No. 93521-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LINDA TURNER,

Appellant,

v.

ERIC SCHULER and TERESA SCHULER, husband and wife,

Respondents

ANSWER TO PETITION

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I. IDENTITY OF RESPONDENT

Eric Schuler ("Eric") and Teresa Schuler ("Teresa") (collectively "the Schulers") request this Court deny the Petition for Review ("Petition") which seeks review of the Court of Appeals' decision, *In re Estate of Mower*, 193 Wn. App. 706, 374 P.3d 180 (2016).

II. STATEMENT OF CASE

On May 16, 2005, the Decedent, Dana Bruce Mower ("Dana") executed his Last Will and Testament ("Will"). CP 2-23. Dana's Will called for the creation of separate trusts to control the distribution of the Estate's residue "[i]n the event [Dana's] spouse survive[d him] by a period of thirty (30) days." CP 7. The Will defines the term "my spouse" to "mean and refer to Christine Leiren Mower." CP 2.

The Will contains an alternate disposition of the Estate's residue, "In the event [Dana's] spouse fail[ed] to survive [him] by a period of thirty (30) days." CP 8. Dana's Will reads:

> In the event my spouse fails to survive me by a period of thirty (30) days, I hereby give, devise, and bequeath the residue of my estate to the following individuals in the following percentages:
>
> ...
>
> (b) Fifty percent (50%) of the residue of my estate to Teresa Schuler and Eric Schuler; provided, however, in the event either predecease me, the survivor of the two shall receive this entire residuary bequest. In the event both

> Teresa and Eric predecease me, I hereby give, devise, and bequeath fifty percent (50%) of the residue of my estate equally to their then-surviving children.

CP 8.

Eric is Christine's brother and, therefore, the former brother-in-law of Dana. CP 44; 221. Eric's and Dana's friendship predates Dana's marriage to Christine. CP 236.

Ultimately, Christine filed for dissolution in June, 2012. *See* CP 223. The Superior Court entered the Decree of Dissolution, dissolving Christine and Dana's marriage, on November 13, 2012. CP 111. Tragically, Dana passed away on November 28, 2012. *Id.* Despite the dissolution proceedings, Dana never amended or rewrote his Will now subject to this litigation. *See* CP 27; 1-23.

On December 18, 2012, Linda Turner ("Linda") petitioned the trial court to admit the Will to probate and to appoint her as Personal Representative. CP 508-11. The Petition sought to appoint Linda as Personal Representative because RCW 11.12.051 deemed Christine, the initial nominee, as predeceasing Dana by virtue of the dissolution. CP 28. The Petition states:

> However, a final Decree of Dissolution was entered and filed on November 13, 2012. Therefore, Christine Leiren Mower is deemed to have predeceased Decedent pursuant to RCW 11.12.051.

CP 28. In her Petition, Linda named the Schulers as beneficiaries under the Will. CP 29. The Pierce County Superior Court appointed Linda to serve as Personal Representative pursuant to her Petition. CP 35-37.

On February 27, 2013, Linda, as Personal Representative, filed a TEDRA Petition seeking declaratory relief. CP 42-57. In her Petition, Linda sought determination by the trial court that RCW 11.12.051 revoked the Will provisions in favor of the Schulers. CP 48-56. Subsequently, on July 5, 2013, Linda personally filed a TEDRA Petition seeking substantially similar relief as her Petition filed as Personal Representative. CP 221-25.

Both the Schulers and Linda moved for summary judgment based on Linda's interpretation of RCW 11.12.051. CP 230-35. The parties extensively briefed the applicability of RCW 11.12.051, as well as the out of state authority cited, and continually relied upon, by Linda. CP 232-34; 249-251; 263-68; 295-300. The trial court granted summary judgment in favor of the Schulers. CP 329-31. The trial court ruled RCW 11.12.051 did not revoke the Will's bequest in favor of the Schulers. CP 330. The trial court further denied Linda's cross-motion for summary judgment. CP 332-33.

