No. 100971-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Estate of:
PATRICIA A. BERG,
and S. EDWARD BERG,
Deceased.

RANDALL A. BERG,

Respondent,

v.

KATHLEEN M. MYRON, in her capacity as personal representative,

Petitioner.

ANSWER TO AMENDED PETITION FOR REVIEW

THE LAW OFFICES OF ANN T. WILSON
Ann T. Wilson, WSBA #18213
1420 Fifth Avenue, Suite 3000
Seattle, WA 98101
(206) 625-0990
Attorney for Respondent
Randall Berg

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

I. INTRODUCTION

Respondent Randall Berg is a beneficiary of his parents' estates and trusts. He respectfully requests this Court deny review of the April 4, 2022 unpublished opinion of the Court of Appeals in *Matter of Estate of Berg*, No. 82328-1-I reversing the trial court's ruling that Patricia Berg did not intend to exercise the limited powers of appointment granted to her under the Will of her predeceased husband, Edward Berg.

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals application of a de novo standard of review to the trial court's interpretation of a will involving ascertainment of a testator's intent is in conflict with published precedent?

2. Whether the decision of the Court of Appeals to limit consideration of "surrounding circumstances" to objective factors at the time of execution of the will when interpreting a will conflicts with published precedent?

3. Whether the decision of the Court of Appeals involves an issue of substantial public interest that should be determined by the Supreme Court?

III. RESTATEMENT OF THE CASE

A. Family Background.

Edward and Patricia were married for 65 years and had six children together: Thomas Berg ("Thomas"), Richard Berg (deceased in infancy), Sharon Griffin ("Sharon"), Randall Berg ("Randy"), Christine DeLaney ("Christine"), and Kathleen Myron ("Kathy"). (CP 654).

During their marriage Edward and Patricia founded Bil-Jax Scaffolding & Equipment Co., Inc. which was subsequently renamed Berg Equipment & Scaffolding Co., Inc. ("Berg Equipment"). Edward originally ran day to day operations of Berg Equipment while Patricia handled the financial and accounting aspects of the business. *Id.* At the time Berg Equipment was started, the family lived in Yakima while Edward attempted to get the business up and running in the

Puget Sound area. Randy has worked for the company for over 50 years starting when he was in high school with taking the train from Yakima on the weekends to work with his father. (RP 135-36). Edward and Patricia referred to Randy as one of the founders of Berg Equipment. Randy was named the Vice President of Operations in 1980 and ran the day-to-day operations after Edward suffered a stroke. (RP135-36, CP 654). Kathy has worked for Berg Equipment on and off for approximately 37 years. (CP 655). There was a time when she left the business to work for a floral company. (RP 290). None of the other children were active in the business at the time of trial or for several years prior to trial. (CP 655).

B. Deaths of Edward and Patricia and Subsequent Probate Proceedings.

Edward died on January 24, 2014, survived by Patricia, Thomas, Sharon, Randy, Christine, and Kathy. (CP 654). Following his death, Edward's Will was admitted to probate in King County under Cause Number 14-4-01868-9 KNT. (Ex 1). Edward's Will named Patricia as Personal Representative of his

Estate and named Kathy as Successor Personal Representative. Article 4 of Edward's Will created an Exemption Trust and a Marital Trust. The Exemption Trust was eventually funded by Kathy as Successor Personal Representative of Edward's Estate with assets including one-half of the shares of Berg Equipment. (Ex. 12; RP 201-02).

