No. 97480-2

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the:

ESTATE OF CONSTANCE LITTLE,

ROXANNE TREES,

Individually and as Personal Representative of the Estate of Constance Little,

Respondent,

v.

RENAE ROBERSON,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Respondent Roxanne Trees, individually and in her capacity as personal representative of the Estate of Constance Little, asks this Court to deny petitioner Renae Roberson's petition for review. The Court of Appeals correctly rejected Roberson's challenge to the decree of distribution and to Trees' final report and accounting as personal representative in the estate of the parties' deceased mother.

The courts below engaged in straightforward statutory construction in holding that the plain language of RCW 11.12.255 expressly allows a testatrix to incorporate by reference a writing that directs distribution of her estate, provided the writing is "in existence when the will is executed," the "will itself manifests the testators' intent to incorporate the writing," and "describes the writing sufficiently to permit its identification." Constance Little's will indisputably satisfied these statutory elements and the Court of Appeals properly honored Ms. Little's express directives in distributing her property in accordance with a separate writing that her will incorporated by reference.

Roberson's contrary argument – that the courts below could not honor the decedent's intent because the separate writing was labelled a "gift list separate from this Will" and therefore could only

direct disposition of "tangible personal property" pursuant to RCW 11.12.260 – is without merit. The Court of Appeals also properly rejected Roberson's argument that the separate writing must be admitted into probate with the will as unsupported by statute or case law. Her contention that she was deprived of due process of law ignores that Roberson challenged the enforcement of her mother's testamentary intent after notice and hearing in contesting the decree of distribution.

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals adhere to the plain language of RCW 11.12.255 and respect the intent of the decedent in holding that the will expressly incorporated by reference a separate writing, in existence at the time the will was executed, that directed the distribution of the assets of her estate?

2. Did the Court of Appeals correctly hold that petitioner received sufficient notice and an opportunity to challenge the distribution of her mother's estate when the personal representative filed the separate writing that the testatrix incorporated into her will by reference, provided notice to the petitioner, who argued her objections before a commissioner and again before the trial court on a motion for revision?

III. RESTATEMENT OF THE CASE

The Court of Appeals decision accurately recites the undisputed facts surrounding this dispute between petitioner Renae Roberson and respondent Roxanne Trees involving the estate of their deceased mother Constance Little.

A. Constance Little incorporated by reference a separate "gift list" in her last will and testament that reduced petitioner's share to account for assets "already received and taken."

Ms. Little remained active in managing her own affairs until six weeks before her death of February 4, 2013 at the age of 90. (CP 194) After her husband's death in 2008, Ms. Little lived alone in Yakima until 2011. (CP 98-99, 267-68) Roberson then prompted Ms. Little to buy, move, and share a house with her in Federal Way. (CP 98-99, 267-68) Ms. Little lived only briefly with Roberson, then moved in with her other daughter, Trees, prompting Roberson to unsuccessfully petition for a guardianship. (CP 98-99, 267-68)

Ms. Little executed a will on July 20, 2011 and a second will on August 4, 2011. (CP 1-12) On September 16, 2011, Ms. Little revoked the August will and reinstated the July will, in a signed document attested to by two witnesses. (CP 7-12; *see* RCW 11.12.020) That revocation expressly stated her intent "that my only valid last will and testament dated July 20, 2011 is to be effective

immediately upon my death and be in place from this day forward." (CP 7)

The revived July will designated Trees as personal representative. (CP 15; Op. 2) In the second paragraph of the revived July will, Ms. Little stated her "intent to prepare a gift list separate from this Will for the purpose of disposition of tangible personal property, mementos and family heirlooms pursuant to RCW 11.12.260." (CP 14) The very next paragraph states, "Except as provided in the list described in Paragraph SECOND above . . . I make the following specific bequests[,]" bequeathing 1% of her net estate to her sister and the remaining 99% to Trees and Roberson in equal shares. (CP 14-15, 38, 141) Ms. Little signed the separate document, referred to as a "gift list" on July 20, 2011, the same day she executed the July will. (CP 84)

