute to require "any" witnesses to lost will to testify to lost will's execution in writing, statute requires every witness to testify).

169. Cf. *In re Will of McCauley*, 565 S.E.2d 88, 92 (N.C. 2002) (noting confusion between elements necessary for executing will and requirements for proving valid will once lost).

170. See *infra* Part IV.C.

171. See *Black*, 153 Wash. 2d at 167, 102 P.3d at 804 (analyzing testimony of one attesting witness to determine whether he possessed sufficient personal knowledge of second attesting witness to prove execution of lost will by clear, cogent, and convincing evidence).

172. See *id.* at 167, 102 P.3d at 804.

now requires testimony from two attesting witnesses to meet the clear, cogent, and convincing standard.<sup>173</sup> However, proponents of the “two witness requirement” ignore the court’s stipulation that witnesses in lost will cases may only testify to facts within their personal knowledge.<sup>174</sup> As a result, the majority did not reject the evidence because only one attesting witness testified, but rather because no single witness possessed sufficient personal knowledge to prove that all of the statutory requirements necessary for validly executing a will were met.<sup>175</sup>

1. *The Evidentiary Deficiency in Black Was The Witnesses’ Lack of Personal Knowledge, Not the Insufficient Number of Witnesses*

The *Black* court’s evidentiary analysis reveals that rather than requiring two witnesses, the court attempted to find a single witness with sufficient personal knowledge to prove the lost will’s execution.<sup>176</sup> The court examined the testimony of three witnesses.<sup>177</sup> The first, Blauert, the drafting attorney, had no personal knowledge of the execution because he was not present at the will-signing.<sup>178</sup> In addition, his testimony could not corroborate any other testimony because he could not independently recall the names of the attesting witnesses appearing on the will.<sup>179</sup>

After rejecting the testimony of the first of three witnesses, the court dismissed the testimony of the second witness.<sup>180</sup> Although more informative than Blauert’s testimony, the court found testimony from Taylor insufficient because she lacked personal knowledge of the will-signing event.<sup>181</sup> Taylor, the notary public and alleged second attesting witness, testified that she could remember neither executing a will for Margaret nor meeting either Myrna or Reiter.<sup>182</sup> Therefore, Taylor could

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173. See *Black*, 153 Wash. 2d at 183, 102 P.3d at 812 (Sanders, J. dissenting) (arguing that court has on several occasion used testimony of fewer than two attesting witnesses to prove valid execution of lost will).

174. *Id.* at 166, 102 P.3d at 804.

175. See *id.* at 166–67, 102 P.3d at 804 (finding Reiter’s testimony insufficient to prove presence of two attesting witnesses).

176. See *id.*

177. See *id.* at 158–59, 102 P.3d at 799–800.

178. See *id.* at 158–59, 102 P.3d at 800.

179. See *id.* at 167, 102 P.3d at 804.

180. See *id.*

181. See *id.*

182. *Id.* at 159, 102 P.3d at 800.

only speculate that she witnessed Margaret's will based on circumstantial evidence.<sup>183</sup> Although Taylor may have been the second attesting witness, she was not an adequate evidentiary witness for purposes of the clear, cogent, and convincing standard because she had no personal knowledge of the execution.<sup>184</sup> The court, however, did not go so far as to claim that Taylor's testimony demonstrating her own independent recollection of the will-signing could serve as the only other possible evidence sufficient to meet the clear, cogent, and convincing standard.<sup>185</sup> If the court truly was applying a "two witness requirement," the inquiry would have stopped after the court's rejection of both Blauert's and Taylor's testimony.<sup>186</sup>

Instead, the court looked to the testimony of the third witness, Reiter, to determine whether his testimony, standing alone, could prove all of the elements of the will's execution.<sup>187</sup> The court found Reiter's testimony insufficient under the "clear, cogent, and convincing" standard because he lacked personal knowledge that each element of will execution had been met.<sup>188</sup> He had personal knowledge of the written will, Margaret's signature, and his presence as an attesting witness, but he lacked personal knowledge of the second attesting witness's identity.<sup>189</sup> Reiter could only speculate that Taylor served as the second witness based on circumstantial evidence.<sup>190</sup> Therefore, Reiter's testimony failed to establish the identity of the second attesting witness, a statutory requirement to the proper execution of a will.