Patricia was the sole beneficiary of the Exemption Trust and the Marital Trust during her lifetime and held a limited testamentary power of appointment over both Trusts. Paragraphs 3.3(a) (Exemption Trust) and 4.3(b) (Marital Trust) of Edward's Will contain the following identical language:

> I give my wife a limited testamentary power of appointment to direct how the remaining trust assets shall be distributed. **My wife may exercise this power in any valid manner,** outright or in trust, in any amounts and proportions; provided that if any of my descendants survive my wife, this power shall be exercisable only in favor of any one or more of my descendants. If this power is exercised by appointment of any assets in trust, the appointment shall be effective even though the terms of the trust provide that the trust assets shall be distributed upon termination of the trust to a beneficiary other than my descendants if none of

> my descendants are then living. This power may not be exercised, however, in favor of my wife, my wife's estate, my wife's creditors or the creditors of my wife's estate or in the manner described in Section 2041(a)(3) of the Internal Revenue Code. **My wife must expressly refer to and exercise this power in her valid will or codicil for the appointment to be effective.**

(Ex. 1; Emphasis added). On September 22, 2014, approximately nine months after Edward's death and before the Exemption and Marital Trusts were funded, Patricia executed her Will and Patricia's Trust. (Exs 2 & 3). Patricia's daughter Kathy was named as Personal Representative of Patricia's estate and successor trustee of Patricia's Trust. Paragraph 1.2 of Patricia's Will exercised the testamentary powers of appointment granted to her by Edward's Will:

> All the rest, residue and remainder of my estate, of whatever nature and wherever situated, of which I may own or be entitled at the time of my death, ***including property over which I may have a power of appointment which I have not otherwise exercised, released or refused in writing, to exercise,*** I give, devise and bequeath to the Trustee of the PATRICIA A. BERG TRUST created under a Trust Agreement dated September 22, 2014, by myself as Trustor, which has been signed prior to

> the Will and is not in full force and effect, as an addition to the principal of said Trust. If the Trust created by said Agreement shall have terminated prior to my death, then this paragraph of my Will shall be construed to establish a Trust with the same terms and conditions as said PATRICIA A. BERG TRUST, including any amendments made prior to the date of my death, and all assets provided for in this paragraph shall go to the Trustee therein named.

(Ex. 2; emphasis added).

Section B.2.3 of Patricia's Trust provides for the distribution of any Berg Equipment stock as follows:

Randy	55%
Kathy	25%
Thomas	5%
Sharon	5%
Christine	10%

(Ex. 3). Because Patricia exercised her testamentary powers of appointment, including her power over the Exemption Trust, the Court of Appeals correctly determined that the Berg Equipment shares held in the Exemption Trust at Patricia's death were subject to distribution in the percentages specified in

Patricia's Trust along with the other half of the shares Kathy had transferred to Patricia's Trust after Patricia's death.

Patricia died on February 17, 2018. (CP 654). Patricia's Will was subsequently admitted to probate under King County Cause No. 18-4-02156-9 KNT. (Ex. 2). Kathy was appointed the Personal Representative of Patricia's Estate as well as the Trustee of Patricia's Trust. (Exs. 2 & 3).

C. Dispute.

Following Patricia's death, Randy attempted to communicate with Kathy regarding the progress of her administration of their parents' estates and trusts. (RP 137-147). One of Kathy's three law firms then sent a letter to Randy dated August 12, 2019, notifying him that Kathy was taking the position that Patricia had not effectively exercised her powers of appointment over the Berg Equipment stock held in the Exemption Trust and that Kathy intended to distribute the stock under the distribution scheme in Edward's Will under which Kathy would receive an additional 15%. (Ex. 17).

On August 30, 2019, Randy filed a Petition in King County Superior Court under Cause No. 19-4-16187-3 SEA requesting a finding that Patricia effectively exercised her powers of appointment and requesting that the court order Kathy to complete the administration of Patricia's Trust. (CP 1-13, 657).

Trial was held in November 2020. The trial court relied on the testimony of Ryan Y. Rehberg and Sabrina Go to determine that the language in Patricia's Will was "merely boilerplate" and that Patricia did not intend to exercise her powers of appointment despite the plain language of her Will. (CP 658-660). The trial court also inexplicably noted the expert witness testimony of Professor Karen Boxx that the language in Patricia's Will was sufficient to exercise her powers of appointment yet still found that Patricia's Will did not exercise her powers of appointment because it could have been more clearly drafted. (CP 658).

