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NO. 63462-3-I

IN THE COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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IN RE THE ESTATE OF WILLIAM ROSS TAYLOR

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REPLY BRIEF OF APPELLANT CHARLES TAYLOR TO  
RESPONSE OF RESPONDENT CAIARELLI

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
<b>I. ARGUMENT .....</b>	<b>1</b>
A. Chapter 11.11 RCW Prohibited William From Changing the Beneficiary Designation on His IRA Through His Will.....	1
B. The Beneficiary Designation On the IRA Remains Unchanged Because William Did Not Substantially Comply With the Charles Schwab Policy Provisions.....	1
1. The Lack of the Disclosure Statement in the Record Does Not Lead to the Conclusion that Schwab Had No Policy for Changing Beneficiaries.	1
2. Caiarelli’s Argument Based on the Format of the Schwab Application Must be Rejected. ....	2
3. Caiarelli’s Reliance on the Will Alone does not Meet the Standard of Substantial Compliance.....	4
C. There is No Basis in Equity for the Resolution Sought by Caiarelli .....	6
<b>II. CONCLUSION .....</b>	<b>8</b>

**TABLE OF AUTHORITIES**

<b><u>Cases</u></b>	<b><u>Page</u></b>
<i>Allen v. Abrahamson</i> , 12 Wn. App. 103, 529 P.2d 469 (1974) .....	7
<i>In Re Estate of Freeberg</i> , 130 Wn. App. 202, 122 P.3d 741 (2005).....	1,4,5
<i>1519-1525 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp.</i> , 101 Wn. App. 923, 932, 6 P.3d 74 (2000) .....	3
<i>In Re Leva's Estate</i> , 33 Wn.2d 530, 206 P.2d 482 (1949)....	6,7
<i>Lyall v. DeYoung</i> , 42 Wn. App 252, 711 P.2d 356 (1985) ...	3
<i>Planet Insurance v. Wong</i> , 74 Wn. App. 905, 877, P.2d 198 (1994) .....	3
<i>Rice v. Life Insurance Co.</i> , 25 Wn. App. 479, 609 P.2d 1387 (1980).....	4,5
<i>Sun Life Assurance Co. v. Sutter</i> , 1 Wn.2d 285, 291-92, 95 P.2d 1014 (1939) .....	7
 <b><u>Statutes</u></b>	
RCW 11.11 .....	1
RCW 11.11.010(7)(a) (iv).....	1
 <b><u>Court Rules</u></b>	
RAP 2.4(a) .....	3
RAP 9.12.....	3

**I. ARGUMENT**

**A. Chapter 11.11 RCW Prohibited William From Changing the Beneficiary Designation on His IRA Through His Will.**

Caiarelli argues that Chapter 11.11 RCW has no bearing on the issue before the court and that the court must look to common law to resolve the dispute. As set forth in more detail in appellant's opening brief, it is his position that because RCW 11.11.010(7)(a)(iv) specifically excludes IRAs from the purview of chapter 11.11 RCW, the will provision that purports to name a trust as beneficiary of an IRA is ineffective, and the court can resolve the dispute on that basis alone.

**B. The Beneficiary Designation On the IRA Remains Unchanged Because William Did Not Substantially Comply With the Charles Schwab Policy Provisions.**

If the court does not find that Chapter 11.11 RCW resolves this issue, it must decide whether William Taylor substantially complied with the Charles Schwab IRA policy provisions for changing beneficiaries. *In Re Estate of Freeberg*, 130 Wn. App. 202, 122 P.3d 741 (2005).

1. The Lack of the Disclosure Statement in the Record Does Not Lead to the Conclusion that Schwab Had No Policy for Changing Beneficiaries.

