Supreme Court No. 90465-1
Court of Appeals Division One No. 69929-6-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Testamentary Trust of Giuseppe Desimone,

DALE COLLINS, a married man,

Petitioner,

v.

BNY MELLON, N.A., JOSEPH R. DESIMONE and RICHARD DESIMONE, JR., in their capacities as Co-Trustees of the TESTAMENTARY TRUST OF GIUSEPPE DESIMONE,

Respondents.

ANSWER TO PETITION FOR REVIEW BY CO-TRUSTEES JOSEPH R. DESIMONE, RICHARD DESIMONE, JR. AND BNY MELLON, N.A.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

I. INTRODUCTION

There is no basis for the Supreme Court to accept review of Division One's decision affirming the dismissal of Dale Collins' claim that he is a beneficiary of the trust created under the Will of Giuseppe Desimone. Division One correctly applied more than a century of Washington rules of construction for interpreting Wills (Appendix A to the Petition for Review, hereafter "App. A"). Division One applied the long-standing law in Washington, which mandates "[t]he primary duty of the court called upon to interpret a will is to ascertain the intent of the testator," "derived from the four corners of the will and the will must be considered in its entirety." (App. A at 1 and 4, *citing Estate of Mell*, 105 Wn.2d 518, 524, 716 P.2d 836 (1986)).

Likewise, Division One upheld well-established Washington law requiring the testator's intensions to be "determined at the time of the execution of the will," "as viewed through the surrounding circumstances and language." (App. A at 1-2 and 4.) Division One properly concluded that because "issue" only included lawful lineal descendants" in 1943 when the Will was executed, the language of Giuseppe's Will shows that "Giuseppe intended that 'issue' not include those born outside of wedlock." (App. A at 2 and 7.)

Contrary to Mr. Collins' assertions, review under RAP 13.4(b)(2) is not warranted. There are no conflicts between Division One's decision here, and either Division Three's decision in *In re Trust of Sollid*, or Division Two's decision in *Estate of Cook*. Division One interpreted the

language in Giuseppe's Will under the unique facts and circumstances in existence when the Will was created in 1943 to conclude that Mr. Collins is not an "issue" of Giuseppe Desimone. Given the distinctive facts in this case, the decision does not have broad application or involve an issue of substantial public interest that would merit review under RAP 13.4(b)(4).

II. ARGUMENT

A. Division One Correctly Followed Washington's Long History of Defining "Issue" as Limited to Children Born in Wedlock.

Mr. Collins conceded that Washington law in 1943 defined "issue" to be limited to children "born in lawful wedlock." CP (69929-6) 24. He attempts to avoid this statutory definition by arguing that the statute addresses intestate succession and therefore has no relevance in determining what the testator intended by using the term "issue" in a will. Not only would it be nonsensical to assume that the statutory definition of "issue" only applied to intestate estates and that some other definition applied in testate estates, but it would ignore the impact illegitimacy has had on inheritance under Washington law, which required formal acknowledgment by a father in order for an illegitimate child to inherit from his estate.[1] Washington courts have consistently imposed these statutory requirements on illegitimate children. *Estate of Baker*, 49 Wn.2d 609, 304 P.2d 1051 (1957) (illegitimate child argued he was pretermitted

[1] Respondents mean no disrespect by using the term "illegitimate," which is the term historically used by Washington courts to refer to children born out of wedlock.

and therefore should take under intestate succession; claim rejected for failure to comply with statutory requirements to establish right to inheritance); *In re Beekman's Estate*, 160 Wash. 669, 295 P.2d 942 (1931) (illegitimate child claimed right to inherit under intestacy; claim rejected for failure to comply with statutory requirements); *Wasmund v. Wasmund*, 90 Wash. 274, 156 P. 3 (1916) (community property under intestate laws went entirely to surviving spouse; illegitimate child of deceased mother could only inherit from her separate property); *In re Rohrer*, 22 Wash. 151, 60 P. 122 (1900) (pleadings from seduction case established paternity; daughter inherited from father's estate); *see also Estate of Gand*, 61 Wn.2d 135, 377 P.2d 262 (1963) (illegitimate daughter could not inherit from mother's sister).

In 1943, the term "issue" was a term of art defined by statute to mean "all the *lawful* lineal descendants of the ancestor." Rem. Rev. Stat § 1354. The use of the term "issue" was one clear way to express the intention that only those children born in wedlock would inherit. It was not until decades after Giuseppe executed his Will that the definition of "issue" under Washington law was changed to include all lineal descendants of an individual. RCW 11.02.005(8) (enacted in 2005).

Mr. Collins erroneously cites *Bowles v. Denny*, 155 Wash. 535, 541, 285 P. 422 (1930), for the proposition that it used a "more expansive common law definition of the term [issue]." (Petition for Review, 11.) As the Court of Appeals concluded in this case, the court in *Bowles* "considered the general meaning of 'issue' in an entirely different context

than in this case." (App. A at 9.) "The *Bowles* court did not consider whether the term 'issue' included grandchildren born out of wedlock, as is the case here." (App. A at 9-10.) The *Bowles* court's reference to "all descendants" was only a reference to the number of succeeding generations (i.e., all) implied by the term "issue." 155 Wash. at 541. The *Bowles* court did not define the word "issue," and it does not hold that the term "issue" includes all lineal descendants of an individual.