In the gift list, Ms. Little directed "my Executor to first reduce Renae Kay Roberson's half of my estate using the bolded amount values listed below and for reasons provided" in three separately numbered sections. First, because Roberson had "already received or taken" specific valuable assets during Ms. Little's life, Ms. Little reduced Roberson's inheritance by $3,000 for Ms. Little's husband's diamond ring and $13,500 for half of the value of her husband's

vehicle. (CP 86) Second, Ms. Little expressly referred to "[p]ersonal funds and loans" that she had given to Roberson "for her own purposes over time," and reduced Roberson's half of the estate by $15,000. (CP 86) (Op. 3)

Third, noting that Roberson had "taken charge" of several assets "without complete permission . . . and/or thorough documentation" to Ms. Little of their "current whereabouts and dispensation," Ms. Little further reduced Roberson's inheritance by $6,000 for a gun collection, given to Roberson "for safekeeping" in 2005, but "not accounted for since then"; "up to $60,000" in government bonds; and $5,000 for Ms. Little's coin collection, "which Renae took without permission or for safekeeping." (CP 86)

If Roberson documented that she had returned the designated items or deposited the funds to Ms. Little's accounts, "[e]ach reduction can be waived individually." (CP 86) But if Roberson failed to do so, Ms. Little directed her PR to reduce Roberson's portion of the estate "proportionally and accordingly, using the itemized reductions." (CP 86)

Ms. Little also made several cash distributions in the gift list, such as two $10,000 gifts to be "deducted first" from the net estate and given to each of her two grandchildren. The writing also directed

the disposition of specific items of tangible personal property, mementos and family heirlooms. (CP 86)

Ms. Little executed another identical "gift list" again on September 16, 2011, when she revived the July 2011 will. Both the July and September documents expressly state in the first sentence that "this is a separate gift list that accompanies my last will and testament dated July 20, 2011." (CP 84, 86)

B. The courts below rejected petitioner's contention that the gift list was void, upholding the personal representative's accountings and the decree of distribution.

Ms. Little died on February 4, 2013, almost seventeen months after reviving her July will and executing the second gift list. (CP 38) Her daughter Roxanne Trees was appointed as personal representative with nonintervention powers and admitted the revived July will to probate. (CP 26-37, 106, 141) Through counsel, Roberson filed a special notice of proceedings on July 21, 2015. (CP 190, 273-74)

Little filed her first interim report and accounting on August 17, 2015, submitting copies of both signed gift lists on July 20, 2011 and September 16, 2011. (CP 185-95, 232, 234) Trees sought an accounting from Roberson, arguing that Roberson had failed to account for her activities while acting on behalf of their mother under

a power of attorney following their father's death in 2008. (CP 193-95, 264, 268; Op. 6)

Following her counsel's withdrawal, Roberson appeared pro se, arguing that the gift list should not be enforced "as there is no evidence provided for substantiation of information." (CP 267) The probate court commissioner approved the interim accounting, reserving the PR's motion to order Roberson to account for the time when she acted as her mother's attorney-in fact. (CP 40, 142, 280-84; RP 13, 30)

Trees filed her final report and sought approval of the personal representative's final accounting and a decree of distribution in November 2017. (CP 38-44) In her Final Report, Trees reported that the estate had reimbursed Roberson for funeral expenses but rejected her claim for "services" and made only a partial payment on her claim for repairs to their mother's home. (CP 39, 141-42) Trees also reported that she intended to follow Ms. Little's directive to reduce Roberson's distributive share and to make other cash distributions and dispose of tangible property. (CP 38-43)

Roberson conceded that the gift list "is in my mother's writing" and that "[m]y mom signed a document entitled 'Gift List'" (RP 30; CP 106), but argued that the gift list was "unenforceable" and

"inadmissible" under both RCW 11.12.255 and RCW 11.12.260. (CP 106-11) She claimed that because the gift list had not been admitted to probate, "failure of notice of [the] separate writing" deprived her of due process. (CP 108)

The probate court commissioner concluded that Ms. Little in her will intended to incorporate the gift list by reference under RCW 11.12.255. (RP 14; CP 142) The commissioner approved the final report and accounting and ordered Roxanne to distribute and close the estate. (CP 140-44)