The Court of Appeals affirmed the trial court. *See generally*, Petition at Appendix A ("Slip Op."). In affirming the trial court, the Court

of Appeals considered RCW 11.12.051's legislative history, relevant case law, general principles of statutory construction and general public policy. Slip Op. at 4-15. The *Mower* Court recognized that the language of RCW 11.12.051 tracks with UPC § 2-508, which does not revoke testamentary gifts to in-laws, contrary to the more broadly written UPC § 2-804. Slip Op. at 7-9. The *Mower* Court further noted the legislature did not broaden the scope of RCW 11.12.051's revocation despite modern trends and judicial interpretation of similar Washington statutes. Slip Op. at 9-10.

Applying the rule against surplusage, the Court of Appeals distinguished RCW 11.12.051 from Linda's out of state authority:

> Applying the rule against surplusage, we hold that the legislature indicated its intent that RCW 11.12.051 generally revoke provisions benefitting the former spouse by providing for revocation of will provisions that are "in favor of" the testator's former spouse, while distinguishing provisions that grant power or property to that former spouse. In some cases, gifts to the former spouse's family members may confer some benefit on the former spouse. Whether a particular will provision benefits the testator's former spouse would be a factual question for the trial court to resolve.
>
> *However, RCW 11.12.051 expressly provides a particular manner of revocation: construction of the will as if the testator's former spouse predeceased him. If that language is to be given effect, a will provision in favor of a former spouse should only fall within the scope of RCW 11.12.051 if it would be effectively revoked by the death of the former spouse.* A will provision that confers only an

> attenuated, indirect benefit on the testator's former spouse—for example, a bequest to a person from whom the former spouse might later inherit the bequeathed asset—would not be revoked by pretending that the former spouse predeceased the testator. In contrast, a will provision conferring some personal benefit on the former spouse—for example, a provision setting up a trust to care for the former spouse's pet as long as the former spouse lived—would not survive if that former spouse were considered deceased. *Therefore, construing RCW 11.12.051 strictly, a will provision "in favor of" a former spouse must be one that would be effectively revoked by treating that former spouse as predeceasing the testator.*

Slip Op. at 11-12 (footnoted omitted; emphasis added).

Avoiding factual inquiries, the court explained RCW 11.12.051's operation:

> [T]he phrase "in favor of" as used in RCW 11.12.051 refers to any testamentary gifts that benefit the former spouse in some manner other than direct conveyance of a power or property interest and that would be effectively revoked by treating the former spouse as predeceasing the testator.

Slip Op. at 15.

Applying the aforementioned rule, the Court of Appeals avoided Linda's factual allegations:

> Turner argues that because Dana's property would go to Christine's family, she would ultimately benefit from the bequest. Turner also appears to argue that because Dana had no relationship with the Schulers that would warrant their inclusion in his will, he must have included them to benefit Christine. *However, even if Dana's bequest to the Schulers indirectly benefits Christine, it would not be effectively revoked by applying the fiction of law that she*

> *predeceased Dana. Therefore, the alternative will provision bequeathing half of the residue of Dana's estate to the Schulers was not a provision in favor of Christine within the meaning of RCW 11.12.051.*

Slip Op. at 15 (emphasis added). Thus, the Court of Appeals affirmed the trial court. The Court of Appeals further affirmed, and also awarded, fees and costs to the Schulers on appeal. Slip Op. at 20-21.

III. ARGUMENT

This Court should deny Linda's Petition for Review. At the core, the Petition requests this Court (1) rewrite the Dana's Will and (2) fundamentally alter Washington's testate laws via judicial fiat rather than legislative enactment. More importantly, however, Linda predicates her Petition on the assertion that the Court of Appeals interpreted RCW 11.12.051 to require factual determinations. However, the Court of Appeals' decision clearly rejected the fact finding approach advocated by Linda as evidenced throughout its opinion and ultimate application of RCW 11.12.051.