In determining the testator's intent with respect to the meaning of a technical term, the court in *In re Estate of Price*, 73 Wn. App. 745, 887, 871 P.2d 1079 (1994), viewed the circumstances as they existed at the time the will was executed and held that there was no reason to suppose the testator did not know the meaning of a particular word that he used several times throughout the document. Likewise, there is no reason to believe that Giuseppe did not understand the legal meaning of "issue," which is consistently used no less than 20 times in the distributive provisions of his Will.

B. Division One's Decision Does Not Conflict With Division Three's Decision in *Sollid.*

Mr. Collins argues that Division Three's decision in *In re Trusts of Sollid*, 32 Wn. App. 349, 647 P.2d 1033 (1982), supports the retroactive application of the current (since 2005) statutory definition of "issue," which includes all lineal descendants. *See* RCW 11.02.005(8). Mr. Collins claims the term "issue" in Giuseppe's Will should have its current statutory meaning because *Sollid* applied a statute requiring adopted

children to be treated as beneficiaries retroactively, and therefore, the more recent law governing the rights of children born out of wedlock should likewise be applied retroactively. (Petition for Review, 6.)

In arguing that there are conflicting rules of construction between the Divisions, Mr. Collins asks this Court to ignore the long-standing rule of construction that the intent of the testator is determined at the time the Will was executed, not some time thereafter. Division One appropriately rejected Mr. Collins' argument that the current definition of "issue" be used to determine the class of beneficiaries. (App. A at 14-15.) On the contrary, the Court of Appeals concluded that the use of technical "issue" in the Will and the surrounding circumstances at the time Giuseppe executed it in 1943, "was intended to limit the income beneficiaries of the trust to his grandchildren of parents married to each other." (App. A at 8.)

Further, as the *Sollid* court explained, it was familial ties, not blood relations that motivated the liberalization of the rules governing inheritance by adopted children. 32 Wn. App. at 352-53. No similar policy applies to people born out of wedlock. Thus, the reason for applying the statute retroactively in *Sollid* does not apply here.

Moreover, unlike the testator in *Sollid*, the testator's intent in this case is clear. As Division One concluded, Giuseppe's use of the term "issue," as it was defined in 1943, demonstrated his intent "to limit the income beneficiaries of the trust to his grandchildren of parents married to each other." (App. A at 8.) Division One correctly noted that if Giuseppe intended to include all descendants without regard to the marital status of

their parents, "his lawyer could have used different language in the Will." *Id.*

In contrast, Division Three in *Sollid* specifically concluded that the record was "entirely devoid of the settlor's specific intent." 32 Wn. App. at 358. Division Three found that the testator's failure to specifically include adopted children could mean that they were included rather than excluded, which permitted retroactive application of current adoption statutes. *Id.* Giuseppe's clear intent prohibits retroactive application of the intestacy statute, as does the rule of construction requiring that the intent of the testator be determined at the time the will is executed.

To the extent *Sollid* applies to the present case, it only supports Division One's decision. The reasoning applied in *Sollid* — that testators intend to include adopted children as beneficiaries because they have emotional ties and bonds to the family — does not apply to a stranger like Mr. Collins, who has no emotional ties or bonds to the family. 32 Wn. App. at 352. Nothing about the opinion in *Sollid* supports a finding that Giuseppe intended to include a complete stranger, born out of wedlock, as a beneficiary of the trust created under his will.

C. The Delaware Case Cited by Mr. Collins Does Not Change the Analysis.

Mr. Collins relies on *Annan v. Wilmington Trust Co.*, 559 A.2d 1289 (1989), a Delaware case, to retroactively apply the statutory definition of the term "issue," which was not changed until 2005. But the facts in *Annan* are distinguishable from this case. In *Annan*, the trusts

used both "issue" and "lineal descendants" to refer to beneficiaries and the testator specifically excluded persons claiming to be his child born prior to 1924 from benefiting under the trust. 559 A.2d at 1292. The testator did not apply the same exclusion to persons born after 1924. *Id.* Although the *Annan* court held that "issue" would be defined based on the laws of intestacy in effect at the time of ascertainment, the *Annan* court articulated an important exception to this rule: If "the document demonstrates a clear intent on the part of the creator to limit the class as it was defined by law on the date of execution of the trust," then the term "issue" would be defined by the law in effect at the time the document was executed. *Id.*

Annan therefore presents a very different set of facts from the present case because (1) Giuseppe's Will unambiguously states, more than 20 times, that only "issue" are intended beneficiaries, and (2) when Giuseppe executed his Will in 1943, Washington law clearly defined "issue" to mean only descendants born to married parents.

