Supreme Court No. 92562-3

SUPREME COURT
STATE OF WASHINGTON

AARON L. LOWE,

Petitioner,

v.

LONNIE LOWE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BETTY L. LOWE, DECEASED;

Respondent.

Division III No. 32192-4-III

PETITIONER'S REPLY TO RESPONDENT'S ANSWER

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Petitioner, Aaron L. Lowe, cognizant of RAP 13.4(d), replies to perceived new issues in Respondent's Answer as follows:

COUNTER STATEMENT TO RESPONDENT'S INTRODUCTION

Respondent Lonnie Lowe (Lonnie) argues that the case resolves factual disputes. The material facts were not in dispute and were admitted by Lonnie. He admitted he never told anyone but his wife of his removal of the million dollars of gold and silver from the parents' home that he kept secret for years. RP 80, 69. He admitted, RP 53-4, that he wrote the email in 2006, Ex. P-27 "I won't let Mom do any thing he says and I will fight him with every thing I have." At that time, Lonnie had possession of the parents' gold and silver. RP 311. He admitted that he never kept simultaneous records of anything he took from the home, RP 111, 72, 75-6. Respondent's Answer at page 7 also admits that Lonnie did not inventory or account for any gold and silver in their father Don Lowe's estate. RP 465. Lonnie admitted that he did not give a copy of Don's handwritten letter to Aaron, who was supposed to act as trustee. RP 317, RP 457. Lonnie faxed the letter to probate attorney, Bob Lamp, in 2003. RP 316, 457, 488. Aaron never saw it until the trial of this case in 2013. RP 147. Aaron never signed a disclaimer of inheritance of Don's estate. RP 153, RP 516. These statements are, for the most part,

Lonnie's own testimony, not factual disputes. No material issue in this case was resolved on credibility. The facts uncovered by Aaron are not in dispute. They are admissions.

OBJECTION TO RESPONDENT'S FACTUAL BACKGROUND

At page 6 of his Answer, Lonnie concludes that "As a result of the lack of a named individual to inherit the residuary estate, it passed via the law of intestacy;. . . All property was community, and thus was distributed entirely to Betty by law." The statement is materially incorrect as Aaron was named as the individual who was to inherit their father's residuary estate, Ex. P-31, RP 481. The will did not distribute the property to Betty. Robert Lamp, the probate attorney, thought he obtained a disclaimer from Aaron, but he did not. RP 482, 485, RP 153, 516-7. The gold and silver was never inventoried in Don's estate. Don died April 25, 2003. RP 458.

ARGUMENT

A. Lonnie's assertion that tortious interference was not proven is a new issue. Tortious interference was proven.

At page 12, the Answer of Lonnie states that "substantial and undisputed evidence of the concluded probate of Don's estate, the inheritance by Betty of those assets, and her appropriate use and distribution of those assets during her lifetime" was the reason the Court of Appeals held that

"Aaron has not proved that his brother acted with an improper purpose and improper means." This issue alone is why Aaron's petition should be granted. Robert Lamp, Don's estate probate attorney, admitted that the gold and silver in Lonnie's possession, and belonging to Don as his community property, was not mentioned to him. RP 469. If it was, he would have inventoried it in Don's estate. RP 469-470. Bob Lamp thought he obtained a disclaimer of Aaron's inheritance. RP 482. Likewise, Don's handwritten letter was never filed in either probate. Don's estate was not closed until 2004. RP 401, Ex. R-122. Lonnie started removing the gold and silver in 2003, after his dad died. RP 253. Lonnie stated that his dad told him there was still gold and silver hidden before Don died. RP 253. Lonnie, as personal representative of Don's estate, had a duty to divulge all the assets of Don so they could be inventoried. RCW § 11.44.015 requires a personal representative to inventory property that "shall have come to the personal representative's possession or knowledge." RCW § 11.48.030 states the same. Any person who takes estate property before the granting of letters testamentary is chargeable to the estate. Lonnie stated that he knew that some gold and silver existed and that he had the gold and silver long before Betty died. RP 311, 253. RCW § 11.48.070 requires anyone who has concealed

or disposed of property to be cited before the court, or jailed if the person refuses to answer. Lonnie used improper means to keep the property concealed and kept it for himself. The entire record proved improper purpose to keep the treasure for himself. This issue alone, however, is complete proof that the Court of Appeals was materially wrong. Tortious interference was proven.

B. Lonnie had no evidence of gift.

Lonnie admitted that he has no proof of the gifts as they were made time to time, and he had no record. RP 111, 97. There is no "competing evidence" as argued by Lonnie in his Answer at page 13. The gift must be proven by the donee. Lonnie had no receipts, no dates, no amounts. These statements were made by the holder of a power of attorney, who had the assets in a locked safe, 319 miles from Betty's residence.

RCW § 11.94.050 requires that the holder of a power of attorney must have specific provision of gifts to the holder. The argument that "Betty made gifts to him," at page 13, fails to address the facts. Lonnie had the gold and silver. Betty could not make gifts to him. Lonnie had to take the gold and silver out of his safe. Lonnie made gifts to Lonnie. The power of attorney could not be turned off and on like a light switch. Dominion and control in

Betty was impossible. The statute's intent is to prevent the abuse. *Buckerfield's Ltd. v. B.C. Goose & Duck Farm Ltd.,* 9 Wash.App. 220, 511 P.2d 1360 (1973), cited by Lonnie to support the gift, is more helpful to Aaron as it held that the evidence must show an unmistakable intention to make a gift. *Id.* at 223. Lonnie could not identify when the gift was made or in what amount. Further, *Buckerfield* requires "an actual delivery at the time." *Id.* at 224. Lonnie could not identify the time, hence, the testimony was completely insufficient. In *Buckerfield,* the funds were in possession of the parents and clearly proven by the parents. Likewise, *In re Pappuleas' Estate,* 5 Wash.App. 826, 490 P.2d 1340 (1971), construed a quit claim deed properly executed and delivered to the grantee. Here, we have nothing. No dates, no amounts, no receipts and no possession by the donor.