A. Standard of Review

Under RAP 13.4(b)(4), this Court may review a prior decision where "the petition involves an issue of substantial public interest that should be determined by the Supreme Court." Pursuant to RAP

13.4(b)(2), this Court may accept review of a Court of Appeals' decision which conflicts with another decision of the Court of Appeals.

B. The Court of Appeals' decision clarified that revocation operates as a matter of law based on the language of the applicable will, and is not dependent on the facts of each case.

The Court of Appeals below considered whether RCW 11.12.051 operates to revoke the alternate disposition in favor of the Schulers. RCW 11.12.051(1) reads, in full:

> If, after making a will, the testator's marriage or domestic partnership is dissolved, invalidated, or terminated, all provisions in the will in favor of or granting any interest or power to the testator's former spouse or former domestic partner are revoked, unless the will expressly provides otherwise. Provisions affected by this section must be interpreted, and property affected passes, as if the former spouse or former domestic partner failed to survive the testator, having died at the time of entry of the decree of dissolution or declaration of invalidity. Provisions revoked by this section are revived by the testator's remarriage to the former spouse or reregistration of the domestic partnership with the former domestic partner. Revocation of certain nonprobate transfers is provided under RCW 11.07.010.

In addressing the scope of RCW 11.12.051(1), the Court of Appeals did not hold RCW 11.12.051's application hinges upon factual inquiry. To the contrary, the Court of Appeals' decision and resulting analysis merely considers the language of the applicable Will. Because Linda's Petition

wholly rests on the erroneous assertion the Court of Appeals found, and resolved issues of fact, her Petition fails.

1. The analysis set forth by the Court of Appeals only considers whether the gift to the third party requires the former spouse predecease the Decedent, and does not require inquiry into otherwise factual matters.

Linda asserts a matter of public interests arises based on "whether the dissolution statute operates as a matter of law or whether it is dependent on the facts of each case." Petition at 10. Linda fundamentally misunderstands the Court of Appeals' holding. The Court of Appeals rejected the fact-finding approach advanced by Linda's out of state authority and now argued in her Petition.

The Court of Appeals enunciated a two-part test to determine if revocation occurs:

1. Does the Will contain a testamentary gift that otherwise benefits the former spouse?
2. If yes, must the former spouse be alive in order for the beneficiary to take under the Will?

Slip Op. at 12; 15.

If the answer to both inquiries is "yes" revocation occurs under the Court of Appeals' interpretation. The Court of Appeals' analysis need not, and did not, concern itself with Linda's attempt to manufacture issues of fact on appeal. The inquiry, instead, focuses solely on the language and

construction of the relevant will, a question decided alone by the trial court. RCW 11.96A.020; RCW 11.96A.030(2), (5); RCW 11.12.230.

The language of Dana's Will clearly reflects that Christine need not survive in order for the Schulers to receive the bequest. The Will clearly states, "*In the event my spouse fails to survive me* by a period of thirty (30) days" the Schulers shall receive half of the Estate residue. CP 7 (emphasis added). Illustrated by the Court of Appeals, because the Will expressly stated the Schulers received the residual bequest if Christine predeceased Dana, RCW 11.12.051 did not terminate the bequest to the Schulers.

In fact, the Court of Appeals' analysis directly avoids the application of Linda's allegations that Dana and the Schulers did not enjoy a close relationship. Slip Op. at 15. Because the Court of Appeals' analysis requires interpretation of the language of a Will, and not factual inquiries, Linda's argument, and basis for the Petition, fails.

2. The language seized upon in Linda's Petition is dicta, which the Court of Appeals expressly rejected noting RCW 11.12.051 does not require a fact-finding expedition.

Critical reading of the opinion further reflects the Court of Appeals averred the factual approach used in other jurisdictions.