Pitzer v. Union Bank of California, 141 Wn.2d 539, 9 P.3d 805 (2000), is directly on point and is dispositive of this "retroactive application" argument. In *Pitzer*, as here, the plaintiffs alleged they were the illegitimate children of the testator and claimed they were entitled to a share of his estate. *Id.* at 543. The testator died in 1965 and it was decades later when plaintiffs claimed the testator was actually their biological father. *Id.* at 543-44. Plaintiffs did not dispute that the former intestacy statute, which was the law in effect when the testator died, precluded them from being heirs. Instead, plaintiffs urged the court to apply the new

statute, which would recognize them as heirs whether or not their parents had been married. *Id.* at 547. In rejecting their claims, the court applied the law in effect when the will was written, which required that they be acknowledged by their father in order to inherit. *Id.* at 553. Division One's decision in this case is consistent with precedent established by Washington's Supreme Court.

Mr. Collins also attempts to draw parallels between the ruling in *Sollid* and certain Delaware adoption cases for the proposition that a testator's intent is not determined by what the testator is presumed to know or understand at the time the will is executed. Mr. Collins argues that a testator knows that statutes are subject to change and, therefore, that the laws of intestacy in effect at the time a class of beneficiaries is ascertained are controlling. (Petition for Review, 6-7.) But Washington case law unambiguously requires a technical term, used in its legalistic sense to be determined at the time the will was executed. *Estate of Mell*, 105 Wn.2d 518, 524, 916 P.2d 836 (1986). If Mr. Collins' rationale was followed, the trustees would be required to determine the law every time a beneficiary dies and apply a different meaning to the term in Giuseppe's Will, potentially adding new beneficiaries. The uncertainty this policy would create is precisely why Washington courts require the terms in a will to be interpreted according to their meaning at the time the will was executed.

D. Division One's Decision Does Not Conflict with Division Two's Decision in *Estate of Cook*.

Mr. Collins argues that Division Two's decision in *Estate of Cook*, 40 Wn. App. 326, 698 P.2d 1076 (1985) retroactively applied RCW 11.04.081 to an individual born before its enactment. (Petition for Review, 12.) But Mr. Collins misrepresents the holding in *Estate of Cook*. Division Two did not retroactively apply RCW 11.04.081 or reject the application of Ohio's requirements for the determination of paternity. Nor did Division Two's decision in *Estate of Cook* rule that a court must look to the law applicable when a class of income beneficiaries is ascertained, as Mr. Collins contends. (Petition for Review, 12-13.)

The threshold question in *Estate of Cook* was a conflict of law analysis regarding whether Ohio or Washington law controlled the determination of paternity. Division Two concluded that Washington law should apply because the claims involved a Washington estate left by a deceased Washington resident, and therefore, Washington, not Ohio, had "the dominant interest" in determining paternity. 40 Wn. App. at 329. As a result, the Washington court accepted the Ohio birth certificate as evidence of Miss Cook's paternity. The holding in *Estate of Cook* is not applicable here and creates no conflict with the Court of Appeals' decision in this case.

E. The Rights of Adopted Children and Illegitimate Children are Different Under Washington Law.

Mr. Collins contends that the Court of Appeals' decision in this case ignores the "striking parallels" between the laws governing adopted

children and children born out of wedlock. (Petition for Review, 7.) Washington courts, however, have explicitly differentiated the rights of an adopted child from the rights of an illegitimate child. *In re Estate of Wright,* 147 Wn. App. 674, 681, 196 P.3d 1075 (2008). In determining whether a purported heir was a beneficiary, the *Wright* court reasoned that the rights of adopted children is an "entirely different issue" from the rights of children of unmarried parents. *Id.* at 683. The court explicitly noted that "nothing in the opinion is based on, or should be construed as commenting on, the term as it applies to adoptive relationships as opposed to the marital status of a person's parents." *Id.* at 681. In fact, no Washington court has applied the Delaware rationale cited by Mr. Collins for the conclusion that an adopted child has a right to inherit based on the rights of illegitimate children to inherit.

III. CONCLUSION

The Court of Appeals interpreted Giuseppe's Will based on more than 100 years of established Washington case law. The Supreme Court should not accept review of Division One's well-reasoned opinion, which is consistent with long-standing Supreme Court precedent. Review is not warranted under RAP 13.4(b)(2) because Division One's decision is not in conflict with another decision of the Court of Appeals. Nor is there an issue of substantial public interest that merits further review under RAP 13.4(b)(4).

RESPECTFULLY SUBMITTED this 7th day of July, 2014.

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Re: In re the Testamentary Trust of Giuseppe Desimone; Dale Collins v. BNY Mellon, N.A., Joseph R. Desimone and Richard L. Desimone, Jr., in their capacities as Co-Trustees of the Testamentary Trust of Giuseppe Desimone
Washington Supreme Court No.: [Not Yet Assigned]
Court of Appeals Division One No.: 69929-6-I
Filed by: Karen R. Bertram, WSBA No. 22051, Attorneys for Co-Trustees Joseph R. Desimone and Richard L. Desimone, Jr., Respondents

Dear Clerk:

Per Karen Bertram's request, I am attaching the following documents for filing today with the Supreme Court regarding the above matter:

1. Answer to Petition for Review by Co-Trustees Joseph R. Desimone, Richard Desimone, Jr. and BNY Mellon, N.A.
2. Certificate of Service

Thank you for your assistance.

Sincerely,

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