NO. 96138-7

SUPREME COURT
OF THE STATE OF WASHINGTON

(Division III, Court of Appeals No. 35270-6)

In Re:

ESTATE OF MABLE MEEKS
and L/M MEEKS NO. 1 TRUST,

LISA WUERCH, Trustee,

Appellant

v.

FRED HUTCHINSON CANCER RESEARCH CENTER

Respondent

RESPONDENT FRED HUTCHINSON CANCER RESEARCH CENTER'S PETITION FOR REVIEW

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A. Identity of Petitioner.

Respondent Fred Hutchinson Cancer Research Center ("FHCRC"), a charitable organization dedicated to the elimination of cancer and related diseases, petitions this Court to accept review of the decision below.

B. Court of Appeals Decision.

The decision for review is the published decision of Division III of the Court of Appeals, *In the Matter of the Estate of Mabel Meeks and the L/M Meeks No. 1 Trust*, No. 35270-6-III, filed July 12, 2018, __ Wn.App.3d.__, 421 P.3d 963 (2018) (the "Decision").[1] The "L/M Meeks No. 1 Trust" is referred to herein as the "Meeks Trust."

C. Issues Presented for Review.

This case involves issues of substantial public interest regarding the paramount duty of Washington courts to carry out the intent of testators/trustors. The Decision failed to recognize: (a) the trustee's lack of standing to appeal the trial court's rulings, and (b) the importance of permitting courts to reform documents and correct mistakes under the strict standards of RCW 11.96A.125. These issues of substantial public interest can be articulated as:

[1] On July 27, 2018, FHCRC filed a Motion for Extension of Time to File Petition for Review. On July 31, 2018, the Supreme Court Clerk entered a ruling granting the Motion and directing that this Petition for Review be served and filed by August 28, 2018. The Decision is attached hereto as Appendix A.

1. Whether the trustee of the Meeks Trust lacked standing to appeal the trial court's ruling. This Court should grant review because the Decision below conflicts with prior decisions of this Court. FHCRC argued that, as a threshold matter, Appellant Lisa Wuerch lacked standing to appeal from the trial court's ruling declaring that FHCRC was a beneficiary of the Meeks Trust. However, the Decision wholly failed to address whether Appellant did, or did not, have standing to bring her appeal. The Court of Appeals' failure to address the critical question of standing, and its failure to dismiss the appeal for lack of standing, flies in the face of this Court's prior decisions that a fiduciary has no independent standing to appeal a trial court's declaration that a person (or, in this case, a charitable organization) is, or is not, a beneficiary of a will or trust. Thus, review is warranted under RAP 13.4(b)(1) and RAP 13.4(b)(4).

2. Whether the Decision violates the mandates of both this Court and the Legislature that effecting the intent of the testator/trustor is paramount and should not be stymied by over-reliance on formalities of will execution, when: (a) the public policies underlying those formalities are equally served by the safeguards of RCW 11.96A.125; and (b) it is undisputed that the failure to follow execution formalities was solely and entirely the result of an attorney's mistake on which the testator/trustor relied. RCW 11.96A.125 provides:

> The terms of a will or trust, even if unambiguous, may be reformed by judicial proceedings under this chapter to conform the terms to the intention of the testator or trustor if it is proved by clear, cogent, and convincing evidence that both the intent of the testator or trustor and the terms of the will or trust were affected by a mistake of fact or law, whether in expression or inducement.

In this case, the Decision acknowledged and affirmed the trial court's findings, based on "clear, cogent and convincing evidence," that: (a) Mr. and Ms. Meeks intended the surviving spouse would be entitled to name the charitable beneficiaries of the Meeks Trust; (b) Ms. Meeks was the surviving spouse; (c) Ms. Meeks tried to name the charitable beneficiaries by seeking the assistance of the same attorney who had drafted the Meeks Trust; and (d) Ms. Meeks relied entirely on her attorney to carry out her intent by signing the document he had drafted for her. CP 430-31, 434-35; Decision at 1, 5.

Unfortunately, Ms. Meeks's attorney made a mistake by drafting an amendment to the Meeks Trust, and having Ms. Meeks execute it before a notary, rather than drafting a codicil to her will. The trial court and Court of Appeals both recognized that the error was not in any way caused by the testator/trustor, who relied solely on her attorney to draft the correct document and present it to her for execution, utilizing whatever formalities he advised her were necessary. Based on the undisputed facts, the trial court properly exercised its authority under RCW 11.96A.125 and reformed Ms.

Meeks's 1994 will to carry out her and her husband's intent, as expressed in the 1994 will, that the surviving spouse would identify the ultimate charitable beneficiaries using her power of appointment.

The Decision created a "Catch 22" by announcing and resolving a "conflict" between the reformation authorized by RCW 11.96A.125 and the requisites of will execution set forth in RCW 11.12.020(1).[2] The Decision reversed the reformation because Ms. Meeks had signed a "trust amendment" in the presence of one witness instead of a new will or a "codicil" in the presence of two witnesses. Ironically, the Decision makes clear that regardless of its title, the Second Amendment could have functioned as a codicil if the attorney had corralled two witnesses, rather than just one. Decision at 12 ("If the second amendment to the trust had met the formalities required of a codicil, we believe the trial court could have concluded that in substance, if not in form, it *was* a codicil and an exercise of Ms. Meeks's limited power of appointment.").