Below, and in her Petition, Linda relies on *Friedman v. Hannan*, 412 Md. 328, 987 A.2d 60 (2010) in support of her argument that RCW

11.12.051 revokes gifts to in-laws generally. The *Friedman* Court interpreted a statute substantially different from RCW 11.12.051, which reads:

> A will, or any part of it, may not be revoked in a manner other than as provided in this section.
>
> ....
>
> By an absolute divorce of a testator and his spouse or the annulment of the marriage, either of which occurs subsequent to the execution of the testator's will; and all provisions in the will *relating to* the spouse, and only those provisions, shall be revoked unless otherwise provided in the will or decree.

Md. Code Ann., Est. & Trusts § 4-105(4) (emphasis added); *Friedman*, 987 A.2d at 65. *Compare* RCW 11.12.051 (revoking, more narrowly, "all provisions in the will *in favor of*... the testator's former spouse") (emphasis added). Relying on the Maryland statute, the *Friedman* Court explained, "[W]hether a particular provision is one 'relating to' a former spouse is a factual one to be made by the trial court." *Friedman*, 987 A.2d at 72.

The Court of Appeals below, citing *Friedman*, *supra*, wrote, "Whether a particular will provision benefits the testator's former spouse

would be a factual question for the trial court to resolve."[1] Slip Op. at 12 (emphasis added).

Linda's Petition and analysis erroneously seizes upon this single sentence within the twenty-one page opinion.

The Court of Appeals immediately following paragraph distinguished and disavowed the *Friedman* analysis. The Court of Appeals below recognized, unlike Maryland's statute, RCW 11.12.051 contains "a particular manner of revocation." Slip Op. at 12. RCW 11.12.051 requires a court construe a will as though the former spouse predeceased the decedent:

> Provisions affected by this section must be interpreted, and property affected passes, *as if the former spouse or former domestic partner failed to survive the testator*, having died at the time of entry of the decree of dissolution or declaration of invalidity.

RCW 11.12.051 (emphasis added). Maryland's statute substantially differs from RCW 11.12.051 and does not include a manner of revocation or interpretation, to which Washington courts must give effect. Thus, the Court of Appeals' decision below avoids the *Freidman, supra*, factual analysis.

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[1] The Court of Appeals did not say the inquiry "is" a factual determination for the trial court.

To this end, the Court of Appeals clearly stated the applicable rule under RCW 11.12.051 immediately after distinguishing *Friedman, supra*:

> A will provision 'in favor of' a former spouse must be one that would be effectively revoked by treating that former spouse as predeceasing the testator.

Slip Op. at 12.

Therefore, the only inquiry concerns whether the relevant will provision to a third party lapses if the court treats the former spouse as predeceased. Linda's Petition misconstrues and seizes upon dicta used to distinguish RCW 11.12.051 from substantially different statutes.

3. In applying the enunciated rule, the Court of Appeals did not address any factual issue.

The Court of Appeals neither decided any issue of fact nor weighed evidence on appeal. The Court of Appeals avoided Linda's various allegations, stating:

> Turner argues that because Dana's property would go to Christine's family, she would ultimately benefit from the bequest. Turner also appears to argue that because Dana had no relationship with the Schulers that would warrant their inclusion in his will, he must have included them to benefit Christine. *However, even if Dana's bequest to the Schulers indirectly benefits Christine, it would not be effectively revoked by applying the fiction of law that she predeceased Dana. Therefore, the alternative will provision bequeathing half of the residue of Dana's estate to the Schulers was not a provision in favor of Christine within the meaning of RCW 11.12.051.*

Slip Op. at 15 (emphasis added).

Thus, the Court of Appeals neither created nor answered any question of fact on appeal. Accordingly, Linda's Petition does not "involve an issue of substantial public interest" as alleged by Linda.