The Court of Appeals reversed, holding: (1) Patricia manifested her intent to exercise her powers of appointment in her Will, which was not ambiguous and (2) the trial court improperly considered extrinsic evidence which contradicted the terms of the Will in concluding otherwise.

IV. WHY REVIEW SHOULD BE DENIED

As set forth in RAP 13.4(b):

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The issues presented in this case and the petition for review do not fall under any of the four categories of cases for which review may be granted under RAP 13.4. Not even Petitioner tries to argue that there is a significant Constitutional question. And, despite Petitioner's protests to the contrary, the Court of

Appeals' decision does not conflict with a decision of this Court or a published decision of the Court of Appeals or present an issue of substantial public interest. Accordingly, this Court should deny the petition for review.

A. The Court of Appeals Decision to Apply a De Novo Standard of Review to the Trial Court's Interpretation of a Will Does Not Conflict with Precedent of this Court or the Court of Appeals.

The Court of Appeals' decision is consistent with existing law. Interpretation of a will involves the court's effort to uphold the testator's intent. *Matter of Estate of Bergau*, 103 Wn.2d 431, 435, 593 P.2d 703 (1985) (citing *In re Estate of Riemcke*, 80 Wn.2d 722, 728, 497 P.2d 1319 (1972)). "Such intention must, if possible, be ascertained from the language of the will itself and the will must be considered in its entirety and effect must be given every part thereof." *Id.* (citing *In re Estate of Douglas*, 65 Wn.2d 495, 499, 398 P.2d 7 (1965); *Elder v. Seattle First Nat'l Bank*, 33 Wn.2d 275, 278, 204 P.2d 1068 (1949)).

Existing precedent consistently holds that "[a]n appellate court reviews de novo the trial court's interpretation of a will, including whether or not there is an ambiguity." *Woodard v. Gramlow*, 123 Wn. App. 522, 526, 95 P.3d 1244 (2004) (citing *King v. Snohomish County*, 146 Wn.2d 420, 423-24, 47 P.3d 563 (2002)). This is true because "[i]nterpretation of a will is a question of law" which is reviewed de novo where "the trial court's factual findings are not in dispute and deemed verities on appeal." *In re Estate of Curry*, 98 Wn. App 107, 112, 988 P.2d 505 (1999) (citing *Moreman v. Butcher*, 126 Wn.2d 36, 39, 891 P.2d 725 (1995); *Espinoza v. City of Everett*, 87 Wn. App. 857, 865, 943 P.2d 387 (1997); *Erickson v. Reinbold*, 6 Wn. App. 407, 422, 493 P.2d 794 (1972)).

The Court of Appeals concluded the trial court's challenged findings although denominated as findings of fact were "conclusions of law, including interpretations of the will." Opinion at 9. Specifically, Randy argued "that paragraph 1.2 of Patricia's will was not ambiguous and sufficiently manifested

her intent to exercise her [limited power of appointment]." *Id.* Accordingly, the Court of Appeals properly applied a de novo standard of review to the trial court's interpretation of paragraph 1.2 of Patricia's Will.

Petitioner relies on *Franklin County Sheriff's Off. v. Sellers*, 97 Wn.2d 317, 646 P.2d 113 (1982) as authority for her contention that the Court of Appeals should have reviewed the trial court's interpretation of Patricia's Will under a substantial evidence standard. Petition at 14. However, reliance on *Franklin* is misplaced.[1] *Franklin* chiefly deals with the correct standard for review of an administrative decision of a

