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NO. 63462-3-I

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

IN RE THE ESTATE OF WILLIAM ROSS TAYLOR

FILED
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA
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BRIEF OF APPELLANT CHARLES TAYLOR II

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I. ASSIGNMENT OF ERROR

1. Assignment of Error

The King County Superior Court, Honorable Jim Rogers, erred in granting partial summary judgment on November 2, 2008, on a motion brought by the Guardian ad Litem for William Taylor's son ACT.

2. Issue Pertaining to Assignment of Error

In 1990, William Taylor named his brother and sister as beneficiaries of an IRA. In 2004, William Taylor executed a will that purported to give the IRA proceeds to a testamentary trust. Was the execution of the will sufficient to change the beneficiary of the IRA from the original beneficiaries to the trust?

II. STATEMENT OF THE CASE

William R. Taylor, a computer science engineer who had worked for Microsoft for 10 years, CP 81, 129, died as a result of a boating accident on Lake Washington on September 11, 2005. CP 18. He left an estate in Washington subject to probate and a probate was started on September 20, 2005. CP 21-22.

Prior to his death, in 1990, when William was 22 years old and unmarried, he started an IRA at Charles Schwab. At that time, he named his brother and sister, Charles and Elizabeth Taylor, as beneficiaries. CP 73. The IRA application provided that "I reserve the right to revoke or

change this beneficiary designation. I understand that such change or revocation must be tendered in writing as specified in the Disclosure Statement.” CP 73.

William Taylor was married to Patricia Caiarelli on November 24, 2001. They had one son, (ACT), born May 5, 2002. ACT is William Taylor’s only surviving child. Subsequently, Patricia Caiarelli filed for divorce. On May 2, 2004, during the divorce proceedings, William executed the will (“Will”) that was admitted to probate. CP 107-10. The Will makes certain specific bequests and then gives the residue of his estate to ACT:

2.3 Remainder of Estate. I give the rest, residue, and remainder of my estate, including any real and personal property, to my son [ACT].

CP 107. While the Will is unclear with regard to the creation of a trust for ACT, there has been no argument made that William did not intend to create such a trust if William were to die before ACT reached age 25. The Will lists assets to be distributed to the trust (“Trust”) in paragraph 2.5:

2.5 **The trust shall consist of** The Sablewood house located at 4711 117th Place NE, Kirkland, WA., 98033-8749, or its proceeds after sale. In addition, the Trust shall include all my monies and properties of Tailorized Industries, Inc. and Tailorized Properties, LLC., and from my Charles Schwab accounts (Schwab IRA’s, Schwab One, etc.), my Fidelity accounts (401K, ESPP,

etc.) and all other checking and savings accounts under my name.

CP 107.

William and Patricia's marriage was dissolved in February 2005 after a bitterly contested dissolution action. CP 75. In the summer of 2005, William started work at a new job. CP 78. At that time, he rolled funds into an IRA at Fidelity on which he named his brother Charles as beneficiary (which was inconsistent with William's Will, that listed Fidelity accounts as going to the Trust). CP 78-79, 122-27. William also checked with Charles Schwab to confirm the beneficiary designations on his Schwab IRA, CP 78, and took out insurance with AIG on which he named his brother Charles as beneficiary. CP 78-79, 205-08.

On September 20, 2005, pursuant to William's Will, Charles Taylor was appointed as William's personal representative with nonintervention powers. CP 22. In the course of the probate, the personal representative identified both probate and nonprobate assets. Among the nonprobate assets listed in the probate Inventory were the two IRAs, the one with Charles Schwab and the other with Fidelity, and the AIG insurance. CP 204-08.

On September 29, 2005, Charles Schwab sent an Account Verification letter to William confirming “recent account instructions.” CP 80, 118.

On March 20, 2006, Caiarelli filed a TEDRA action seeking an order that declared ACT entitled to receive all proceeds from 401(k) Accounts, Individual Retirement Accounts, Investment Accounts, Option Accounts, and other nonprobate assets identified in decedent’s will and owned by the decedent at death. CP 5-6.

After Caiarelli’s attorneys withdrew from representation in the TEDRA action, a stipulation was entered in both the probate action and the TEDRA action, appointing a guardian ad litem (“GAL”) for ACT. CP 62-64.