The Decision has far reaching implications that undermine both judicial and legislative policy. It not only eviscerates Washington law authorizing reformation of testamentary documents to correct errors caused

[2] RCW 11.12.020 provides in relevant part: "(1) Every will shall be in writing signed by the testator or by some other person under the testator's direction in the testator's presence, *and shall be attested by two or more competent witnesses*, by subscribing their names to the will, or by signing an affidavit that complies with RCW 11.20.020(2), while in the presence of the testator and at the testator's direction or request:…" (Emphasis added).

by attorneys, when both the intent of the testator/trustor and the source of the error has been shown by clear and convincing evidence (thereby satisfying the evidentiary purposes of RCW 11.12.020), it also places an almost impossible burden on lay people to detect when their attorney is giving them incorrect legal advice. Further, the Decision improperly subordinates RCW 11.96A.125's grant of authority to furnish relief to the very barriers RCW 11.96A.125 was intended to address. For these reasons, the Court should grant review pursuant to RAP 13.4(b)(4).

D. Statement of the Case.

1. The Relevant Testamentary Documents. This is a case where implementation of a testator/trustor's clear and undisputed intent was stymied by her attorney's negligence. In 1994, Lloyd and Mabel Meeks engaged an attorney to draft the Meeks Trust, which they executed on March 2, 1994 (CP 8-23), along with each of their respective wills (CP 40-44; CP 216-20). Although the Meeks Trust recited that it would become irrevocable and not subject to amendment following the death of the first spouse (CP 8), each of Mr. and Ms. Meeks's wills and the Meeks Trust provided "a limited power of appointment" to the surviving spouse to name the charitable beneficiaries.[3] CP 10. The relevant restriction on the power

[3] When included in a trust, a power of appointment allows the power holder to alter or designate the beneficiary of some or all of the trust property, without amending the trust itself. *In re Lidston's Estate*, 32 Wn.2d 408, 419, 202 P.2d 259 (1949). *See also* George

of appointment provided that it could be exercised by the survivor of Mr. and Ms. Meeks in favor of organizations "to whom a bequest would be deductible for Washington inheritance tax and federal estate tax purposes as a bequest for a religious, charitable, scientific, literary or educational purpose." The surviving spouse could exercise that power "in a provision specifically describing this power of appointment contained in [his or her] Last Will[.]" *Id.*

Following Mr. Meeks's death in 2002, Ms. Meeks desired to designate different charitable beneficiaries of the Trust, as she was authorized by the power of appointment to do. Among other things, Ms. Meeks "had recently survived breast cancer" and wished to add FHCRC as a Trust beneficiary. She returned to the same attorney who had drafted the original Trust, seeking to ensure that the Trust's residue be distributed to FHCRC and designated to fund breast cancer research. Instead of preparing a new will or a codicil, in which she would exercise the limited power of appointment granted to her in the original Trust and in her and her husband's 1994 wills, her attorney prepared, and on December 6, 2002, Ms. Meeks executed, a First Amendment to the Meeks Trust. Her attorney served as notary. CP 25-27.

Gleason Bogert et al., *The Law of Trusts and Trustees* § 299 (rev. 2d ed. Supp. 2016). A holder of a power of appointment thus may designate the ultimate grantee of property. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 17.1 (1999).

Three years later, Mr. and Ms. Meeks's daughter died of glioblastoma multiforme cancer. Following her daughter's death, Ms. Meeks again wished to change the charitable beneficiaries of the Trust, as she was entitled to do. She returned to the same attorney, who drafted a Second Amendment, which Ms. Meeks executed on October 10, 2005, before a notary.[4] CP 28-31. The Second Amendment, among other changes, provided that the residue of the Meeks Trust would be split equally between FHCRC and University of Washington and designated for researching glioblastoma multiforme cancer. Ms. Meeks passed away on March 19, 2015, with every expectation that her attorney had prepared, and she had executed properly, the document necessary to exercise her power of appointment to designate the charitable beneficiaries of the Meeks Trust.

2. Proceedings Before the Trial Court. On May 1, 2015, the trustee petitioned the Spokane County Superior Court, asking "that the court determine the validity and/or enforceability of the Amendments" in light of the language providing that "[u]pon the death of the first Grantor . . . this Agreement shall not be revocable in whole or in part nor subject to

[4] Indeed, on September 19, 2005, Ms. Meeks had executed before a notary a draft version of the Second Amendment. Ms. Meeks's handwritten cover letter to her attorney, enclosing the executed draft, stated: "Because we have not completed the second amendment to the Trust yet and because I am flying to Seattle tomorrow and will be doing a lot of travelling, I have signed before a Notary this second draft so my estate can be distributed according to my wishes, in case of my death. I hope this is binding." CP 164.

amendment" (CP 8). FHCRC offered as evidence Ms. Meeks's letters to her attorney (CP 126-27, 163-69), the drafting attorney's statement that the Second Amendment reflected Ms. Meeks's intent (CP 135), and the declaration of Ms. Meeks's niece, emphasizing the clarity of Ms. Meeks's intent and Ms. Meeks's good faith belief that her attorney had done everything necessary to implement her intent (CP 140-42).

On January 13, 2017, the court, ruled from the bench, finding clear, cogent and convincing evidence that (1) it was the joint intent of Mr. and Ms. Meeks that the surviving spouse have a power of appointment to designate charitable beneficiaries of the Trust; (2) it was Ms. Meeks's intent to designate charitable beneficiaries as allowed under the Trust; and (3) Ms. Meeks's intent was not correctly carried out by the attorney she hired to prepare that designation. In making its rulings, the court found "somewhat compelling" that the same attorney had prepared the "prohibited" amendments despite having also drafted the original Trust. CP 272-91, 281. On April 28, 2017, the court memorialized its oral rulings in written Findings of Fact, Conclusions of Law and an Order, reforming Ms. Meeks's will to reflect her exercise of the power of appointment and instructing the trustee to distribute the Meeks Trust accordingly. CP 430-38.