The court utilized the "one witness standard," because if Reiter recalled the identity of the second attesting witness, his testimony alone

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183. *See id.* (noting that Taylor only notarized documents in presence of signer).

184. *See id.* at 167, 102 P.3d at 804.

185. *See id.* (stating that because neither Reiter nor Taylor could recall Taylor witnessing will, their testimony could not prove valid execution).

186. The court began its inquiry by determining that Reiter acted as the first attesting witness and ended its inquiry by concluding that Reiter could not sufficiently identify Taylor as the second attesting witness. *See id.* at 166–67, 102 P.3d at 803–04. For the sake of clarity, this Comment deals with these two discussions together.

187. *See id.* at 167, 102 P.3d at 804.

188. *See id.* (finding Reiter's testimony insufficient to prove two witnesses signed will in Margaret's presence because Reiter could not independently identify second attesting witness).

189. *See id.* at 166, 102 P.3d at 803–04.

190. *See id.* at 167, 102 P.3d at 804 (finding that Reiter believed Taylor to have been second attesting witness because she notarized power of attorney document for Margaret on same day lost will was allegedly executed).

would have proved the lost will's execution.<sup>191</sup> The court's evidentiary analysis reveals that rather than requiring testimony from two attesting witnesses, the court actually established a "one witness standard" in which at least one witness must have personal knowledge of all of the elements of the execution in order to meet the clear, cogent, and convincing standard. Thus, Myrna fell short of this standard not because she lacked a second witness to the execution, but because she could not produce even one witness with sufficient personal knowledge of the execution.<sup>192</sup>

*B. Proponents of the "Two Witness Requirement" Conflate the Distinction Between the Requirements for Valid Execution and the Proof of Execution Under the Lost Will Statute*

Reading the *Black* opinion to create a "two witness requirement" conflates the requirements of properly *executing* a will with those of *proving* proper execution of a lost will.<sup>193</sup> The requirements for executing a will under RCW 11.12.020 include the presence of "two" attesting witnesses.<sup>194</sup> The lost will statute, RCW 11.20.070, on the other hand, conditions probating a lost will on "proof of the execution and validity" that "must be reduced to writing and signed by any witnesses who have testified as to the execution and validity."<sup>195</sup> Therefore, the statutory requirements for proving proper execution of a lost will simply amount to providing and establishing proof of execution and requiring that *any* witnesses who testify to the execution do so in writing.<sup>196</sup> Because the majority found the testimony of one attesting witness in *Black* insufficient to prove execution of the lost will under RCW 11.20.070, the dissent concluded that the court utilized a "two witness requirement," requiring testimony from *both* attesting witnesses required by RCW 11.12.020.<sup>197</sup>

However, the majority in *Black* understood the distinction between the "two" attesting witnesses required by RCW 11.12.020, and the

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191. See *id.* (finding Reiter's testimony insufficient to prove existence of second attesting witness).

192. See *id.*

193. See *In re Will of McCauley*, 565 S.E.2d 88, 92 (N.C. 2002).

194. WASH. REV. CODE § 11.12.020(1) (2004).

195. *Id.* § 11.12.070(1).