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[1] Likewise, Petitioner's reliance on *Eisenbach v. Schneider,* 140 Wn. App. 641, 651, 166 P.3d 858 (2007) is misplaced. Whether testamentary intent is a question of fact is irrelevant to the question of whether the Court of Appeals correctly applied a a de novo review standard to the interpretation of Patricia's Will. As further explained in this Answer, Washington law is well settled that testamentary intent is to be determined from the terms of the Will and evidence of intent may not contradict the express terms of the Will. Interpretation of a Will is a question of law. Petitioner ignores all the rules regarding interpretation of a Will in attempting to create a non-existent conflict in existing precedent.

government agency - it does not concern an appellate court's review of a lower court's interpretation of a will. Moreover, nowhere in the *Franklin* opinion does the Court state that will interpretation is a mixed question of law and fact to be reviewed under a substantial evidence standard. Instead, as explained in the Court of Appeals' opinion, *Franklin* held:

> Mixed questions of law and fact, or law application issues, involve the process of comparing, or bringing together, the correct law and the correct facts, with a view to determining the legal consequences. As we said in *Daily Herald Co. v. Department of Employment Security*, 91 Wn.2d 559, 561, 588 P.2d 1157 (1979), mixed questions of law and fact exist 'where there is dispute both as to the propriety of the inferences drawn by the agency from the raw facts and as to the meaning of the statutory term.' We have invoked our inherent power to review de novo those issues.
>
> De novo review in these cases refers to the inherent authority of this court to determine the correct law, independently of the agency's decision, and apply it to the facts as found by the agency and upheld on review by this court.

Opinion at FN 5 (quoting *Franklin*, 97 Wn.2d at 329 (citations omitted)).

Therefore, the holding in *Franklin* need not be clarified and the Court of Appeals' decision to review the trial court's interpretation of Patricia's Will de novo, rather than for substantial evidence, is neither a misapplication of Washington law nor contrary to any existing Washington precedent. There was no dispute as to the language of Edward's and Patricia's Wills. The dispute was how the law was to be applied to the Wills. That is a question which is clearly subject to de novo review under existing Washington precedent.

B. The Court of Appeals Properly Considered the "Surrounding Circumstances and Language" in Ascertaining Intent.

"When called upon to construe a will, the paramount duty of the court is to give effect to the testator's intent." *Bergau* at 435 (citing *Riemcke*at 728). Testamentary intent "must be gathered from the four corners of the will when read

as a whole." *In re Estate of Douglas*, 65 Wn.2d 495, 499, 398 P.2d 7 (1965).

There are limitations to the rule that intent is to be determined solely from the four corners of a testator's will. The first of those is where the language is ambiguous. *Riemcke* at 727. The fact that a will or trust contains commonly used language or "boilerplate" language has no bearing on whether that language is ambiguous. That language must be given effect absent fraud. *See, e.g.*, *South Kitsap Family Worship Center v. Weir,* 135 Wn. App. 900. 907, 146 P.3d 935 (2006). If commonly used (or boilerplate) language cannot be a manifestation of the testator's intent, as argued by Petitioner, then in every will or trust contest case, courts must determine which provisions in wills are written "from scratch" and which provisions are sourced from attorneys' templates. Under this framework, *every will* that is drafted using a template, contains commonly used language, or that is drafted using document-

generating software *cannot* be an accurate manifestation of the testator's intent. This is not and should not be Washington law.

"When upon a reading of the will in its entirety any uncertainty arises as to the testator's true intention, it is well accepted that extrinsic facts and circumstances may be admitted for the purpose of explaining the language of the will." *Bergau* at 436 (citing *Riemcke* at 728; *In re Estate of Torando*, 38 Wn.2d 642, 228 P.2d 142 (1951)). However, "[e]xtrinsic evidence is not admissible to vary or supplement the terms of the will.... Whenever possible, the "actual intent" of the testator should be garnered from the four corners of the will unaided by extrinsic facts." *Matter of Estate of Wendl*, 37 Wn. App. 894, 897, 684 P.2d 1320 (1984) (internal citations and quotations omitted).