3. Summary of the Decision Below. The trustee appealed the trial court's reformation of Ms. Meeks's will.[5] FHCRC argued at the outset that the trustee lacked standing to appeal the court's ruling. The Decision did not address FHCRC's standing argument in any way. Despite acknowledging the "clear intent" shown by the undisputed record, the Decision reversed the trial court's reformation, finding that "the failure of the second amendment to satisfy the formalities of a will is fatal." Decision at 13. The Decision identified the "statutory purpose for requiring the minimal formalities required by Washington law" as ensuring that "the testator has a definite and complete intention to dispose of his or her property and to prevent, as far as possible, fraud, perjury, mistake and the chance of one instrument being substituted for another." *Id*. (citing *In re Estate of Malloy*, 134, Wn.2d 316, 322-23, 949 P.2d 804 (1998)). In determining that the purpose of requiring two witnesses to a will would be frustrated by reformation, *id*. at 14, the Decision ignored that the identified statutory purposes are equally well-served when, as here: (a) the estate plan already includes both a properly executed will and a trust; (b) both the intention and the mistake must be proved by "clear, cogent and convincing

[5] During the pendency of the appeal, on June 11, 2018, the trustee resigned, creating a vacancy. A motion to appoint successor trustee is set for hearing on September 14, 2018, before the Spokane County Superior Court.

evidence, as required by RCW 11.96A.125; and (c) the mistake being corrected is solely the fault of the drafting attorney.

E. Reasons for Granting Review.

1. The Court of Appeals Should Not Allow Appeals by a Fiduciary Under Circumstances Expressly Prohibited by Prior Decisions of the Supreme Court, When Allowing Such Appeals Encourages Breaches of the Fiduciary Duties of Loyalty And Impartiality.

A trustee has a duty of undivided loyalty and impartiality to all beneficiaries. RCW 11.98.078(1); *Wilkins v. Lasater*, 46 Wn. App. 766, 774, 733 P.2d 221 (1987). Accordingly, a trustee cannot litigate the conflicting claims of beneficiaries by appealing orders determining which beneficiaries are entitled to receive a portion of the trust. *See In re Maher's Estate*, 195 Wash. 126, 130, 79 P.2d 984 (1938); *In re Cannon's Estate*, 18 Wash. 101, 50 Pac. 1021 (1897) (in "a contest between claimants" the fiduciary "may not take sides, for, if so, he might resist the rightful claimant at the expense of the estate, to which he might ultimately be found entitled."). While the fiduciary has a duty to guard against an improper distribution of the assets under her control, "this duty extends no further than to see that all available evidence is fully and truthfully presented to the superior court[.]" *Maher's Estate*, 195 Wash. at 131. Once the court "has determined the matter and designated the persons who are entitled to receive

[distributions], as to that phase of the proceeding the interest of the [fiduciary] ceases." *Id.* at 132.[6]

Having requested and received the trial court's instruction as to the identity of the beneficiaries, the trustee had neither a duty, nor any authority, to contest the issue further. *See* RAP 3.1 (only an "aggrieved party" may appeal); *Cooper v. Tacoma*, 47 Wn. App. 315, 316, 734 P.2d 541 (1987) ("An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected.") *(citing Sheets v. Benevolent & Protective Order of Keglers*, 34 Wn.2d 851, 855, 210 P.2d 690 (1949)). Here, the trustee's appeal of the court's declaration of beneficiaries, a declaration the trustee herself had requested, violated her twin duties of undivided loyalty and impartiality and set a precedent for other fiduciaries to engage in similar violations. The Decision's allowance of this conflict with prior decisions of the Supreme Court compels granting the Petition for Review.

2. Whether Washington Courts Are Authorized to Carry Out Their Paramount Duty to Give Effect to Testator/Trustor Intent Under the Authority of RCW 11.96A.125, or Are Required to Subordinate that

[6] *See also In re Estate of Bernard*, 182 Wn. App. 692, 729, 332 P.3d 480, *review denied*, 181 Wn.2d 1027 (2014) (a trustee cannot "litigate the conflicting claims of beneficiaries" by appealing orders "determining which beneficiaries are entitled to share in a particular fund"; distinguishing its unique circumstances from the "general rule" that where a court order "determines which beneficiaries are entitled to share in a particular fund," the trustee cannot appeal).

Paramount Duty to a Blind Adherence to Formalities, Presents an Issue of Substantial Public Interest.

a. The Decision Contravenes Judicial and Legislative Policy and Creates a "Catch 22" for Courts Attempting to Effectuate Testator/Trustor Intent. This Court and the Legislature have repeatedly articulated the policy of honoring and carrying out testator intent. *See* RCW 11.12.230 ("All courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them.); *In re Estate of Bergau*, 103 Wn.2d 431, 435, 693 P.2d 703 (1985) (citing *In re Estate of Riemcke*, 80 Wn.2d 722, 728, 497 P.2d 1319 (1972)).[7]

In a break from prior common law, in 2011, the Legislature adopted RCW 11.96A.125, authorizing a court to reform a will or trust to conform to the intent of the testator/trustor when there is clear, cogent, and convincing evidence "that both the intent of the testator or trustor and the terms of the will or trust were affected by a mistake of fact or law, whether in expression or inducement." In permitting will reformation when these strict standards are met, the Legislature joined a "trend away from insisting on strict compliance with statutory formalities" in favor of "the broader

[7] *Cf Matter of Estate of Rathbone*, 190 Wn.2d 332, 346, 412 P.3d 1283, 1290 (2018) (holding beneficiary could not invoke court intervention in estate where testator intent to provide non-intervention powers was "expressly and clearly evident.")