C. The Court of Appeals' decision comports with well-settled Washington probate law.

Importantly, Linda's argument assails well-settled presumptions concerning Washington probate law. As a matter of law, "[t]he testator is presumed to have known the law at the time of execution of his will." *Matter of Estate of Mell*, 105 Wn.2d 518, 524, 716 P.2d 836 (1986); *see also Matter of Estate of Niehenke*, 117 Wn.2d 631, 640, 818 P.2d 1324 (1991) ("[A] testator is presumed to be aware of the anti-lapse statute at the time the will is executed.") "Although a will speaks as of the date of the testator's death, the testator's intentions, as viewed through the surrounding circumstances and language, are determined as of the time of the execution of the will." *Matter of Estate of Bergau*, 103 Wn.2d 431, 436, 693 P.2d 703 (1985). The testator's intent must, if possible, be derived from the four corners of the will and the will must be considered in its entirety. *In re Estate of Bergau*, 103 Wn.2d 431, 435, 693 P.2d 703 (1985); *In re Estate of Douglas*, 65 Wn.2d 495, 499, 398 P.2d 7 (1965).

The record reflects Dana executed his Will in May 2005. CP 21. Former RCW 11.12.051 (2005) at the time Dana executed his Will mirrors the operation and language of the now-current RCW 11.12.051:

> If, after making a will, the testator's marriage is dissolved or invalidated, all provisions in the will in favor of or granting any interest or power to the testator's former spouse are revoked, unless the will expressly provides otherwise. Provisions affected by this section must be interpreted, and property affected passes, as if the former spouse failed to survive the testator, having died at the time of entry of the decree of dissolution or declaration of invalidity.

Laws of 1994, ch. 221, § 11. Yet, despite former RCW 11.12.051 (2005), Dana's Will specifically names "Theresa Schuler and Eric Schuler" as beneficiaries "[i]n the event [Christine] fails to survive me." CP 8. Notably, the bequest does not describe the Schulers by any familial designation such as "in-laws" or make any reference the gift is made as a result of marriage or relation.[2] CP 8. Thus, Linda's argument requires a court rewrite the express language of the specific bequest based wholly on extrinsic evidence. Additionally, Linda's argument runs afoul of the long-

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[2] Importantly, the law relied upon by Linda is easily distinguishable. Here, the Will makes a specific bequest to, and identifies by name alone, "Theresa Schuler and Eric Schuler." CP 8. In contrast, the opinions cited by Linda involved gifts to individuals identified by familial relation. *Friedman*, 987 A.2d at 62-63 (leaving gift to "those surviving immediate family members of my Wife") (alterations omitted); *Estate of Hermon*, 39 Cal. App. 4th 1525, 1528, 46 Cal. Rptr. 2d 577 (1995) (dispositive provision of will devising gift to "my children and my spouse's children"); *In re Estate of Jones*, 122 Cal. App. 4th

standing presumption that Dana knew if he and Christine divorced, a court would interpret his will "as if [Christine] failed to survive [him]." Former RCW 11.12.051 (2005).

D. The Court of Appeals' decision does not conflict with other appellate decisions because the Court of Appeals did not resolve factual issues on appeal.

Linda's Petition erroneously alleges the Decision conflicts with other decisions by the Court of Appeals. Specifically, the Petition alleges the Court of Appeals' decision decided an issue of fact on appeal from summary judgment. Petition at 17-18.

Stated herein, the Court of Appeals avoided factual inquiries. The Court of Appeals interpreted the language of the Will and did not address, much less "weigh" the evidence on appeal. *See, e.g.*, Slip Op. at 15. Because the Court of Appeals did not decide any factual issue on appeal, the decision does not fall under the auspices of RAP 13.4 as alleged in the Petition.

E. Linda fails to demonstrate a basis for review of the trial court's and Court of Appeals' award of attorneys' fees and expenses to the Schulers.

Linda's Petition requests fees and costs associated with bringing this litigation and appeal.