A second exception to the four corners rule exists "[e]ven where no ambiguity exists in the will language... it is nevertheless appropriate to consider 'the situation as it existed when the will was drawn' with an awareness of 'all the

surrounding circumstances." *Id.* (quoting *Anderson v. Anderson*, 80 Wn.2d 496, 499, 495 P.2d 1037 (1972)). The *Wendl* court makes clear that the surrounding circumstances rule pertains to "objective factors". *Id.* The court relied on earlier rulings to establish the parameters of what was appropriate to consider under the surrounding circumstances rule and made clear that **unless the will was ambiguous, oral declarations, including those of the testator themselves, could not be considered**, concluding that "[t]he rule is logical because such evidence is highly susceptible to fraud. It is inherently unreliable." *Id.* at 899 (emphasis added). In fact, the *Wendl* court itself stated that extrinsic evidence of statements or which contradicts the will itself does not fit into the surrounding circumstances rule. *Id.* at 897-98.

In this case, Patricia's Will is straightforward and clearly and unambiguously transfers all her property, "including property over which I may have a power of appointment", to her Trust. CP 45; Ex. 2 at 2. Moreover, the objective factors

raise no flags or indicate any intent other than Patricia's intent to exercise her power of appointment. Objectively it is clear that:

1. Edward intended for Patricia to have unfettered discretion to exercise the limited powers of appointment to alter the dispositive scheme in his Will and structured the powers in a way that would avoid having negative estate tax consequences for Patricia's Estate. CP 29-30; Ex. 1 at 4-5.
2. Patricia references any power of appointment she may have in her Will, and the only powers of appointment anyone testified that she in fact had, were the limited powers of appointment granted to her by Edward.
3. Patricia's exercise of her only powers of appointment conformed with the limitations placed upon those powers. She specifically stated her intent to exercise any powers of appointment she held which she had not previously exercised, released, or expressed an intent not

to exercise, and did not attempt to exercise the powers in a manner which would benefit her estate or the creditors of her estate, and distributed assets solely amongst Patricia and Edward's children. RP 118-123.

4. At the time Patricia executed her Will, the Berg Equipment stock had not been divided between Edward's Trusts and Patricia. RP 195-97; Ex. 26.

As noted by the Court of Appeals, the trial court considered and was clearly swayed by testimony that went far beyond permissible testimony regarding objective surrounding circumstances under well-settled Washington law. Thus, the Court of Appeals justifiably determined that the language in Patricia's' Will was sufficient to exercise her powers of appointment under existing Washington precedent.

Finally, Petitioner's contention that by finding Patricia exercised her powers of appointment, the Court of Appeals rendered the language in Edward's Will "completely meaningless" is simply incorrect. Edward specifically gave

Patricia the ability to change the ultimate distributive scheme in his Will by giving her the limited powers of appointment over the Trusts created under his Will. (Ex 1 at 4-5). In concluding the language in Patricia's Will was sufficient to exercise her limited powers of appointment, the Court of Appeals did not nullify Edward's intent. It carried out that intent.

C. The Court of Appeals Decision Does Not Involve an Issue of Substantial Public Interest.

A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue. *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d (2005).

As set forth in RAP 14.1(a), "[u]npublished opinions of the Court of Appeals have no precedential value and are not binding on any court." As an unpublished opinion, the Court of Appeals' decision in this case necessarily has no potential to

affect proceedings in the lower courts and therefore does not raise an issue of substantial public interest worthy of review.

Even if the Court of Appeals' decision was binding on the lower courts, this case still does not raise a matter of substantial public interest because it does not confuse any common issues that would result in unnecessary litigation.

As previously explained, Washington precedent has consistently held will interpretation is a question of law reviewed under a de novo standard. *See e.g., Curry* at 112 (citing *Moreman*, 126 Wn.2d at 39; *Espinoza*, 87 Wn. App. at 865; *Erickson*, 6 Wn. App. at 422). Therefore, the Court of Appeals was correct in its application of a de novo standard of review to the trial court's interpretation of Patricia's Will.