Caiarelli argues that the will alone meets the standard of substantial compliance because Charles Schwab failed to give an adequate policy for changing beneficiary designations. She makes that assertion

based upon the fact that the Disclosure Statement referenced in the IRA application is not in the record before the court. While it is true that from the record we do not know *exactly* how an account holder is required to implement a change in beneficiary, we do know from the Schwab Application, signed by William, that such a change must be “tendered in writing.” CP 73. In this case, it is not necessary to know what type of writing the Disclosure Statement required. It is clear that some type of writing was required by the policy. In addition, the application signed by William states that he received and read the Disclosure Statement. CP 73. There is therefore evidence that William knew he needed to tender a writing to Schwab in order to change beneficiaries and that he had read the specific requirements regarding such a written request. There is, however, no evidence that William tendered anything in writing to, or otherwise contacted Charles Schwab regarding a change in beneficiary. He therefore did not substantially comply with the Schwab policy.

2. Caiarelli’s Argument Based on the Format of the Schwab Application Must be Rejected.

Caiarelli argues that the Schwab application form, based on the size of the font used and the placement of its provisions, is so defective that William should not be held to any of its provisions, including the provision that a request for a change of beneficiary must be tendered to

Schwab in writing. Caiarelli realizes that this issue is being raised for the first time on appeal and that RAP 2.4(a) provides that issues not raised in the trial court may not be raised for the first time on appeal. She relies on an exception to the rule for issues in which “the record has been sufficiently developed to fairly consider the ground.” RAP 2.4(a). Here, no party raised the issue of the format of the application form in the trial court, and the trial court did not address the issue. The record is therefore not sufficiently developed to fairly consider Caiarelli’s argument.

Furthermore, RAP 9.12 specifically prevents a party from raising an issue on appeal that was neither pleaded nor argued to trial court on summary judgment. RAP 9.12; *1519-1525 Lakeview Blvd. Condo. Ass’n v. Apartment Sales Corp.*, 101 Wn. App. 923, 932, 6 P.3d 74 (2000). As no party raised this issue in the summary judgment motion, Caiarelli is precluded from raising it on appeal.

Even if the court were to address the merits of Caiarelli’s argument, she cites no law that would support a finding that the application form should be found inoperable based upon its format. Small print in contracts has been an issue when addressing the unconscionability of contract provisions, *Planet Insurance v. Wong*, 74 Wn. App. 905, 915, 877, P.2d 198 (1994), or the conspicuousness of waiver provisions, *Lyall v. DeYoung*, 42 Wn. App 252, 257, 711 P.2d 356 (1985), but appellant has

found no law that supports a claim that a provision in an IRA application requiring that a request for a change of beneficiary be in writing could be found inoperable based upon the format of the application.

3. Caiarelli's Reliance on the Will Alone does not Meet the Standard of Substantial Compliance.

Caiarelli next argues that if the court were to conclude that Schwab had no policy to which William was subject, then the will alone meets the criteria of substantial compliance embraced by the major Washington cases. In support of that argument, Caiarelli relies on *Rice v. Life Insurance Co.*, 25 Wn. App. 479, 609 P.2d 1387 (1980) and *In Re Estate of Freeberg*, 130 Wn. App. 202, 122 P.3d 741 (2005). In *Rice*, the decedent signed a change of beneficiary request form four days before his death in which he named his new fiancée as beneficiary of an insurance policy instead of his parents and brother. In a dispute between the fiancée and the parents and brother, the court found for the fiancée. The parents and brother challenged several findings of fact, claiming in part that the change of beneficiary form was ambiguous. The court gave short shrift to this argument, noting that it was the only form the insurance company gave its employees to make a change of beneficiary and that the decedent had used the same form in prior years to change his beneficiary

designation.<sup>1</sup> The court found that the writing by the decedent met the requirements of the insurance policy for changing beneficiaries. That is not the case here.

In *Freeberg*, the decedent went to the office of Edward Jones and instructed his agent to change the beneficiary designation on his IRA. An Edward Jones employee corroborated that fact. It was clear that the failure to make the change was due to negligence on the part of Edward Jones. *Id.* at 204.