King County Superior Court Judge Lori Smith ("the trial court") denied Roberson's motion for revision, holding that the gift list satisfied RCW 11.12.255 and that Ms. Little incorporated the writing in her will by reference. (CP 148-56, 171-74; RP 36-38) The trial court found that, although "Ms. Roberson did not receive the gift list initially, she has had it, or access to it, for a few years and had an opportunity to address the issues in the gift list" and found "no evidence of undue influence or wrongdoing" in the creation of the gift list. (CP 173)

The Court of Appeals affirmed, holding that "the gift list meets the requirements of RCW 11.12.255 and controls distribution of the Estate" (Op. 15), that the personal representative was not required to

file the gift list when the will was admitted to probate (Op. 16), and that Roberson was not deprived of due process because she "knew about and challenged the gift list and distribution of the Estate" in opposing the personal representative's Final Report and decree of distribution. (Op. 17)

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. The Court of Appeals adhered to the plain language of RCW 11.12.255 in holding that a will may incorporate a separate writing by reference.

The Court of Appeals' holding that RCW 11.12.255 authorizes a testatrix to incorporate a separate writing by reference in her will comports with the plain language of the statute, conflicts with no case law and presents no issue of constitutional magnitude or substantial public interest. RAP 13.4(b)(1)-(4). The Court of Appeals properly treated this as a straightforward case of statutory construction based on unambiguous statutory language:

> A will may incorporate by reference any writing in existence when the will is executed if the will itself manifests the testator's intent to incorporate the writing and describes the writing sufficiently to permit its identification. In the case of any inconsistency between the writing and the will, the will controls.

RCW 11.12.255.

The statute requires that the separate writing must (1) have been "in existence when the will is executed," (2) the will itself must

"manifest[] the testator's intent to incorporate the writing" and (3) the will must "describe[] the writing sufficiently to permit its identification." RCW 11.12.255. Finally, the separate writing must not be inconsistent with the terms of the will, or the "will controls." RCW 11.12.255. The Court of Appeals properly held that the gift list meets these requirements because it "is a writing that the will incorporates by reference" under the "plain and unambiguous language of RCW 11.12.255." (Op 11-12) Its decision furthers Ms. Little's testamentary intent. Roberson would instead undermine that intent.

Roberson does not now contest that the gift list existed when Ms. Little "executed the will on July 20, 2011 and reinstated the will on September 16, 2011." (Op. 12) She has thus abandoned her argument below that the list did not exist when Ms. Little executed her last will and testament. (App. Br. 18-19) *Havens v. C & D Plastics, Inc.*, 124 Wn. 2d 158, 176, n.5, 876 P.2d 435 (1994) ("Plaintiff has not argued this issue in his Amended Petition for Review, and we deem it abandoned.")

Roberson disregards the "fundamental maxim" in construing a will, which requires the Court to "go to the utmost possible length to carry into effect the testator's wishes" and may not, "by technical

rules of statutory or other legal construction[,] . . . . defeat the will of the testator, unless such construction be absolutely required." *Estate of Elliot,* 22 Wn.2d 334, 350-51, 156 P.2d 427 (1945) (internal quotation omitted), a principle the Court of Appeals properly acknowledged. (Op. 11, citing *Estate of Bergau*, 103 Wn.2d 431, 435, 693 P.2d 703 (1985); *Estate of Price*, 73 Wn. App. 745, 754, 871 P.2d 1079 (1994)). The will manifests Ms. Little's clear intent to incorporate the gift list by reference. The Court of Appeals properly held that the court must determine that intent from the "language of the will as a whole" and in the "context of the entire will." (Op. 11, citing *Bergau*, 103 Wn.2d at 435; *Estate of Riemcke*, 80 Wn.2d 722, 728, 497 P.2d 1319 (1972); and *Estate of Mell*, 105 Wn.2d 518, 524, 726 P.2d 836 (1986).