C. The statute, RCW § 11.12.260, will not allow legal tender to be distributed by written instructions.

Lonnie presents a new issue at page 14 of his Answer, stating that the plain language of the statute identifies the coins "as being akin to precious metals." The separate writing statute is limited to "disposition of tangible personal property." RCW § 11.12.260(1). Subsection 4 defines "tangible personal property" and includes "precious metals in any tangible form." Commemorative coins can be issued in the form of souvenirs. Anyone can

melt gold or silver into bars or other forms. Precious metals include iridium, osmium, palladium, rhodium, ruthenium, gold and silver. Precious metals are not legal tender. The term would include silver bars or even combinations of precious metals. The statute then states: "The term does not include mobile homes or intangible property, for example, money that is normal currency or normal legal tender..." It defines intangibles and specifically excludes "money that is normal currency or normal legal tender." Coins were minted using precious metals, but they are still money. The statute does not address whether or not the metal used in making the coins may be worth more than its value as legal tender. Paper money printed upside down by the U.S. Treasury is worth more than face value, but it is still legal tender. Money cannot be bequeathed by written instructions. Only tangible property can be passed on death by written instructions. Money is intangible property. "The rule is universal that when the language of a statute is plain and free from ambiguity, it must be held to mean exactly what it says. In such a situation, there is neither room nor occasion for the application of any rules of construction." *Shelton Hotel Co. v. Bates,* 4 Wash.2d 498, 507, 104 P.2d 478 (Wash 1940). Where specific exemptions to a statute are listed "There is a presumption that the legislating body intended all omissions, i.e, the rule of

expressio unius est exclusio alterius applies." *Washington State Republican Party v. Washington State Public Disclosure Commission,* 141 Wash.2d 245, 280, 4 P.3d 808 (Wash. 2000). All omissions of a statute must be applied and the statute as a whole must be examined. *Blue Diamond Group, Inc. v. KB Seattle 1, Inc.,* 163 Wash.App. 449, 454, 266 P.3d 881 (Div. 1, 2011). If anyone other than the U.S. Treasury issues money or normal legal tender, a crime of counterfeiting occurs. The intrinsic value of gold or silver in coins is immaterial. It is illegal to melt down U.S. coins that are legal tender. 31 C.F.R. 82.1. It makes no difference if the coins had more value based on what metals were used to stamp them. They are still legal tender. 31 U.S.C. § 5103 specifically states that "United States coins. . .are legal tender." They are not, as Lonnie argues "akin to precious metals."

D. The Vulnerable Adult claim is not baseless.

The Court of Appeals made no ruling on this claim. RCW § 11.84.010 is a probate statute and involves the denial of inheritance if the person was a financial abuser. It is not dependent on an amendment. Lonnie testified that he wants to keep the property himself. The claim should be considered.

E. This Court has no jurisdiction to consider the claim by Lonnie to reconsider the denial of attorney's fees by Division III or the issue of attorney's fees on this request for review in this Court.

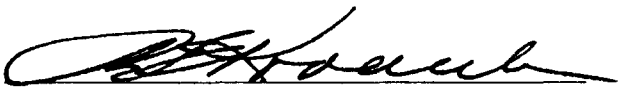
RAP 18.1(j) applies only if two conditions are satisfied. "If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied." Lonnie was denied attorney's fees at Division III and cannot raise the issue in this Court. In *CH2M Hill, Inc. v. Greg Bogart & Co., Inc.*, 47 Wash.App. 414, 735 P.2d 1330 (Div. 1, 1987), the statute allowed attorney's fees, but the lower court, in its discretion, denied attorney's fees. The opinion states "Because Washington Mutual did not prevail on its motion for attorney's fees at the trial level, we do not award fees incurred in this appeal." *Id.* at 419. The appeal to the Court of Appeals presented the issue of first impression, of tortious interference with right to inherit. A first impression issue is sufficient to deny attorney's fees. *Wheeler v. East Valley School Dist. No. 361,* 59 Wash.App. 326, 332, 796 P.2d 1298 (Div. III, 1990). See also *Biggs v. Vail,* 119 Wash.2d 129, 137, 830 P.2d 350 (1992). The Appellate Court in its discretion decided that Lonnie should not receive any attorney's fees. The case cited by Lonnie, *In re Guardianship of McKean,* 136 Wash.App. 906, 920, 151 P.3d 223 (Div. II, 2007), was an apportionment

case in which assets were exposed that benefitted the estate. See *In re Guardianship of Lamb,* 154 Wash.App. 536, 228 P.3d 32 (Div. 1, 2009). "*In re Guardianship of McKean* demonstrates this required showing of a direct benefit." *Id.* at 545. Here, Lonnie depleted the estate. The issue is not within RAP 13.4(b).

CONCLUSION

Aaron has raised issues reviewable by this Court. Therefore, his petition should be granted.

DATED this 18th day of January, 2016.



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CERTIFICATE OF SERVICE

This is to certify that a copy of the Petitioner's Reply to Respondent's Answer was served on Counsel for Respondent by first class mail addressed as follows:

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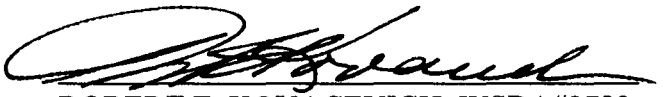

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