196. See *id.* § 11.12.070(1).

197. See *Black*, 153 Wash. 2d at 179, 102 P.3d at 810 (Sanders, J. dissenting).

witness testimony required to prove valid execution of a lost will under RCW 11.20.070.<sup>198</sup> First, the court looked at RCW 11.12.020, stating that in order to prove that the will was executed Myrna must show that two attesting witnesses signed the lost will.<sup>199</sup> The court then turned to RCW 11.20.070 to explain how Myrna could prove the presence of two attesting witnesses under the lost will statute.<sup>200</sup> The court did not state that “two” attesting witnesses must testify that “two” witnesses signed the will.<sup>201</sup> Rather, dicta in *Black* suggests that proof of valid execution of a lost will may be shown by clear, cogent, and convincing evidence if a witness draws upon his or her personal knowledge to identify the two witnesses who signed the will.<sup>202</sup>

C. *Reading Black to Create a “One Witness Standard” Is Consistent With the Application of the Clear and Convincing Standard in Washington Fraud Cases and Lost Will Cases From Other States*

*Black* should be read to create a “one witness standard” because such an interpretation is consistent with the application of the clear, cogent, and convincing standard to prove fraudulent inducement of a will,<sup>203</sup> and in other jurisdictions with similar lost will standards.<sup>204</sup> In the progression of lost will jurisprudence, Washington courts have developed an analogy between the direct evidence required to prove fraud under the statute of frauds and the evidence required under the lost will statute.<sup>205</sup> In Washington, proving fraudulent inducement of a will by clear, cogent, and convincing evidence only requires the testimony of a single witness with sufficient personal knowledge, not the testimony of two witnesses.<sup>206</sup> Reading *Black* to create a “two witness requirement”

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198. See *id.* at 164–65, 102 P.3d at 803 (majority opinion).

199. See *id.*

200. *Id.*

201. See *id.* at 165, 102 P.3d at 803.

202. See *id.* at 167, 102 P.3d at 804 (finding Reiter’s testimony insufficient to prove valid execution of will because he failed to independently identify second attesting witness).

203. *In re Estate of Lint*, 135 Wash. 2d 518, 533, 957 P.2d 755, 763 (1998).

204. See *In re Estate of Mecello*, 633 N.W.2d 892, 900 (Neb. 2001); *In re Will of McCauley*, 565 S.E.2d 88, 95 (N.C. 2002).

205. See *In re Borrow*, 123 Wash. 2d 128, 130, 212 P. 149, 150 (1923) (noting *Clark* court’s discussion of how policies underlying evidentiary rules in statute of frauds should be applied in lost will cases to prevent submission of false wills (citing *Clark v. Turner*, 69 N.W. 843, 846 (1897))).

206. See *Lint*, 135 Wash. 2d at 534, 957 P.2d at 764; *In re Estate of Mumby*, 97 Wash. App. 385, 392–93, 982 P.2d 1219, 1224 (1999); *In re Estate of Kessler*, 95 Wash. App. 358, 375–76, 977 P.2d

for lost wills would be inconsistent with these fraud cases.<sup>207</sup> Additionally, the Washington State Supreme Court has a history of looking to other states' laws when applying evidentiary standards in the lost will context.<sup>208</sup> Courts in other jurisdictions only require testimony from a single witness with sufficient personal knowledge to prove execution of a lost will by clear and convincing evidence.<sup>209</sup> Reading *Black* to require a second witness would contradict the lost will jurisprudence from these other states.<sup>210</sup>

1. *The Application of the Clear and Convincing Standard in Fraudulent Inducement Cases Supports the "One Witness Standard"*

Fraudulent inducement cases are analogous to lost will cases and provide guidance in the application of the clear, cogent, and convincing standard.<sup>211</sup> In 1923 the Washington State Supreme Court cited a Nebraska Supreme Court case as the collation of authority on the evidentiary requirements for admitting lost wills to probate.<sup>212</sup> The Nebraska court explained that the fraud and lost will statutes were linked by common policy goals and should therefore be linked by common evidentiary standards.<sup>213</sup> As Washington's probate law developed, the analogy between fraudulent inducement and lost will execution remained. Washington courts require direct evidence to prove both the elements of fraudulent inducement of a will<sup>214</sup> and the elements of lost will execution by clear, cogent, and convincing evidence.<sup>215</sup> Unlike other

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591, 602 (1999).