In addition, Washington precedent makes clear that testamentary intent, if possible, shall be derived from the plain language of a will and a general understanding of the objective circumstances surrounding the execution of the will in question. *See e.g., Wendl*) (quoting *Anderson*, 80 Wn.2d at 499, 495 P.2d

1037 (1972)). Contrary to Petitioner's claims, extrinsic evidence is only admissible if the language of the will is ambiguous. *See e.g., Bergau* at 436) (citing *Riemcke*, 80 Wn.2d at 728, 497 P.2d 1319 (1972); *In re Estate of Torando*, 38 Wn.2d 642, 228 P.2d 142 (1951)). Therefore, to properly interpret Patricia's Will, the Court of Appeals was required to consider only the clear and unambiguous language in her Will and the objective surrounding circumstances at the time of the execution of her Will. In doing so, the Court was correct in reviewing de novo whether the language of Patricia's Will was sufficient to exercise her powers of appointment over the Trusts created under Edward's Will.

Petitioner's contention that if the Court of Appeals' decision stands, the legal meaning of the term "express" will be eliminated and affect many areas of law outside the context of will interpretation is a blatant misstatement of the Court's opinion and established legal principles. The language in Edward's Will required Patricia to expressly reference and

exercise her powers of appointment. Patricia did so by including the following language in her will:

> All the rest, residue and remainder of my estate, of whatever nature and wherever situated, of which I may own or be entitled at the time of my death, ***including property over which I may have a power of appointment*** *which I have not otherwise exercised, released or refused in writing, to exercise,* I give, devise and bequeath to the Trustee of the PATRICIA A. BERG TRUST.

The Court of Appeals concluded this language was "an express reference to and exercise of her power" and Petitioner has failed to cite any legal authority indicating otherwise. Instead, Petitioner attempts to cast doubt on the Court of Appeals' decision by erroneously pointing to other areas of the law entirely irrelevant to the current case merely because they may include the term "express." As a result, Petitioner has misrepresented the reach of the Court of Appeal's decision and unjustifiably exaggerated the issues currently before this Court.

D. Respondent is Entitled to Fees on Appeal.

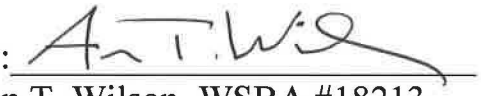
Respondent is entitled to an award of attorneys' fees and costs under RAP 18.1 for the time spent on this answer to the petition. RCW 11.96A.150 authorizes an award of such fees and costs, and Respondent requests an award of his reasonable fees and costs because this Petition is not well brought.

V. CONCLUSION

For the reasons stated above, the Petition for Review should be denied and Randy should be awarded his reasonable attorneys' fees and costs incurred in responding to the Petition.

DATED this 7th day July, 2022.

THE LAW OFFICES OF ANN T. WILSON

By: 

Ann T. Wilson, WSBA #18213
1420 Fifth Avenue, Suite 3000
Seattle, WA 98101
Phone: (206) 625-0990
Fax: (206) 464-0461
Email: ann@atwlegal.com

Attorney for Respondent Randall Berg

I hereby certify that this Motion contains 4183 words in compliance with RAP 18.7(c)(17)

CERTIFICATE OF SERVICE

I, Richard M. Stewart, hereby certify that on July 7, 2022, I delivered a copy of the foregoing document (*Respondent's Answer to Amended Petition for Review*) on the parties listed below via the Washington State Appellate Courts' Portal:

Robert P. Dickson
Daniel Eduardo Pizarro
Dickson Frohlich, PS
1200 East D Street
Tacoma, WA 98421
Attorneys for Respondent
Kathleen M. Myron

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

Dated this 7th day of July, 2022.

RM Stewart

Richard M. Stewart, Legal Assistant

LAW OFFICES OF ANN T. WILSON

July 07, 2022 - 12:41 PM

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