principle that mistake . . . should not be allowed to defeat intention." RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS ("RESTATEMENT") § 12.1 cmt. c (1999).[8] Here, review and restoration of the trial court's order of reformation will provide clear guidance to courts regarding their authority under RCW 11.96A.125.

b. The Decision's Focus on the Requirement of Two Witnesses Under These Circumstances Ignores the Legislative Purpose Behind RCW 11.96A.125. The Decision held that "the failure of the second amendment to satisfy the formalities of a will is fatal." Decision at 13. However, execution of the Second Amendment with one witness (the notary) instead of two witnesses is precisely the type of mistake that RCW 11.96A.125 was adopted to remedy and the Decision's denial of reformation rested on the same arguments that opponents of will reformation in general have relied on. The Decision therefore ignores that, in enacting RCW 11.96A.125, the Legislature rejected blind adherence to will formalities in favor of implementing testator/trustor intent, by reformation of validly executed

[8]"Until recently, courts have not allowed reformation of wills." RESTATEMENT § 12.1 cmt. c. "Reforming a will, it was feared, would often require inserting language that was not executed in accordance with the statutory formalities." *Id.* Proponents of reformation argue that "the primary impediment to the adoption of a general reformation doctrine for wills is the seeming need for technical adherence to the Wills Act, rather than any judgment that it would offend the underlying purpose of the Wills Act to remedy well proven mistakes." John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. Pa. L. Rev. 521, 526 (1982).

documents, when RCW 11.96A.125's heightened standards are met. The tension between the statutory will formalities required by RCW 11.12.020(1) and the trial court's authority under RCW 11.96A.125 to reform a validly executed will, when its own strict requirements of clear, cogent, and convincing proof of both testator intent and the cause of the mistake (here, attorney error) have been satisfied, should be resolved by this Court in favor of reformation.

The policies underlying RCW 11.12.020(1), as articulated in the Decision, and the policies underlying RCW 11.96A.125 are the same – to protect testator/trustor intent with heightened evidentiary scrutiny of dispositive documents. "In ascertaining legislative purpose, statutes which stand in *pari materia* are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes." *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974).

RCW 11.96A.125's exceptionally high standard of proof, requiring "clear, cogent, and convincing evidence that both the intent of the testator or trustor and the terms of the will or trust were affected by a mistake of fact or law, whether in expression or inducement," is a safeguard that ensures the policies articulated in *Estate of Malloy, supra*, and relied upon as the sole basis for the Decision have been fully served. These core policies are

also known as the evidentiary function and the protective function of the Statute of Wills. John H. Langbein, *Substantial Compliance with the Wills Act*, 88 Harv. L. Rev. 489, 492–97 (1975). The evidentiary function is served because "clear, cogent, and convincing evidence" provides the court with reliable evidence of testator intent. The protective function is served because the court is assured that the clear, cogent, and convincing evidence of testator's intent was not a result of fraud, coercion, or undue influence and the error that reformation is seeking to correct was caused solely by an attorney upon whom the trustor/testator relied.

The undisputed circumstances of this case are not unique; unfortunately, attorneys can make errors when their clients rely upon them to get it right. Allowing reformation on evidence such as that present in this case harmonizes the underlying purposes of the two statutes and avoids declaring a winner and loser in direct contradiction to the legislative purpose. This Court's review will provide guidance on whether the Decision undermines the policy of honoring testator/trustor intent, when shown with heightened evidentiary standards.

c. <u>The Decision Ignores Washington Law Emphasizing That Estate Planning Documents Should Be Construed Together</u>. The Decision concluded that "the 'will or trust' whose terms may be reformed under RCW 11.96A.125 must be the *same* 'will or trust' whose terms were

affected by a mistake of fact or law, whether in expression or inducement." Decision at 9. However, RCW 11.96A.125 states no such requirement of "sameness."[9] Moreover, insisting that reformation can only apply to the document that was mistakenly signed would be contrary to the requirement that courts focus not on each document in isolation, but on a decedent's estate plan as a whole. *See generally In re Estate of Sherry*, 158 Wn. App. 69, 240 P.3d 1182 (2010) (reconciling intent of decedents' separate wills). "Pour-over wills," like those executed by Mr. and Ms. Meeks, especially must be looked at in conjunction with the trust into which they pour-over the testator/trustor's assets. The main purpose of the pour-over will is to transfer the probate assets of the estate into an existing inter vivos trust, where they will be held by a trustee for the purposes set forth in the trust and for the benefit of the beneficiaries named in the trust. V. Woerner, Annotation, *"Pour-over" Provisions From Will to Inter Vivos Trust*, 12 A.L.R.3d 56, § 1[a] (originally published in 1967). To look at documents that are part of a comprehensive plan in isolation is to ignore the function of a pour-over will and, in this case, also ignored that each of Mr. and Ms. Meeks's wills directly referenced the provision of the Meeks Trust containing the power of appointment. CP 41, CP 217.

[9] *See State, Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 9–10, 43 P.3d 4, 9 (2002) (in interpreting a statute, "if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent").