207. See *Lint*, 135 Wash. 2d at 534, 957 P.2d at 764; *Mumby*, 97 Wash. App. at 391, 982 P.2d at 1223; *Kessler*, 95 Wash. App. at 375–76, 977 P.2d at 602.

208. See *Borrow*, 123 Wash. at 130, 212 P. at 150 (stating that authorities on evidentiary standards required for lost wills have been collated in *Clark*, 69 N.W. at 846).

209. See *Mecello*, 633 N.W.2d at 900 (admitting lost will where only one attesting witness could testify to will's execution); *McCauley*, 565 S.E.2d at 90 (finding testimony of single attesting witness sufficient to prove execution of lost will).

210. See *McCauley*, 565 S.E.2d at 90; *Mecello*, 633 N.W.2d at 900.

211. See *Clark*, 69 N.W. at 846.

212. See *Borrow*, 123 Wash. at 130, 212 P. at 150 (stating that *Clark* court collated authorities on evidentiary standards required in lost will cases (citing *Clark*, 69 N.W. at 846)).

213. See *Clark*, 69 N.W. at 846 (explaining that because policies underlying statute of wills are same as those underlying statute of frauds, statute of frauds' bar on parol evidence should be applied under statute of wills to bar submission of allegedly lost will).

214. See *In re Estate of Lint*, 135 Wash. 2d 518, 533, 957 P.2d 755, 763 (1998).

215. See *In re Estate of Black*, 153 Wash. 2d 152, 167, 102 P.3d 796, 804 (2004) (finding



will contest claims that require clear, cogent, and convincing evidence, proving the statutory elements of both lost will execution and fraudulent inducement turn on proving the occurrence of particular events, not the state of mind of the testator.<sup>216</sup> In the lost will context, proponents of the will must prove that the testator and two witnesses signed the will.<sup>217</sup> In the fraud context, will contestants must establish that a beneficiary of the contested will made a false representation to the testator.<sup>218</sup> Both claims require direct evidence meeting the clear, cogent, and convincing burden.<sup>219</sup>

Reading *Black* to adopt a “one witness standard” is consistent with the use of the clear, cogent, and convincing standard in will contest cases involving fraud. In these fraud cases, the courts only require testimony from a single witness, just as the *Black* court looked to the testimony of a single witness—Reiter.<sup>220</sup> In addition, like the *Black* court’s requirement that Reiter have sufficient personal knowledge of each element of execution,<sup>221</sup> the courts in the fraud cases require witnesses to have personal knowledge of each element of fraud.<sup>222</sup> Moreover, these courts uniformly reject circumstantial evidence,<sup>223</sup> much like the *Black*

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testimony of one attesting witness insufficient to prove valid execution of will because he relied on circumstantial evidence to identify second attesting witness).

216. Proving undue influence and lack of testamentary capacity requires a showing by a “totality of evidence” rather than direct evidence of a single event. See *Lint*, 135 Wash. 2d at 534, 957 P.2d at 763; *In re Estate of Mumby*, 97 Wash. App. 385, 392–93, 982 P.2d 1219, 1224 (1999); *In re Estate of Kessler*, 95 Wash. App. 358, 375–76, 977 P.2d 591, 602 (1999). Direct evidence of a single event is crucial for proving fraudulent representation. See *Lint*, 135 Wash. 2d at 534, 957 P.2d at 764.

217. See *Black*, 153 Wash. 2d at 165, 102 P.3d at 803.

218. See *In re Dand’s Estate*, 41 Wash. 2d 158, 163–64, 247 P.2d 1016, 1020 (1952).

219. Compare *Black*, 153 Wash. 2d at 167, 102 P.3d at 804 (requiring witness to have direct, personal knowledge rather than relying on circumstantial evidence to prove execution of lost will), with *Lint*, 135 Wash. 2d at 533, 957 P.2d at 764 (requiring direct evidence of misrepresentation rather than circumstantial evidence to prove that beneficiary fraudulently misrepresented feelings of love to testator).