On August 11, 2008, the GAL brought a partial summary judgment motion seeking to have the Trust declared the beneficiary of the Charles Schwab IRA, contrary to the beneficiary designation on the account. CP 1-14. The personal representative opposed the motion. CP 132-42. Both parties agreed that there were no genuine issues of material fact, and that the determination of the motion was strictly a matter of law. CP 225.

On November 2, 2008, Judge Jim Rogers granted the GAL’s motion, holding that the funds in the Schwab IRA should be distributed to

Charles Taylor as trustee of the testamentary trust for ACT, stating in part that:

The Motion for Partial Summary Judgment is Granted. The Court concludes that the common law preexisting before TEDRA regarding the passing of nonprobate assets (such as the IRA account in dispute here) remains good law in this case.

The court further concludes, acting in equity, that the decedent's will, executed after the establishment of the Schwab IRA, provides evidence of his intent to change the beneficiary of his Charles Schwab account in favor of decedent's minor son.

CP 224-27.

III. ARGUMENT

The court's ruling that the proceeds of the Schwab IRA account should be distributed to the Trust was incorrect. Instead, the court should have denied the GAL's motion, ruling that the proceeds of the IRA should be distributed to the named beneficiaries, Charles and Elizabeth Taylor.

A. Standard of Review

The standard of review on summary judgment is the *de novo* standard, with the court engaging in the same inquiry as the trial court. *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985).

B. The Funds From the IRA Do Not Belong to the Trust Pursuant to the Disposition Provisions of William Taylor's Will

If it was William Taylor's intention that the proceeds of the Schwab IRA be distributed to the Trust, his Will does not accomplish that purpose. An IRA is generally considered a nonprobate asset under Washington Probate and Trust law. RCW 11.02.005(15). Chapter 11.11 RCW, the Testamentary Disposition of Nonprobate Assets Act, governs the disposition of nonprobate assets. That chapter is intended to establish ownership rights to nonprobate assets upon the death of the owner, as between beneficiaries and testamentary beneficiaries. RCW 11.11.007.

Under chapter 11.11 RCW, "subject to community property rights, upon the death of an owner the owner's interest in any nonprobate asset specifically referred to in the owner's will belongs to the testamentary beneficiary named to receive the nonprobate asset, notwithstanding the rights of any beneficiary designated before the date of the will." RCW 11.11.020(1).

If that were the only statute that applied to this issue, the funds in the Schwab account would belong to the Trust because William Taylor named Charles and Elizabeth as beneficiaries in 1990 and the Will naming the Trust as beneficiary of the account was signed on May 2, 2004. CP 107-110. However, a testator cannot change beneficiaries on an IRA

through a will provision. Chapter 11.11 RCW excludes IRA's from the definition of nonprobate asset for purposes of that chapter. RCW 11.11.010(7)(a)(iv). Will provision 2.5 does therefore not operate as a bequest of the IRA account to the Trust.

Chapter 11.11 RCW makes it clear that if it was really William Taylor's intent that the Schwab IRA should go to the Trust, he needed to contact Charles Schwab to change the beneficiary designation on the IRA. As the only evidence of William's intent to change the beneficiary designation is paragraph 2.5 of the Will, and as that paragraph is ineffective to make such a change because of RCW 11.11.010(7)(a)(iv), the court should reverse the trial court ruling on that basis alone.

The GAL recognized the effect of RCW 11.11.010(7)(a)(iv) and did not make the argument at the partial summary judgment hearing that the Trust took the funds pursuant to the Will. Instead, the GAL argued that under Washington common law, paragraph 2.5 of the Will was sufficient to show William's intent to change his beneficiary designation from Charles and Elizabeth to the Trust and that was sufficient to find that the Trust should be deemed the beneficiary of the IRA. CP 7-12, 219-23.

C. The Funds From the IRA Do Not Belong to the Trust Pursuant to Washington Common Law.

The GAL's argument at the partial summary judgment hearing was that certain actions taken by a decedent will be considered sufficient to change a beneficiary designation on an IRA, even if no change in beneficiary was made pursuant to the IRA procedures; and that William Taylor's execution of his Will was sufficient to change the beneficiary designation on his IRA from his brother and sister to the Trust. CP 7-12.

