NO. 46778-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE ESTATE OF DANA BRUCE MOWER,

Deceased.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

I. ARGUMENT

A. This Court should disregard any references to the Schulers' supposed relationship with Dana as the trial court struck that testimony and the Schulers did not appeal that order.

The trial court granted Ms. Turner's motion to strike the declaration of Eric Schuler,[1] and the Schulers failed to file a notice of cross-appeal from that decision or assign error to it in their Respondents' Brief. RAP 2.4(a). As such, this Court should disregard the blatant attempt to mislead this Court. Ms. Turner respectfully requests that this Court assess attorney's fees and costs against Respondents for violating a trial court order to which they did not cross-appeal or assign error to.

B. Standard of Review is De Novo.

The parties agree that the appropriate standard of review by this Court is *de novo*. Appellant's Brief at 8 – 9; Brief of Respondent at 7-8.

C. Dana set as a condition precedent to the residuary bequest failed and the bequest lapsed.

The plain language of Dana's Will itself demonstrates that he did not intend to leave a bequest to anyone other than his family. The residue bequest to his siblings and then-siblings-in-law was conditioned on Dana's marriage to Christine. Dana left the residue of his Estate to the siblings only "[i]n the event my spouse fails to survive me by a period of thirty (30) days . . . ." CP at 8 (emphasis added). That is, if Dana were widowed before he passed away and before he divorced Christine, the residue instead goes to his siblings and his wife's siblings. Dana's condition precedent, that he

[1] CP at 326 – 28.

have a spouse at the time of his death, failed. 96 Corpus Juris Secondum § 1215; *Ray v. Tate*, 272 S.C. 472, 473, 476 (1979).

This Court should hold that a bequest to the Schulers was a bequest in Christine's favor, that Dana did not intend to leave his assets to the Schulers but for his marriage to Christine, and that no independent relationship existed between Dana and the Schulers that would have explained the bequest. Ms. Turner requests that this Court revoke the bequest to Christine's brother and sister-in-law and vacate the judgment.

D. The Schulers' argument that dissolution of marriage only revoked the bequest to Christine Mower fails to comply with Washington law that the entire Will must be given effect.

If this Court holds that Dana's residue bequest does not fail for want of a condition precedent, it should hold that RCW 11.12.051 operates to revoke the bequest to the Schulers.

The Schulers' argument that the dissolution of the marriage between Dana and Christine only revoked the bequest to Christine fails to address Washington law requiring that the entire Will must be given effect. *Brief of Respondent* at 8-26. Ms. Turner focuses on the evidence of Dana's intent as found within the four corners of the Will.

The Schulers focus on a select reading of Dana's Will, ignoring the reality of his bequests and the intent evident within the document's four corners. It cannot be disputed that when reading Dana's Will as a whole, the provision in favor of the Schulers was predicated on Dana and Christine being married at the time of Dana's death. When Dana's Will is read as a

whole, there is no escaping the conclusion that Dana intended to leave his estate to his family. That family included the Schulers while Dana and Christine were married. Upon dissolution of the marriage between Christine and Dana (and frankly even before that), the Schulers were no longer Dana's family, and because they would inherit solely through their relationship with Christine, this Court should hold that RCW 11.12.051 operates to revoke the bequest to the Schulers in the same fashion as it did to Christine.

The Schulers' continued disregard for the plain language of Dana's Will is not valid justification to support the trial court's summary judgment order in this case. Dana specifically excluded from definition of "family," "[his] brother-in-law Peter Schuler." If Dana did not, at that time, consider the Schulers his family, he had no obligation to address Peter's exclusion. Additionally, Schulers' attempt to ignore the plain fact that Dana left his estate to his and his then-wife's siblings. The equality of the bequest to the two families underscores the reciprocal nature of Dana and Christine's Wills, not special feelings that Dana supposedly possessed for the Schulers. However it is phrased, Dana did not leave any assets to anyone other than his then-wife, or if she failed to survive him, his siblings and his then-wife's siblings. He did not leave any assets to any friends or charities, just his family.

The Schulers failed to produce any admissible evidence below that they had a relationship with Dana divorced from his marriage to Christine. The only admissible evidence offered was that Dana despised his in-laws

because of their greed and lack of responsibility. There was similarly no evidence that Dana had any contact with the Schulers at any time near his dissolution from Christine or thereafter.