220. See, e.g., *Lint*, 135 Wash. 2d at 534, 957 P.2d at 764 (arguing that evidence from single witness with personal knowledge that petitioner lied to testatrix would prove fraudulent inducement); *Mumby*, 97 Wash. App. at 391, 982 P.2d at 1223 (finding evidence insufficient to prove fraudulent inducement because no single witness had personal knowledge of any false representation); *Kessler*, 95 Wash. App. at 375–76, 977 P.2d at 602 (determining that because no single witness overheard respondent tell testatrix that petitioners were stealing from her, petitioners could not prove fraudulent inducement).

221. See *Black*, 153 Wash. 2d at 167, 102 P. 3d at 804.

222. See *Lint*, 135 Wash. 2d at 534, 957 P.2d at 764.

223. See, e.g., *id.* (refusing to allow evidence that Christian was seeing other women when he told Estelle that he loved her prove that he falsely misrepresented his feelings of love); *Mumby*, 97

court rejected circumstantial evidence regarding Taylor's attestation.<sup>224</sup> Reading *Black's* application of the clear, cogent, and convincing standard to require two witnesses is not consistent with the use of the same evidentiary standard in these fraudulent inducement cases.<sup>225</sup>

First, as in *Black*, the courts in these fraud cases require only a single witness to prove fraudulent inducement of a will by clear, cogent, and convincing evidence.<sup>226</sup> For instance, in *Lint* the evidence was insufficient to prove false representation because the opponents of the will failed to come forward with even a single witness.<sup>227</sup> *Lint* involved a question of whether Christian, the beneficiary of the will, fraudulently procured the will of Estelle by falsely representing that he loved her.<sup>228</sup> The court stated that to prove false representation by clear, cogent, and convincing evidence, opponents of the will needed direct evidence, such as a witness who overheard Christian admit that he lied to Estelle about his feelings.<sup>229</sup> Similarly, through its careful analysis of Reiter's testimony, the *Black* court demonstrated that the testimony of a single witness could have been sufficient to satisfy the clear, cogent, and convincing standard.<sup>230</sup> Had Reiter been able to recall the name of the second attesting witness, he would have proven execution of Margaret's lost will.

Second, like *Black*, the courts in these fraud cases require the witness to have sufficient personal knowledge to prove fraud by clear, cogent, and convincing evidence.<sup>231</sup> For instance, in *Kessler*, the Trimmis

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Wash. App. at 391, 982 P.2d at 1223 (rejecting claims of fraudulent inducement based on testimony of events occurring at time of will's execution); *Kessler*, 95 Wash. App. at 375-76, 977 P.2d at 602 (finding insufficient evidence to show false representation despite statements made by testatrix to her guardian ad litem demonstrating that such false representations had been made).

224. See *Black*, 153 Wash. 2d at 167, 102 P. 3d at 804.

225. See *Lint*, 135 Wash. 2d at 534, 957 P.2d at 764 (requiring single witness with personal knowledge of false representation); *Mumby*, 97 Wash. App. at 391, 982 P.2d at 1223 (stating that testimony from witness overhearing respondent make false representations to testatrix was required to show fraudulent inducement); *Kessler*, 95 Wash. App. at 375-76, 977 P.2d at 602 (holding that evidence was insufficient to prove fraudulent inducement because no single witness had personal knowledge of any false representation).

226. See *Lint*, 135 Wash. 2d at 534, 957 P.2d at 764; *Mumby*, 97 Wash. App. at 391, 982 P.2d at 1223; *Kessler*, 95 Wash. App. at 375-76, 977 P.2d at 602.