By declining to look at reformation as part of a holistic implementation of testator/trustor intent and focusing solely on the will, the Decision ignored the plain meaning of RCW 11.96A.125 and negated the authority granted by the Legislature to correct mistakes of execution in favor of the very formalistic requirements that the grant of equitable authority was intended to ameliorate. If a court cannot rely on RCW 11.96A.125 in a case where clear, cogent and convincing evidence shows that an attorney's mistake in expressing testator intent would otherwise result in failure of that intent, the statute fails to perform its primary function to remedy mistakes. The Decision is especially troublesome because modern estate plans frequently consist of multiple documents, which can only function together, and there is substantial public interest in resolving what authority courts have to consider the estate plan as a whole and reform those documents to correct mistakes.

d. The Illustrations Relied Upon By the Decision Are Inapplicable to the Undisputed Facts. The Decision relies extensively on Illustrations in Section 12.1 of the RESTATEMENT. Decision at 10-11, notes 1 and 2. However, both Illustrations are premised on an individual mistakenly believing that oral communications about intent are a substitute for a will, where the individual did not sign any writing. Those Illustrations

are not applicable where Ms. Meeks reduced her intent to writing and signed the Second Amendment before a notary.

Moreover, neither Illustration relied on by the Decision addresses a situation where the failure to implement testator intent is due entirely to a lawyer's mistake. *Contrast* RESTATEMENT § 12.1 cmt. j (reformation will lie where "the donor's advisor or drafting agent" has "fail[ed] properly to formulate the language necessary to carry out the donor's intention"). In relying on her attorney and executing the Second Amendment before a notary, Ms. Meeks did what any reasonable person would do. Members of the public should not bear the burden of ensuring their attorneys give them correct advice when reformation under the strict standards of RCW 11.96A.125 is available to ameliorate what would otherwise be a complete failure of a testator/trustor intention. RCW 11.96A.125 should not be subordinated to the formality of the two witness requirement on such facts.

e. <u>The Public Interest Would be Well-Served By Granting Review of a Decision That Eliminates an Avenue to Avoid Future Litigation</u>. Unfortunately, the Decision effectively leaves only the remedy of a malpractice claim where an attorney makes a mistake, the client relies on that mistake, and, therefore, executes a document incorrectly.

> To frustrate the wishes of a testator who had the prudence to follow counsel's direction seems especially offensive if it is avoidable. Since testators cannot be expected to discover their

> lawyers' mistakes, the question is whether to charge them with such mistakes when the evidence clearly establishes what was really wanted. We think it palpable that in these circumstances the testator's intent should be implemented if it can be proved with appropriate certainty.

Langbein & Waggoner, *supra*, at 571. Although an argument can be made that a malpractice action may be available to the intended beneficiary where reformation is denied, a court's conclusion that the estate planning attorney does not owe a duty to nonclients often bars them from bringing a claim against a negligent attorney. Kaitlyn C. Kelly, *Put Privity in the Past: A Modern Approach for Determining When Washington Attorneys Are Liable to Nonclients for Estate Planning Malpractice*, 91 Wash. L. Rev. 1851, 1869 (2016).[10] The application of the reformation statute to cases of attorney mistake thus allows for "the efficient and cheap resolution of trust and will disputes without malpractice litigation" and can "lessen the exposure of an attorney's estate planning malpractice liability while still remedying the harm to intended beneficiaries." Kelly, *supra*, at 1887-1889. Mistakes in estate planning documents do occur. Determination of when and how such errors can be remedied by reformation under RCW

[10] Although this Court has pointed to a relaxation of the privity requirement in estate planning cases, *Stangland v. Brock*, 109 Wn.2d 675, 680-81, 747 P.2d 464 (1987), reported cases have consistently found no duty on the part of the estate planning attorney to an intended beneficiary of an estate. *See e.g. Parks v. Fink*, 173 Wn. App. 366, 293 P.3d 1275 (2013) (attorney did not owe duty of care to prospective beneficiary of client's will to execute client's will promptly); *Linth v. Gay*, 190 Wn. App. 331, 360 P.3d 844 (2015) (attorney did not owe primary beneficiary a duty of care to properly execute trust documents).

11.96A.125, without resort to future litigation, raises a substantial issue of public interest that should be determined by this Court under RAP 13.4(b)(4).

F. Conclusion.

For all of the reasons stated above, FHCRC respectfully requests that the Washington Supreme Court grant review of the Decision below; first, to address the issue of fiduciary standing to appeal a trial court's determination of beneficiaries where the Decision below conflicts with prior decisions of this Court, and, second, to address the questions of substantial public interest presented by the Decision's refusal to accept RCW 11.96A.125's grant of authority to correct errors and implement testator/trustor intent when there is clear, cogent and convincing evidence that both the intent of the testator or trustor and the terms of the will or trust were affected by a mistake of fact or law, caused entirely by the attorney on whom the estate planning client relied.

RESPECTFULLY SUBMITTED this 28th day of August, 2018.

LANE POWELL PC

By *s/Gail E. Mautner*

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DECLARATION OF SERVICE

I certify and declare under penalty of perjury under the laws of the State of Washington and the United States as follows:

On August 28, 2018, declarant caused the document to which this Declaration is attached to be delivered to the following persons as indicated:

John Pierce, Esq. Law Office of John Pierce, P.S. 505 W. Riverside Avenue, Suite 518 Spokane, WA 99201 john@lawps.com	☑ by **JIS via the Clerk** ☐ by **Electronic Mail** ☐by **Facsimile Transmission** ☐ by **First Class Mail** ☐by **Overnight Delivery**
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Further, on August 28, 2018 declarant caused the document to which this Declaration is attached to be delivered to the following persons by U.S. Postal Service, first-class mail:

John Pierce, Esq. Law Office of John Pierce, P.S. 505 W. Riverside Avenue, Suite 518 Spokane, WA 99201	☐ ☐ ☑	by **Electronic Mail** by **Facsimile Transmission** by **First Class Mail**
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Executed at Seattle, Washington, this 28th day of August, 2018.