Moreover, the Schulers cannot deny that a bequest to the Schuler family benefits Christine. As the Restatement illustrates, courts should effectuate the purpose of revocation statutes like RCW 11.12.051 by "revok[ing] the devise to the former spouse's children." Restatement (Third) of Property (Wills & Don. Trans.) § 4.1, cmt. o (1999).[2] Dana and Christine had no children and this reality is reflected in their reciprocal Wills, leaving all assets to their siblings and siblings-in-law. The Schulers attempt to claim that Christine is not benefited by their inheritance because they might not leave the assets to Christine. However, they stand in the same position as the former spouse's child used in the Restatement comment. A child, like a sibling, is not compelled to bequest an estate to a parent. However, logic dictates that a bequest to such class of persons is inconsistent with the realities of a dissolution, in which the relationships are likely to break down and weaken, and the parties' loyalties remain with their blood relatives.[3]

The Schulers fail to offer any authority for their allegation that Washington's revocation statute differs from states that extend the

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[2] The Schulers argue that this Court should reject the Restatement's guidance because it was adopted after RCW 11.12.051. However, the Schulers offer no authority that Washington courts follow this logic, and this Court should reject the claim. RAP 10.3(a)(6).

[3] Ms. Turner does not allege that the Uniform Probate Code is binding authority. Simply, the comment to UPC § 2-804 acknowledges the reality of dissolution

revocation to the ex-spouse's family members. *Brief of Respondent* at 8. The Maryland statute, for instance, revokes quests "relating to the spouse." *Friedman v. Hannan*, 412 Md. 328, 338–39 (2010). Similarly, RCW 11.12.051 revokes bequests "in favor of" the former spouse. The Schulers offer no argument as to why the two statutes are so materially different as to undermine Ms. Turner's arguments.

Additionally, the California statute relied on in *Estate of Hermon*[4] and *Estate of Jones*[5] states that if a testator's marriage is dissolved after he or she executes a will, the "dissolution . . . revokes . . . [a]ny disposition or appointment of property made by the will to the former spouse." *Estate of Jones*, 122 Cal. App. 4th at 332. The *Jones* court acknowledged that the statute does not make reference to the former spouse's relatives, such as children. 122 Cal. App. 4th at 332. Arguably, California's statute is more favorable to the Schulers than Washington because it seemingly revokes only direct bequests to the ex-spouse. However, California still applies the statute to disinherit the ex-spouse's relatives.

In addition, the Schulers disregard the difficulty of analogizing one Will to another. As is evident from an attempt to analogize any will to another, "[n]o two wills are exactly alike and few are sufficiently similar in wording of dispository provisions so that a decision interpreting one is rarely any great help in interpreting another." *Estate of Hermon*, 39 Cal.

[4] 39 Cal. App. 4th 1525 (1995).
[5] 122 Cal. App. 4th 326 (2004).

App. 4th at 1531. As such, while general holdings and policy declarations are helpful in determining the testator's intent, each case is of limited value.

As demonstrated in the Appellant's Brief, Dana's Will, when read as a whole, provides for what were then his siblings. Dana's failure to provide for anyone other than his family and his specific exclusion of Peter Schuler, to name a few reasons, demonstrate that he intended to leave any bequest to the Schulers only so long as they were his family. The Schulers were named in Dana's Will only because he was married to their sister, and they took only in the event that their sister failed to survive Dana. *Jones*, 122 Cal. App. 4th at 336.

The Schulers offer no authority that the only way to find a class gift is if the parties are referred to by their class title. In reality, courts will not set aside common sense to determine whether a bequest is to a class. *See Cryder v. Garrison*, 387 Pa. 571, 576 (1957) ("The proposition that a gift to several individuals described by their respective names, may be construed as a gift to a class, if it is apparent from the will that the testator so intended"). And Dana's failure to refer to the Schulers as his siblings is not surprising given his specific exclusion of Peter Schuler from the Will. A bequest to his siblings and his siblings-in-law might have opened up a claim by Peter that he was entitled to recover under the Will. That Dana kept his bequests simple does not undermine a conclusion that the Schulers stood to inherit solely because of Dana's marriage to their sister.