227. *Lint*, 135 Wash. 2d at 534, 957 P.2d at 764.

228. See *id.*

229. See *id.*

230. See *Black*, 153 Wash. 2d at 167, 102 P. 3d at 804.

231. See, e.g., *Lint*, 135 Wash. 2d at 534, 957 P.2d at 764 (arguing that evidence from single witness with personal knowledge that petitioner lied to testatrix would prove fraudulent

claimed that the beneficiary, Davis, fraudulently induced the testator to write a new will by telling the testator that the Trimms had mishandled her money.<sup>232</sup> However, the court determined that the Trimms failed to prove fraudulent inducement because their witness lacked sufficient personal knowledge of Davis's false representation.<sup>233</sup> Similarly, in *Mumby*, Darlene, the testator's daughter, argued that James Caldwell fraudulently induced the testator to place his land in trust for Caldwell.<sup>234</sup> Once again, the court found insufficient proof to show fraudulent inducement by clear, cogent, and convincing evidence because no witness had sufficient personal knowledge of the falsity of Caldwell's statements.<sup>235</sup> Finally, the court in *Lint* required the will opponents to come forward with at least one witness who *overheard* Christian admit that he lied to the testator about his love for her.<sup>236</sup> Because no witness had personal knowledge of the falsity of Christian's professions of love, the opponents failed to prove fraudulent inducement by clear, cogent, and convincing evidence.<sup>237</sup> These fraud cases parallel the analysis in *Black*, where the court determined that none of the witnesses had sufficient personal knowledge of the execution to prove that two attesting witnesses signed the lost will.<sup>238</sup> Thus, they failed to prove execution by clear, cogent, and convincing evidence.<sup>239</sup>

Finally, just as in *Black*, the courts in these fraud cases uniformly reject the use of circumstantial evidence to satisfy the clear, cogent, and convincing standard.<sup>240</sup> For example, the *Lint* court explained that the clear, cogent, and convincing burden requires more than merely circumstantial evidence.<sup>241</sup> Even evidence disclosing that Christian was

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inducement); *Mumby*, 97 Wash. App. at 391, 982 P.2d at 1223 (finding evidence insufficient to prove fraudulent inducement because no single witness had personal knowledge of any false representation); *Kessler*, 95 Wash. App. at 375–76, 977 P.2d at 602 (ruling that because no single witness overheard respondent tell testatrix that petitioners were stealing from her, petitioners could not prove fraudulent inducement).

232. See *Kessler*, 95 Wash. App. at 375, 977 P.2d at 602.

233. See *id.*

234. See *Mumby*, 97 Wash. App. at 391, 982 P.2d at 1223.

235. See *id.* at 393, 982 P.2d at 1224.

236. *Lint*, 135 Wash. 2d at 534, 957 P.2d at 763.

237. See *id.*

238. See *In re Estate of Black*, 153 Wash. 2d 152, 167, 102 P.3d 796, 804 (2004).

239. *Id.*

240. See *id.*; *In re Estate of Kessler*, 95 Wash. App. 358, 375–76, 977 P.2d 591, 602 (1999).

241. See *Lint*, 135 Wash. 2d at 534, 957 P.2d at 763 (finding that circumstantial evidence could not be used under clear, cogent, and convincing standard to prove that beneficiary misrepresented

seeing other women at the time he told Estelle he loved her could not prove that his “expressions of love for Estelle were less than sincere.”<sup>242</sup> Similarly, the *Black* court found that Taylor’s notarization of Margaret’s power of attorney document was insufficient to prove that Taylor served as the second attesting witness, although this did provide strong circumstantial evidence that Taylor was present at the execution of the will.<sup>243</sup>

If the court adopted a “two witness requirement” to satisfy the clear, cogent, and convincing standard for lost wills, it would be introducing a standard not present in the clear, cogent, and convincing burden for fraud: the testimony of a second witness.<sup>244</sup> These courts applied a “one witness standard” for proving fraudulent inducement by requiring that a single witness with sufficient personal knowledge prove that the beneficiary made false representations to the testator.<sup>245</sup> In none of these cases, however, did the court even mention the need for a second testifying witness.<sup>246</sup> Thus, reading *Black* to adopt the “one witness standard” under the lost will statute is consistent with case law identifying fraudulent inducement of a will.