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

In the Matter of the	)	No. 35270-6-III
	)	
ESTATE OF MABEL MEEKS, and,	)	
L/M MEEKS NO. 1 TRUST.	)	PUBLISHED OPINION

SIDDOWAY, J. — Lisa Wuerch, successor trustee of the L/M Meeks No. 1 Trust and personal representative of the estate of Mabel Meeks, appeals the trial court's reformation of Ms. Meeks's 1994 will and its award of attorney fees and costs to the Fred Hutchinson Cancer Research Center (Fred Hutchinson). Clear and convincing evidence supported Ms. Meeks's effort to make changes to her estate plan. But evidence does not support the reformation of her 1994 will. In substance, the trial court reformed a 2005 attempt at what needed to be, but was not, a testamentary transfer. We are constrained to reverse. We remand the issue of any attorney fees and costs to be awarded to the parties to the trial court.

APPENDIX A

FACTS AND PROCEDURAL BACKGROUND

Estate Planning History

In March 1994, Lloyd and Mabel Meeks executed a trust agreement creating the L/M Meeks No. 1 Trust and identifying themselves as co-trustees. From the schedule of assets assigned and transferred to the trust, it appears they contributed to the trust all or most of their bank accounts, certificates of deposit, real estate, vehicles, securities, and personal property. On the same day, Mr. and Ms. Meeks executed twin wills, simple in form, which recognized as valid any written disposition of tangible personal property they might later prepare, but that otherwise gave, devised and bequeathed their estates to the trust.

The first purpose of the trust was to support the grantors during their joint lifetimes and the survivor following the death of the first to die. Upon that first death, the trust contained a common tax planning directive to fund a "By-Pass" trust with an amount of assets that would take full advantage of the unified credit applicable to federal gift and estate taxes. Any remaining assets were to be placed in a separate trust qualifying for the unlimited federal estate tax marital deduction. Assets remaining in either of the two trusts following the death of the second grantor were to be distributed 80 percent to the Meeks's

only child, Mary, with the remainder to be distributed to several individuals and Catholic charities identified by the trust.

During the grantors' joint lifetimes, the terms of the trust allowed for its revocation, modification, and for assets to be withdrawn. "Upon the death of the first Grantor," however, the trust provided, "this Agreement shall not be revocable in whole or in part nor subject to amendment." Clerk's Papers (CP) at 8. Notwithstanding the irrevocable character of the trust following the death of the first grantor, the trust agreement did provide the surviving grantor with a limited power of appointment over the By-Pass trust. The limited power could be exercised by the surviving grantor only in favor of lineal descendants of the Meeks's marriage, spouses of their lineal descendants, or tax-exempt religious, charitable, scientific, literary, or educational organizations. The trust further provided that the power "may be exercised only in a provision specifically describing this power of appointment contained in the Last Will of the surviving Grantor." CP at 10.

Lloyd Meeks was the first to die, in September 2002. It is undisputed on appeal that all of the Meeks's real and personal property had been transferred to the trust before his death. While the record does not reveal the size of his estate, it is undisputed on appeal that it was less than the amount excluded from federal estate taxation at the time,

meaning that all of the assets should have been segregated into a By-Pass trust. Ms. Meeks did not comply with the trust directive to retitle trust assets as assets of a By-Pass trust.

Not long after Mr. Meeks's death, Ms. Meeks contacted the lawyer who had prepared the couple's estate planning documents about changing the distribution of the trust assets following her death. Ms. Meeks wished to slightly reduce the percentage bequest to Mary to 75 percent of the estate, to cap all of the existing bequests by dollar amounts, to reduce some bequests, add two additional individual beneficiaries, and leave any remaining assets to Fred Hutchinson for breast cancer research. (Ms. Meeks was a breast cancer survivor.) Rather than prepare a new will or codicil to Ms. Meeks's 1994 will exercising her limited power of appointment, the lawyer prepared a first amendment to the trust. Ms. Meeks executed the amendment in December 2002.

In 2005, Mary died of glioblastoma multiforme cancer. After Mary's death, Ms. Meeks contacted her lawyer again, to address further changes to the distribution of the trust assets, including what she wanted done with the majority of the estate that had been intended for Mary. She wished to add a new individual beneficiary, make relatively small bequests to two additional charities, and make a large, $100,000 bequest for a scholarship fund for working single mothers to be established at the Community Colleges of Spokane,

where Mary had worked. She wished for the larger residual estate to be distributed one-half to Fred Hutchinson and one-half to its research partner, the University of Washington, solely for the research of glioblastoma multiforme cancer. Ms. Meeks's lawyer prepared a second amendment of the trust that made these changes. Ms. Meeks executed the second amendment in October 2005.

Ms. Meeks died in March 2015. She had never executed a new will or codicil exercising the limited power of appointment provided by the trust agreement.

Procedure

Lisa Wuerch, a niece of Mr. and Ms. Meeks, was named a successor personal representative by Ms. Meeks's will and a successor trustee by the trust. In May 2015, she filed a petition to open trust file in which she sought a judicial determination of the validity and enforceability of the first and second trust amendments, eventual approval of an accounting, and compensation for her service as trustee. She sought and obtained court approval of the identity of the individuals and charities entitled to notice of the proceeding. The court later certified Ms. Wuerch's status as successor trustee and approved reasonable compensation subject to her maintaining true and accurate contemporaneous records.

Fred Hutchinson obtained a court order authorizing the Meeks's estate planning lawyer to produce his records pertaining to Ms. Meeks's estate plan. He produced all records other than his work product. Based on his records and affidavits from other witnesses, Fred Hutchinson moved the court for an order confirming the validity of the trust amendments.