The cases cited by the Schulers in their response brief do not support a holding that a statute like Washington's applies to revoke only those

bequests directly to the ex-spouse and not the ex-spouse's family. *Brief of Respondents* at 24 – 25. In *First Church of Christ, Scientist v. Watson*,[6] decedent left his estate to his then-wife or, if she failed to survive him, to the First Church of Christ. Decedent passed away shortly after his dissolution without changing his will. The Church claimed his estate, and the Court was asked to decide whether a revocation statute revoked only the bequest to the former spouse, and thus allowed the alternate bequest to the Church to survive. *First Church of Christ*, 286 Ala. at 272 – 74. *First Church of Christ* does not address the question here, which is whether a revocation statute revokes all bequests in favor of an ex-spouse, including bequests to her relatives.

In *In re Estate of Kerr*,[7] the testator executed a will leaving his estate to his son and his step-daughter. After executing the will, the testate became incapacitated due to Alzheimer's, and his wife subsequently divorced him. The testator's son asked the court to find that the dissolution revoked the bequest to the stepdaughter, but the court declined holding that the legislature had not revoked bequests to in-laws and that "[a] testator will not necessarily be estranged from relatives of a former spouse. Under these circumstances, the bequest to testator's stepdaughter is not revoked." 520 N.W.2d at 514 (citations omitted).

There was no evidence that the testator in *Kerr* was not estranged from his former stepdaughter. His dissolution was initiated by his wife after

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[6] 286 Ala. 270 (1970).
[7] 520 N.W.2d 512 (1994).

he lost capacity due to an Alzheimer's diagnosis. In contrast, there is significant evidence that Dana disliked the Schulers and tolerated them only because of his marriage to Christine. Unlike the relationship in *Estate of Kerr*, Dana's separation from the Schulers was voluntary and intentional.

Russell v. Russell's Estate[8] dealt with an alternative bequest to an adopted child, not a former in-law. 216 Kan. at 730 – 32. Both *Steele v. Chase*[9] and *Jones v. Brown*[10] considered the effect of a dissolution on a bequest to a spouse, and rejected the idea that the dissolution resulted in a failure of a condition precedent and intestate succession. *Steele*, 151 Ind. App. at 607; *Brown*, 248 S.E.2d at 814. The courts did not decide whether their revocation statute also revoked a bequest to a spouse's heirs. The cases relied on by the Schulers do not support their argument that states with statutes more similar have specifically addressed the issue in this matter, which is whether revocation statutes revoke bequests to a former spouse's relative as well as the former spouse.

Only by finding that Dana's bequest to his former in-laws is revoked can this Court give effect to Dana's intent at the time he drafted his Will, which was to provide for what then constituted his siblings. Ms. Turner asks that this Court hold that the trial court erred in granting the Schulers' summary judgment motion, and remand for entry of an order finding that the bequest to the Schulers was revoked by Christine's dissolution.[11]

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[8] 216 Kan. 730 (1975).
[9] 151 Ind. App. 600 (1972).
[10] 248 S.E.2d 812, 814 (1978).
[11] Pursuant to Section 5.3, the portion of Dana's Estate that would go to the Schulers would fall to the residue, and thus his siblings. CP at 8.

II. CONCLUSION

Law and equity mandate that a decedent's dissolution from his ex-spouse operates to revoke any bequest in favor of the spouse, which includes a bequest to the ex-spouse's family. Dana's bequest to the Schulers as alternate beneficiaries was conditioned solely on their relationship to him through Christine and they stand to inherit solely because of their relationship to Christine. Dana had no contact with the Schulers following his dissolution and never reaffirmed his bequest to the Schulers after his dissolution. Allowing the Schulers to inherit frustrates the intent of RCW 11.12.051 by allowing a former spouse's family to benefit from a relationship that no longer exists. As such, the trial court erred in not revoking the bequest to the Schulers. In the alternative, because the condition precedent for Dana's alternative bequest, that Christine fail to survive him by at least 30 days, did not occur, the residue bequest fails and his Estate must pass through intestacy succession. Accordingly, this Court should reverse the trial court's orders on summary judgment and award Ms. Turner the Estate's attorney fees and costs associated with this matter.

RESPECTFULLY SUBMITTED this 11th day of June, 2015.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

C. Tyler Shillito Smith Alling, PS 1515 Dock St., Suite 3 Tacoma, WA 98402	☐ U.S. First Class Mail, postage prepaid ☐ Via Legal Messenger ☐ Overnight Courier ☑ Electronically via email ☐ Facsimile

DATED this 11th day of June 2015, at Tacoma, Washington.

Marsha Reidburn
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