## 2. *Other Jurisdictions Employing Similar Clear and Convincing Standards Support Reading Black as Creating a “One Witness Standard”*

Interpreting *Black* to adopt a “one witness standard” is consistent with courts in other states that require clear and convincing proof of a lost will’s execution.<sup>247</sup> These courts also adopt a “one witness standard,”

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feelings of love toward testatrix).

242. *Id.*

243. *See Black*, 153 Wash. 2d at 167, 102 P. 3d at 804.

244. *See, e.g., Lint*, 135 Wash. 2d at 534, 957 P.2d at 764 (arguing that evidence from single witness with personal knowledge that petitioner lied to testatrix would prove fraudulent inducement); *In re Estate of Mumby*, 97 Wash. App. 385, 391, 982 P.2d 1219, 1223 (1999) (finding evidence insufficient to prove fraudulent inducement because no single witness had personal knowledge of any false representation); *Kessler*, 95 Wash. App. at 375–76, 977 P.2d at 602 (ruling that because no single witness overheard respondent tell testatrix that petitioners were stealing from her, petitioners could not prove fraudulent inducement).

245. *See Lint*, 135 Wash. 2d at 534, 957 P.2d at 763; *Mumby*, 97 Wash. App. at 391, 982 P.2d at 1223; *Kessler*, 95 Wash. App. at 375–76, 977 P.2d at 602.

246. *See Lint*, 135 Wash. 2d at 534, 957 P.2d at 763; *Mumby*, 97 Wash. App. at 391, 982 P.2d at 1223; *Kessler*, 95 Wash. App. at 375–76, 977 P.2d at 602.

247. *See In re Estate of Mecello*, 633 N.W.2d 892, 900 (Neb. 2001); *In re Will of McCauley*, 565 S.E.2d 88, 90 (N.C. 2002).

allowing testimony by one witness with sufficient personal knowledge to prove execution by clear and convincing evidence.<sup>248</sup> Additionally, one of these courts rejected a proposed “two witness requirement” because it conflated the two *attesting* witnesses necessary for proper execution with the single *testifying* witness required to prove execution.<sup>249</sup> Taken together, decisions from these out-of-state courts further bolster the argument for reading *Black* to adopt a “one witness standard.”

Courts in other jurisdictions also employ a “one witness standard” to prove execution of a lost will.<sup>250</sup> For instance, in *McCauley*, the North Carolina Supreme Court found testimony insufficient to meet the clear, strong, and convincing burden because the witness could identify only one of the attesting witnesses by name.<sup>251</sup> Conversely, in *Mecello*, the Supreme Court of Nebraska found testimony from a single attesting witness sufficient to prove valid execution by “direct, clear, and convincing” evidence.<sup>252</sup> There, the witness recalled personally witnessing the will and could remember the name of the notary who signed the will in the presence of the testator.<sup>253</sup> These courts allow the testimony of a single witness to satisfy the clear and convincing burden, where that witness has sufficient personal knowledge of the will’s execution.<sup>254</sup> Reading *Black* to adopt a “one witness standard” would be consistent with these out-of-state courts that also follow a similar “one witness standard.”

The Supreme Court of North Carolina has rejected a “two witness requirement” in similar circumstances by clarifying the distinction between testifying witnesses and attesting witnesses.<sup>255</sup> In *McCauley*, the North Carolina court explained that, like the proponents of the “two witness requirement” in *Black*, the petitioner confused the distinction between the two “attesting” witnesses necessary to *execute* a will and the witness testimony necessary to *prove* execution of a lost will.<sup>256</sup> The court explained, “while only one attesting witness to a will would not be sufficient for valid execution, one witness’ testimony that the will was

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248. See *Mecello*, 633 N.W.2d at 900; *McCauley*, 565 S.E.2d at 90.