Roberson improperly parses a portion of the will by quoting solely Ms. Little's statement in the SECOND Article, that "it is my intent to prepare a gift list separate from this Will for the purpose of disposition of tangible person property . . . pursuant to RCW 11.12.260." (CP 14) But in the very next THIRD Article, Ms. Little again refers to the gift list as governing her specific bequests, specifically stating, *"[e]xcept as provided in the list described in Paragraph SECOND above* . . . I make the following specific

bequests." (CP 14, emphasis added) Roberson's contention that "there is no mention of any other separate writing in the Will" except for in the SECOND Article (Pet. 10) is patently erroneous.

Ms. Little's July will both "manifests the testator's intent to incorporate the writing" and specifically "describes the writing sufficiently to merit its identification" within the meaning of RCW 11.12 255. *See Woodard v. Gramlow*, 123 Wn. App. 522, 527, 95 P.3d 1244 (2004) (testator must "describe or identify the documents intended to be incorporated, or render them capable of identification by extrinsic evidence, so that no room for doubt can exist as to what papers were meant" to be incorporated. (internal quotation omitted)), *rev. denied*, 153 Wn.2d 1029 (2005); *Baarslag v. Hawkins*, 12 Wn. App. 756, 763, 531 P.2d 1283 (1975) (will must describe separate documents "with sufficient certainty that it may be identified and distinguished from other similar documents."), *rev. denied*, 86 Wn.2d 1008 (1976). The Court of Appeals decision is consistent with these cases. RAP 13.4(b)(2).

Roberson's contrary argument, that because "RCW 11.12.255 is neither referenced in the Will or in the separate writing, . . . the elements of sufficient description to permit incorporation are not satisfied" (Pet. 14), is particularly misplaced. RCW 11.12.255

requires identification of "the writing," not citation to the statute that authorizes incorporation of the writing.

Roberson's argument that "Constance's will only references a writing under RCW 11.12.260, so RCW 11.12.255 does not apply" (Pet. 9) manifestly defeats Constance Little's clear intent. That Ms. Little referenced RCW 11.12.260[1] in the SECOND Article of her will, where she directed the gift list to govern the disposition of specific items of tangible personal property, is in no way inconsistent with her intent, expressed in the THIRD Article, to incorporate by reference the gift list's separate provisions reducing Roberson's share of the Estate to account for the personal property that "Roberson has already received or taken," taken "without complete permission by me" and funds "acquired . . . from me for her own purposes over time." (CP 86)

Nothing in chapter RCW ch. 11.12 or the remainder of probate code prohibits a testator by separate writing to both dispose of

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[1] Under RCW 11.12.260, a will "may refer to a writing that directs disposition of tangible personal property not otherwise specifically disposed of by the will" if (1) the unrevoked will refers to the writing, (2) the writing is either signed by the testator or in the testator's handwriting, and (3) the writing describes the items and recipients of the property with "reasonable certainty." RCW 11.12.260(1). The separate writing "may be written or signed before or after the execution of the will," RCW 11.12.260(2), and the testator "may make subsequent handwritten or signed changes to any writing." RCW 11.12.260(3).

tangible personal property under RCW 11.12.260, and to allow the disposition of non-tangible assets of the estate, provided the document also satisfies the requirements for incorporation by reference under RCW 11.12.255. Contrary to Roberson's argument that the courts below held that "gifts not permitted under RCW 11.12.260 could be gifted under RW 11.12.255" (Pet. 8), there is no conflict between the two statutes because they address separate matters, operating independently to fulfill testamentary intent. *See Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 437, 858 P.2d 503, 509 (1993) ("different sections of a statute [should] be read harmoniously rather than in conflict"). The Court of Appeals properly interpreted "the statutory scheme as a whole," rather than in isolation, as Roberson does. *See Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 421, 432, ¶ 28, 395 P.3d 1031 (2017) (Op. 11).

As the trial court found, the gift list "was specifically mentioned, not just in the Will, but even when the Will was redone three months later it was re-dated and mentioned again." (RP 36) And, as the Court of Appeals held, "[t]he will explicitly directs the executor to implement the directions in the gift list before distributing the remainder of Little's Estate." (Op. 16)

The Court of Appeals followed established law, interpreting RCW 11.12.255 according to its plain and unambiguous language and fulfilling Constance Little's manifest testamentary intent to incorporate by reference a document governing the disposition of her estate. This Court should deny review.