In its legal briefing to the court, Fred Hutchinson argued first that the court should reform the *trust* under RCW 11.96A.125—specifically, that it should "reform the provision purporting to prohibit amendments to the Meeks Trust and find that Ms. Meeks was entitled to amend the Meeks Trust in order to make [Fred Hutchinson] a beneficiary of the Trust." CP at 155. RCW 11.96A.125 provides in relevant part:

> The terms of a will or trust, even if unambiguous, may be reformed by judicial proceedings under this chapter to conform the terms to the intention of the testator or trustor if it is proved by clear, cogent, and convincing evidence that both the intent of the testator or trustor and the terms of the will or trust were affected by a mistake of fact or law, whether in expression or inducement.

Fred Hutchinson emphasized a report from Ms. Wuerch's lawyer that in his conversations with the estate planning lawyer, the estate planner had characterized the trust's prohibition on amendment following the first death as a "scrivener's error." CP at 304. According to Fred Hutchinson, "This information is strong evidence that Mr. and Ms. Meeks did not intend to limit Ms. Meek's ability to amend the dispositive provisions

for charitable remainder beneficiaries following Mr. Meeks's death." CP at 85 (boldface omitted). Fred Hutchinson conceded that the estate planning lawyer later denied ever admitting to a scrivener's error. *Id.* at 150. But it continued to argue that the court could infer an intent on the part of Mr. and Ms. Meeks that the trust was to remain revocable following the death of the first grantor, allowing the surviving grantor to modify the trust's distributions to charitable organizations.

Fred Hutchinson also argued that the court could reform the trust under RCW 11.96A.127 to order distribution in a manner consistent with the trustor's charitable purposes.

As an alternative to these two primary arguments for reforming the trust, Fred Hutchinson asked that the court reform Ms. Weeks's last will and testament under the same two statutory provisions to conform to her clearly expressed charitable intentions.

At the time of the hearing on Fred Hutchinson's motion, the trial court announced that "[b]ased upon what has been provided, the Court, at this point, is able to find by clear, cogent, and convincing evidence that the intent of both Mr. and Mrs. Meeks was to allow for the power of appointment for the surviving spouse, that Ms. Meeks was the surviving spouse, and she tried to exercise the power of appointment." CP at 282-83. It further found, however, that "[b]ecause the original trust isn't to be amended, I don't

know that it'd be appropriate for the Court to reform the trust. That would be an amendment to it. I think the more appropriate thing to do here is have the Court reform the will to reflect the designated beneficiaries as requested by Ms. Meeks, which do not conflict with the original trust." *Id.* at 283.

Following supplemental briefing on complications presented by some of Ms. Meeks's other beneficiary changes, the trial court entered supplemental findings and conclusions directing Ms. Wuerch as to the distributions to be made. It granted Fred Hutchinson's request for an award of its attorney fees and costs from the trust residue. Its final written findings, conclusions and order contain the following reformation provision:

> The Court REFORMS Ms. Meeks' Last Will and Testament so as to incorporate her exercise of the power of appointment in favor of the charities delineated in the Second Amendment to the Meeks Trust.

CP at 436.

The trustee appeals.

ANALYSIS

The trustee makes a number of arguments on appeal. We find only one of her arguments persuasive, but it is dispositive. As argued by the trustee, "RCW 11.96A.125 does not give a party or the court the right to circumvent the statutes that prescribe the processes for creating, and executing instruments, and executing specific rights." Br. of

Appellant at 19-20. We agree. The superior court's power of reformation under RCW 11.96A.125 enables it to reform a valid trust to conform to the grantor's intent in executing the trust. It enables the court to reform a valid will to conform to the testator's intent in executing the will. It does not enable the court to import into a valid will terms that conform to the testator's intent in executing a different document at a later date that was not executed with the formalities of a will.

The "will or trust" whose terms may be reformed under RCW 11.96A.125 must be the same "will or trust" whose terms "were affected by a mistake of fact or law, whether in expression or inducement." This is plain from the fact that the instrument's terms are being "reformed" to "conform" to the testator's or trustor's intent, making it clear that the intent must have existed at the same time that the mistake of fact or law caused the intent to be imperfectly expressed in the instrument.

This is also clear from the sources of law on which RCW 11.96A.125 was based. The provision was one of several added to Title 11 RCW at the request of the Washington State Bar Association, which appointed a task force to review the Uniform Trust Code proposed by the National Conference of Commissioners on Uniform State Laws and recommend amendments and additions to Washington's trust laws. *See* FINAL B. REP. ON SUBSTITUTE HB 1051, 62d Leg., Reg. Sess. (Wash. 2011); LAWS OF 2011, ch. 327, § 11.

Both section 415 of the Uniform Trust Code and section 2-805 of the Uniform Probate Code, on which the Washington statute is patterned, were based on section 12.1 of the *Restatement (Third) of Property: Wills and Other Donative Transfers* (Am. Law Inst. 2003). *See* UNIF. PROBATE CODE § 2-805 (amended 2010), 8 Pt. 1 U.L.A. 335-36 (2013).

> As the comments to section 12.1 to the *Restatement* state:
>
> An order of reformation alters the text of a donative document so that it expresses the intention it was intended to express. Thus, unless otherwise stated, a judicial order of reformation relates back and operates to alter the text as of the date of execution rather than as of the date of the order or any other post-execution date.