The GAL relied on *In Re Estate of Freeberg*, 130 Wn. App. 202, 122 P.3d 741 (2005) to support his position. In *Freeberg*, the decedent, while unmarried, named his children as beneficiaries of his IRA. Decedent subsequently remarried and attempted to change the beneficiary designation on the IRA from his children to his spouse. *Id.* at 204.

After decedent's death, his spouse attempted to transfer the funds of the IRA and discovered that the beneficiary change had not been made. The spouse brought a court action to have the IRA proceeds distributed to her. Decedent's children objected. *Id.*

The court found that:

- In 1982, Freeberg opened an IRA at Edward Jones and named his children as beneficiaries;
- In 1984, Freeberg was re-married;

- In 1995, the Freebergs had new wills prepared and their attorney advised them they needed to change the beneficiary designations on their IRAs if they wanted their spouse to be beneficiary;

- The Freebergs instructed their agent at Edward Jones to change the beneficiary designation on their IRAs from their respective children to each other;

- An Edward Jones employee recalled the Freebergs' visit to the office and corroborated that Freeberg directed the office to change the beneficiary from his children to his wife. The employee did not know why the change was not made.

Id.

Based on those findings, the Court of Appeals affirmed the trial court's determination that the spouse was entitled to the IRA proceeds. *Id.* at 205. *Freeberg* makes it clear that the issue in "change of beneficiary" cases is the sufficiency of proof of the owner's intent to change beneficiaries. Intent must be established through "substantial compliance" with the change of beneficiary provisions. Substantial compliance means that "the insured has not only manifested an intent to change beneficiaries, but has done everything which was reasonably possible to make that change." *Id.* at 205-06, citing *Allen v. Abrahamson*, 12 Wn. App. 103, 529 P.2d 469 (1974). In executing his Will, William did not meet the

standard of “doing everything reasonably possible” to change beneficiaries.

It is instructive for the present case to compare the rulings in *Freeberg* and *Allen*. *Allen* was a case in which the Court of Appeals ruled that there was insufficient proof of intent to change the beneficiary designation on an insurance policy. There, Allen purchased life insurance and named a girlfriend as beneficiary. The insurance contract provided that in order to change beneficiaries, a written request signed by the insured was necessary. After the relationship with his girlfriend “began to fade,” Allen delivered the insurance certificates to his parents and told them that he was going to change the beneficiary designation from his girlfriend to his parents. Allen died six weeks later, never having delivered a written change of beneficiary request or contacted the insurance company or his employer about such a change. *Id.* at 104. In a dispute between the girlfriend and the parents, the trial court ruled for the parents. *Id.*

The Court of Appeals reversed the trial court, finding insufficient proof of intent on Allen’s part to make the change, stating that Allen “... never even attempted to comply with the policy requirement of written notification...” *Id.* at 108. *Allen* is also clear that the standard of proof necessary in change of beneficiary cases is high:

Equity requires diligence. Therefore, where the insured failed to do all which might reasonably have been possible to effectuate his wishes, as to change a named beneficiary, aid will be denied.

Id. at 106, citing *In re Estate of O'Neill*, 143 Misc. 69, 76, 255 N.Y.S. 767, 775 (1932).

William Taylor's actions do not rise to the level of compliance required by *Freeberg* and *Allen*. The present case is factually much closer to *Allen* than to *Freeberg*. Despite the language in the IRA application that a change in beneficiary must be tendered to Schwab in writing, there is no evidence of anything in writing related to a change in beneficiary being tendered to Schwab by William. There is no indication that William ever contacted Charles Schwab in any manner about changing the beneficiary. The only action William took that indicates his intent to change beneficiaries is the execution of his Will. That is simply insufficient. As stated in *Allen*:

There is virtually no persuasive authority to support the ... argument that a change in beneficiary is effective when the insured's intent at one time to make that change is proven.

Allen, supra, at 106.

In fact, there is evidence, in addition to William's failure to contact Schwab about changing his beneficiary, that is consistent with a conclusion that William wanted his brother and sister to be the

beneficiaries. In 2005, William contacted Schwab to confirm his beneficiary designations. CP 78. The Schwab IRA was not a dormant account. As late as several weeks before William died, he contacted Schwab with investment instructions related to the account. CP 118. If William still intended for the IRA to go the Trust, he could have, and should have, discussed that intention with Schwab. There is no evidence that he did so.