B. The lower courts' application of RCW 11.12.255 did not deprive Roberson of due process because she had notice and an opportunity to challenge the gift list.

The Court of Appeals also correctly rejected Roberson's contention her due process rights were somehow violated by the lower courts' decisions effecting Ms. Little's plain intent to incorporate the gift list into her last will and testament by reference or by the personal representative's failure to admit into probate the separate writing along with the will. The "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Aiken v. Aiken*, 187 Wn.2d 491, 501, ¶ 19, 387 P.3d 680 (2017) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)) (Op. 17). Roberson exercised her due process right to be heard after notice before the commissioner, on revision, and in the Court of Appeals.

Roberson had notice of the contents of the gift list two years before she brought her challenge to the final decree. The Court of

Appeals properly held that "Washington law does not require the personal representative to file a separate writing when the will is admitted to probate." (Op. 16) RCW 11.28.237 does not require the personal representative to include a copy of the will with the notice of the "pendency of said probate," although it is "often an effective practice to provide the heirs with copies of the initial probate documents approved by the court, at the time notice is provided of appointment of the personal representative." Cheryl C. Mitchell, 26B *Wash. Prac., Probate Law and Practice* § 16:2 (2017). Trees filed the July will and gave the requisite notice of her appointment and the pending probate to Roberson in February 2013. (CP 1-36),

A writing incorporated by reference "is not a physical part of the will and need not be offered for probate nor be made part of the public record." Restatement (Third) of Property (Wills & Don. Trans.) § 3.6 cmt. h (1999). As the trial court recognized, if documents incorporated by reference were required to be admitted to probate, RCW 11.12.255 would be unnecessary: "It would be part of the Will and attached. The reason that [RCW 11.12.255] exists is so that something that is not attached to the Will can be clearly identified as being that document that's incorporated." (RP 37)

Roberson's contention that she had no notice or opportunity to challenge the gift list or to return the money and property taken from her mother before her share of the estate was reduced is also without merit. Roberson received a copy of the gift list when the personal representative filed the writing in August 2015 – more than two years before the estate closed. (CP 193, 231-34, 278; RP 30) When initially appearing in probate court she did not raise her current allegation that the document was not prepared by her mother (Pet. 12), but complained only that the values of items identified in the gift list lacked "substantiation of information." (CP 267) Two years later, when arguing that the document was unenforceable, Roberson conceded that the gift list "is in my mother's writing" and that "[m]y mom signed a document entitled 'Gift List.'" (RP 30; CP 106)

Roberson appeared at two hearings contesting the gift list, where the trial court afforded her the right to be heard before the probate court approved the personal representative's decree of distribution. (RP 6-11, 13, 29-36) The trial court found "no evidence of undue influence or wrongdoing" in the creation of the gift list and that, although "Ms. Roberson did not receive the gift list initially, she

has had it, or access to it, for a few years and had an opportunity to address the issues in the gift list." (CP 173)

The Court of Appeals properly rejected Roberson's due process arguments based on substantial evidence and established law. Its decision presents no basis for this Court's review.

C. The Court should award the personal representative her fees in responding to the petition, and on appeal in the unlikely event the Court accepts review.

The Court of Appeals declined respondent's request for fees on appeal under RW 11.96A.150(1). (Op. 18) This Court may "in its discretion" require "any party" to pay reasonable fees incurred in an action under RCW ch. 11.96A. RCW 11.96A.150. Roberson has persisted in contesting the personal representative's actions to fulfill Ms. Little's testamentary intent, taken pursuant to the plain language of RCW 11.12.255, before the commissioner, on revision and in two appellate courts. The Court should exercise its discretion to award Trees her fees in this Court. In the event this Court grants review it should also review the Court of Appeals denial of attorney fees and order Roberson to pay all of Trees' fees in defending the trial court's decision on appeal.

V. CONCLUSION

The Court should deny review and award fees to respondent.

Dated this 16th day of September, 2019.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 16, 2019, I arranged for service of the foregoing Answer to Petition for Review, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 16th day of September, 2019.

Sarah N. Eaton

SMITH GOODFRIEND, PS

September 16, 2019 - 11:26 AM

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