249. See *Mecello*, 633 N.W.2d at 900; *McCauley*, 565 S.E.2d at 90.

250. See *Mecello*, 633 N.W.2d at 900; *McCauley*, 565 S.E.2d at 90.

251. See *McCauley*, 565 S.E.2d at 90.

252. See *Mecello*, 633 N.W.2d at 900.

253. See *id.* at 896.

254. See *id.*

255. See *McCauley*, 565 S.E.2d at 93.

256. See *id.* at 92.

attested by two witnesses may be sufficient to show that the will was duly executed.”<sup>257</sup> In *Black*, the dissent interpreted the majority’s opinion as requiring two testifying witnesses,<sup>258</sup> but, like the *McCauley* plaintiff, this “two witness requirement” confuses the distinction between attesting and testifying witnesses.<sup>259</sup>

Reading *Black* to adopt the “one witness standard” in the lost will context is consistent with case law from other jurisdictions.<sup>260</sup> Courts in these jurisdictions have rejected a “two witness requirement,” finding that it confuses the distinction between attesting witnesses and testifying witnesses.<sup>261</sup> In addition, these courts, like the *Black* court, consistently demonstrate that testimony from a single witness with sufficient personal knowledge of the statutory elements of execution may prove the execution of a lost will by clear and convincing evidence.<sup>262</sup>

In sum, *Black* creates a “one witness standard” to prove execution of a lost will. Testimony from a single witness with personal knowledge that the will was in writing, signed by the testator and witnessed by at least two attesting witnesses now serves to prove execution of a lost will by clear, cogent, and convincing evidence. The court’s evidentiary analysis in *Black*, examining the testimony of all three witnesses, demonstrates the application of the “one witness standard.” In addition, applying a “two witness requirement” would be inconsistent with the court’s application of the clear, cogent, and convincing standard in other probate contexts, including fraud. Moreover, adopting a “one witness standard” in *Black* would be consistent with recent case law in other jurisdictions with similar standards.

## V. CONCLUSION

The *Black* court adopted a “one witness standard” to prove valid execution of a lost will by clear, cogent, and convincing evidence. This standard parallels evidentiary standards used in other probate contexts,

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257. *Id.*

258. *In re Estate of Black*, 153 Wash. 2d 152, 175, 102 P.3d 796, 808 (2004) (Sanders, J., dissenting).

259. See *McCauley*, 565 S.E.2d at 92–93 (explaining confusion between number of witnesses required to execute will and number of witnesses required to prove valid execution of lost will).

260. See *id.* at 90; *In re Estate of Mecello*, 633 N.W.2d 892, 900 (Neb. 2001).

261. See, e.g., *McCauley*, 565 S.E.2d at 92–93 (noting that petitioner confused distinction between “attesting” witnesses and “testifying” witnesses).

262. See *Mecello*, 633 N.W.2d at 900; *McCauley*, 565 S.E.2d at 90.

as well as those standards used by other jurisdictions to prove lost wills. Those who interpret the majority in *Black* as adopting a “two witness requirement” conflate the statutory elements required for executing a will with those necessary for proving a lost will. The “two witness requirement” places too heavy a burden on those wishing to probate a lost will. Under the old lost will statute, proving the existence of the lost will at the testator’s death routinely barred lost wills from probate. By removing this requirement in the new statute, the legislature intended for the courts to become more receptive to lost wills. The “two witness requirement,” on the other hand, would subvert legislative intent by replacing the old “existence at the time of death” bar with a new bar. Thus, in order to uphold the legislative intent behind the statute, *Black* should be read as requiring merely one witness to probate a lost will.