In both *Rice* and *Freeberg*, the decedent took actions sufficient for a court to conclude that there was no reasonable doubt regarding the decedent's intention to change beneficiaries. Here, even if the court were to conclude that there is no Schwab policy to which William was subject regarding effectuating such a change, the inquiry would still be whether he took sufficient action to unequivocally show an intent to change beneficiaries. The most basic action that would be evidence of such intent is an attempt to contact or communicate with Schwab in some manner. There is no evidence that William tried to contact Schwab in writing about a change of beneficiary. Caiarelli acknowledges that "[d]espite many contacts with Schwab agents, there is no evidence that [William] ever

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<sup>1</sup> The *Rice* court was more concerned with the argument on whether the testimony of the fiancée was properly allowed at trial. *Id.* at 482-83.

spoke with anyone about changing the designation.” Respondent’s Brief at p.11. In addition, just three months prior to his death, William made Charles Taylor the beneficiary of four other nonprobate assets. CP 78-79, 205-08, 122-27. Given that evidence, which is consistent with an intent to leave the Schwab IRA to his brother, and the lack of evidence that William made any attempt to contact Schwab about making a change in beneficiary, the court must conclude that William’s intent, as evidenced in his will, is not clear and that he did not do all he reasonably could have done to effectuate a change in beneficiary.

**C. There is No Basis in Equity for the Resolution Sought by Caiarelli.**

Caiarelli’s last argument is basically that it would be equitable to give the IRA funds to the trust because “it is hard to comprehend that [William] wanted to leave his brother and his sister the funds in the Schwab account. . . .” Respondent’s Brief at p. 12. Caiarelli cites *In Re Leva’s Estate*, 33 Wn.2d 530, 206 P.2d 482 (1949) in support of her argument. In *Leva’s Estate*, a father’s will left all his real property to his son and all personal property to his brother. The son and brother both claimed the interest in a real estate contract held by the father. *Id.* at 531. The trial court determined that the real estate contract was real property and awarded it to the son. *Id.* at 537. The appellate court upheld the trial

court, based on the trial court's factual conclusion that it was the father's intention that the son take the real estate contract. *Id.* at 537.

Caiarelli's reliance on *Leva's Estate* is misplaced. *Leva's Estate* involved property passing under a will and the only question before the court was whether the factual findings of the trial court supported the judgment. *Id.* at 531. Here, the property at issue is a nonprobate asset, and the issue is whether William effectuated a change of beneficiary with regard to that nonprobate asset. This is not a case where the court must look within "the four corners" of a will to determine the intent of the testator. Instead, the court has to consider whether one provision in the will meets the substantial compliance standard for changing beneficiary designations. As stated in *Sun Life Assurance Co. v. Sutter*, 1 Wn.2d 285, 291-92, 95 P.2d 1014 (1939) and quoted in *Allen v. Abrahamson*, 12 Wn. App. 103, 106, 529 P.2d 469 (1974):

A court of equity will order a change in beneficiary only if it appears that the insured, during his lifetime, did everything necessary to effectuate the change, nothing remaining for the insurer to do, save purely ministerial acts.

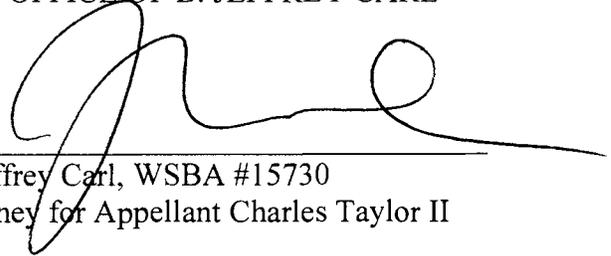
Here, William did not do all that was required and the court should decline to change the beneficiary designation.

## II. CONCLUSION

William Taylor's 1990 beneficiary designation on his Charles Schwab IRA was not changed by his 2004 will provision that purported to give that IRA to a trust. Washington statutes prohibit a testator from naming the beneficiary of an IRA in a will. As the will is the only evidence of William's intent to change beneficiaries, and as nothing in writing regarding a request for a change of beneficiary was tendered to Schwab, William did not substantially comply with Schwab's policy regarding a change of beneficiary. This court should reverse the trial court's partial summary judgment order of November 2, 2008.

DATED this 8 day of January, 2010.

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