326, 329, 18 Cal. Rptr. 3d 637, 638 (2004) (devising gift to "my stepdaughters Paula Labo and Kathy Hardie") (alterations removed).

As an initial matter, Linda does not identify the basis for which this Court should review the issue of fees and costs under RAP 13.4(b). To the extent Linda blindly designates the issue of fees and costs without designating a basis for review, this Court should decline review.

Nevertheless, the trial court and, subsequently, the Court of Appeals did not err in awarding fees to the Schulers. The Schulers prevailed first on summary judgment and again on appeal.

RCW 11.96.150(1), affords discretion to courts in awarding fees to TEDRA litigants:

> Either *the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party*: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. *The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable*. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

(Emphasis added). RCW 11.96.150(1) does not predicate an award of fees upon success on the merits. Instead, RCW 11.96.150(1) allows Washington courts to award fees based on equitable considerations.

An appellate court "will not interfere with a trial court's fee determination [under RCW 11.96.150] unless there are facts and

circumstances clearly showing an abuse of the trial court's discretion." *In re Estate of Black*, 153 Wn.2d 152, 173, 102 P.3d 796 (2004) (quotes omitted).

Linda argues "[t]he Schulers are not the substantially prevailing party." Petition at 18. However, under the plain language of RCW 11.96.150, the Schulers need not be the substantially prevailing party to recover fees and costs. To the extent Linda argues the Schulers must substantially prevail, her argument fails.

Moreover, the multiplicity of factors here favors an award of fees and costs to the Schulers. First, the Schulers prevailed on their motion for summary judgment adjudicating them heirs under the Will, thereby taking half of the net Estate residue. *Compare In re Estate of Ehlers*, 80 Wn. App. 751, 764, 911 P.2d 1017 (1996) ("Where the beneficiaries are unsuccessful in their litigation and primarily pursue their action for their own benefit, the court does not abuse its discretion in denying them attorney fees.").

Second, the Schulers successfully defended the cross motion for summary judgment filed by Linda as Personal Representative. CP 237-44.

Third, the Schulers' action benefits the Estate. As noted by Linda in her Petition, an "action benefits Dana's Estate [which] correctly identif[ies] his heirs and give[s] effect to his true intent." Petition at 20.

Because of the Schulers' action, the trial court adjudicated the proper heirs under the Will, which, according to Linda, the Personal Representative, benefits the Estate.

Fourth, the trial court granted the Schulers' motion concerning the disposition of non-probate assets pursuant to RCW 11.07.010. CP 416-18. Thus, even if the trial court applied the substantially prevailing party standard, the Schulers prevailed on substantially all, if not all, claims set forth in the Estate and Linda's TEDRA Petitions.

F. The Schulers request fees and costs in responding to Linda's Petition.

The Schulers request fees and costs here. Noted above, RCW 11.96.150 expressly authorizes trial courts and appellate courts to award fees and costs as a matter of equity. The Schulers received fees and costs below. RAP 18.1(j) expressly allows an award of attorneys' fees and expenses to the prevailing party in the Court of Appeals where the Petition for Review is denied. This Court should award fees and costs to the Schulers.

The Schulers defended themselves in this matter in the trial court, the Court of Appeals, and now this Supreme Court. The law designates the Schulers as heirs under the Will. The Schulers should not bear the cost

of forcing the Personal Representative to faithfully execute the language of the Will under Washington law.

IV. CONCLUSION

For the reasons stated herein, this Court should decline to accept review outlined in Linda's Petition. This Court should further award fees and expenses to the Schulers for submitting this Answer.

Respectfully submitted this 26th day of September, 2016.

SMITH ALLING, P.S.

By: _____
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Attorneys for Eric and Teresa Schuler

CERTIFICATE OF SERVICE

I hereby certify that I have this 26th day of September, 2016, served a true and correct copy of the foregoing document, upon counsel of record via the methods noted below, properly addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 26th day of September, 2016, at Tacoma, Washington.

Amy H. Presley