Further, also in 2005, some 15 months after executing his Will and over one year after his divorce was final, William made changes to a Fidelity IRA making his brother the beneficiary.¹ CP 78-79, 127. At that same time, he also took out insurance with AIG naming his brother as beneficiary. CP 78, 205-08. Those actions are consistent with a conclusion that in 2005 William knew the beneficiaries of the Schwab IRA were his brother and sister and decided to leave it that way rather than change the beneficiary to the Trust.

Finally, The GAL's argument fails to take into account RCW 11.11.010(7)'s exclusion of IRAs from testamentary disposition of nonprobate assets. If the GAL's argument was to prevail, anyone who is named in a will as beneficiary of an IRA (where the beneficiary

¹ That designation in contrary to paragraph 2.5 of the Will, that lists William's Fidelity accounts as well as the Schwab account as going to the Trust.

designation was not later changed pursuant to the IRA instructions) could argue that the will provision should prevail despite the clear language of RCW 11.11.010(7)(a)(iv). This would defeat the clear purpose of the statute.

The GAL also cites *Koch v. Aetna Life Insurance Co.*, 165 Wash 329, 5 P.2d 313 (1931) in support of his position. In *Koch*, Peter Miller's employer purchased a \$1,000 life insurance policy on Miller's life. While the policy entitled the insured to name and to change the beneficiary of the policy, the policy contained no procedures for designating beneficiaries or for changing beneficiary designations. Instead, the employer instituted a procedure for that purpose. That procedure involved informing the company of who the beneficiary should be, and the employer would keep a record of the beneficiary designation and any changes. *Id.* at 331.

Miller told the employer that he wanted his sister to be the beneficiary because, in exchange for naming her as beneficiary, she would move from Montana to Washington to care for Miller. This arrangement was terminated soon after it was started. Miller then gave a friend the actual insurance certificate and told her that he wanted her to be the beneficiary. *Id.* at 332.

On Miller's death, a dispute arose as to who was entitled to the insurance proceeds. The court concluded that because the insurance

policy did not designate any particular method for changing beneficiaries, it would look to whether there was sufficient evidence of Miller's intent to make a change in designation. It found that delivery of the policy with the intent to make the change was sufficient. *Id.* at 336.

The GAL argues that the present case is similar to *Koch* because the procedure for tendering the written change of beneficiary form required by Schwab is contained in Schwab's Disclosure Statement and the Disclosure Statement was not produced by Schwab pursuant to the GAL's discovery request. The GAL incorrectly equates the Disclosure Statement being missing from the record with a complete lack of a policy for changing beneficiary designations.

The Schwab application states that a written change form must be tendered to Schwab. CP 73. The procedures for such a tender are contained in Schwab's Disclosure Statement. While the Disclosure Statement is not part of the record before the court, there is no suggestion that such a Disclosure Statement did not exist, or that it did not apply to effecting a change of beneficiary on the account. Just because the record does not disclose what the exact procedure was does not mean that Charles Schwab did not have a policy for changing a beneficiary, that William

Taylor did not know what the policy was² or that he was not bound to follow that procedure. It is clear from the record that some form of writing must be tendered to Charles Schwab in order make a change of beneficiary, and there is no evidence of William tendering or attempting to tender any type of written change of beneficiary to Schwab.³ *Koch* is not applicable to the current situation.

IV. CONCLUSION

Washington law is clear that there must be extraordinary circumstances for a court to find that someone other than the named beneficiary is entitled to the proceeds of an IRA after the owner's death. No such extraordinary circumstances exist here. This court should reverse the trial court's partial summary judgment order of November 2, 2008.

DATED this 9th day of November 2009.

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² The application, that William signed, includes a statement that "I have received and read the Plan, Disclosure Statement, and the Schwab Money Fund Cash Management Service Authorization." CP 73.

³ We can be sure that the procedure did not include naming a beneficiary for the IRA in a will, as that is not allowed by RCW 11.11.010(7)(a)(iv).