Cmt. f. Limitations on reformation are discussed by comment h to section 12.1:

> Reformation is a rule governing mistakes in the content of a donative document, in a case in which the donative document does not say what the transferor meant it to say. Accordingly, reformation is not available to correct a failure to prepare and execute a document (Illustration 1).[1] Nor is reformation available to modify a document in order to give effect to the

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[1] Illustration 1 states:

> G decided to leave his estate to his niece, X. G orally communicated his intent to X, mistakenly thinking that he could effectuate his intent in this manner. Thereafter G died intestate, leaving his sister, A, as his sole heir.
>
> Because G did not reduce his testamentary intent to writing and execute it as required by the Statute of Wills, X cannot invoke the reformation doctrine to implement G's true intent. G's mistake did not refer to specific terms in a donative document, because G never executed a document. There is no document to reform.

> donor's post-execution change of mind (Illustration 2)[2] or to compensate for other changes in circumstances.

The trial court's order of reformation in this case reformed Ms. Meeks's 1994 will, but no evidence was presented, let alone clear and convincing evidence, that Ms. Meeks intended in March 1994 for her last will and testament to make any distributions other than to pour whatever assets existed in her estate into the trust. And no evidence was presented, let alone clear and convincing evidence, that she intended in March 1994 to make the distributions she identified to her estate planning lawyer 11 years later, which he documented in the second amendment to the trust.

Fred Hutchinson understandably advocated primarily for reformation of the trust, to eliminate its prohibition on revocation. If, as the estate planning lawyer was alleged to

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[2] Illustration 2 states:

> G validly executed a will that devised his estate to his sister, A. After execution, G formed an intent to alter the disposition in favor of A's daughter, X, in the mistaken belief that he could substitute his new intent by communicating it to X orally.
>
> G's oral communication to X does not support a reformation remedy. Although a donative document exists that could be reformed by substituting "X" for "A," the remedy does not lie because G's will was not the product of mistake. The will when executed stated G's intent accurately. G's mistake was his subsequent failure to execute a codicil or a new will to carry out his new intent. This is a mistake of the same sort that G made in Illustration 1 in not making a valid will in the first place.

have said, the prohibition on revocation was a scrivener's error, it could be argued as clear and convincing evidence that Mr. and Ms. Meeks believed in March 1994 that the surviving grantor would be able to amend the trust to change its beneficiary designations. But the trial court was not persuaded. The estate planning lawyer denied admitting to a scrivener's error. And the trial court concluded that "the original trust [wasn't] to be amended." CP at 283.

An additional but unavailing approach to solving the problem is to reform the second amendment to the trust under RCW 11.96A.125 and treat it as a codicil,[3] which is what, in substance, the trial court attempted to do. If the second amendment to the trust had met the formalities required of a codicil, we believe the trial court could have concluded that in substance, if not in form, it *was* a codicil and an exercise of Ms. Meeks's limited power of appointment. But it does not satisfy the required formalities.

RCW 11.12.020(1) requires that a will satisfy three formalities:

> Every will shall be [1] in writing [2] signed by the testator or by some other person under the testator's direction in the testator's presence, and shall be [3] attested by two or more competent witnesses, by subscribing their names to the will, or by signing an affidavit that complies with RCW 11.20.020(2), while in the presence of the testator and at the testator's direction or request.

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[3] "'Codicil' means a will that modifies or partially revokes an existing earlier will." RCW 11.02.005(2).

Washington decisions recognize that with this statute, "requirements for valid will execution have been reduced to a minimum in Washington." *In re Estate of Price*, 73 Wn. App. 745, 751, 871 P.2d 1079 (1994) (citing *In re Estate of Chambers*, 187 Wash. 417, 425, 60 P.2d 41 (1936)). The statutory purposes underlying the minimal formality requirements that remain are "to ensure that the testator has a definite and complete intention to dispose of his or her property and to prevent, as far as possible, fraud, perjury, mistake and the chance of one instrument being substituted for another." *In re Estate of Malloy*, 134 Wn.2d 316, 322-23, 949 P.2d 804 (1998). Neither of Ms. Meeks's two trust amendments were attested by two or more competent witnesses as required by RCW 11.12.020(1).

The failure of the second amendment to satisfy the formalities of a will is fatal. Our facts fall squarely within the problem identified in one of the examples to section 12.1 of the *Restatement*. "Although a donative document exists that could be reformed by substituting 'X' for 'A,' the remedy does not lie because G's will was not the product of mistake. The will when executed stated G's intent accurately. G's mistake was his subsequent failure to execute a codicil or a new will to carry out his new intent." *Id.* at cmt. h., illus. 2.

In many if not most cases in which a will is held invalid for failure to satisfy the required formalities, the proponent of the will can make the case that the failed instrument clearly and convincingly reflects the intention of the would-be testator. After all, the would-be testator thought she or he was executing a will. If the superior court were allowed to "reform" an earlier, validly executed will by importing into it the different terms of the invalid will, the statutory purpose for requiring the minimal formalities required by Washington law would be frustrated. It is not a purpose of RCW 11.96A.125 to excuse a failure to satisfy those formalities. The statute does not operate to do so.

In addition to seeking reversal of the reformation order, the trustee asks us to reverse the award to Fred Hutchinson of its reasonable attorney fees and costs. Although the trial court awarded the fees and costs on the rationale that Fred Hutchinson was the successful party, its discretion in awarding fees and costs under RCW 11.96A.150 is extremely broad. We therefore reverse the award as predicated on the successful results obtained by Fred Hutchinson in the trial court, but with leave to the trial court to exercise its discretion to order attorney fees paid in such amount, if any, that the court determines to be equitable.

We reverse the trial court's findings, conclusions and order and remand for further proceedings consistent with this opinion.

Siddoway, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Pennell, J.

LANE POWELL PC

August 28, 2018 - 3:43 PM

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