

No. 68354-3

WASHINGTON STATE COURT OF APPEALS
DIVISION I

In the Matter of the Estate of Leora M. Givens, Deceased,

ROY ANTHONY GIVENS,

Appellant

vs.

RHONDA MARY BROWN, as Personal Representative of the Estate of
Leora M. Givens, deceased,

Respondent.

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APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Roy Anthony Givens brought an action under the Trust and Estate Dispute Resolution Act ("TEDRA") because despite a signed designation of beneficiary form leaving him a share of his mother's Ameriprise account, and despite his mother's declared intent in her Living Trust to leave him her remaining interest in Pantrol, Inc., Respondent sought to distribute everything to his six siblings, disinheriting him completely. The evidence submitted in support of Roy Anthony's TEDRA petition was sufficient to establish both his mother's competence to execute the designation of beneficiary form and to interpret the Trust on summary judgment. However, the trial court committed several errors in its ruling, necessitating this appeal.

The Respondent's assertion that the trial court properly interpreted Leora Givens' unambiguous Trust agreement, refused to consider inadmissible evidence, and made all necessary findings of fact is not supported by the record. In reality, the court's Order establishes that it failed to identify or exclude inadmissible evidence, failed to establish or apply the burden of proof on the issue of Mrs. Givens' competency, and failed to make appropriately supported findings of facts relative to her competency.

As to the ambiguity or clarity of the Living Trust, while the trial court declared it unambiguous, it did not strike all of the evidence on intent submitted by the Respondent, and its determination of the issue is thus suspect. Moreover, the trial court failed to identify how it harmonized apparently conflicting provisions, and thus failed to correctly interpret the terms of the Trust as a matter of law. Based on these errors, this Court should determine that the Living Trust either did not properly express an intent to deprive Roy Givens of the entirety of his mother's estate, or should determine there is a question of fact and remand for further fact finding.

II. UNDISPUTED FACTS

The facts of this case have been addressed adequately in the Appellant's brief. Appellant will limit his reply to issues concerning the Respondent's use of some procedural or evidentiary facts which underscore the necessity of reversal or remand.

First, while the Respondent asserts that "The trial court did not consider the declarations of interested parties regarding their interactions with Leora under the Deadman Statute" (Respondent's Brief, p. 3), the record cited is the court's Order, which states only:

Each side submitted affidavits concerning various peoples' observations of Mrs. Givens, many of which

were properly objected to because they violate the dead man's statute.

(CP 421)

There was no further order identifying or excluding evidence.

And despite the Respondent's assertion that the Leora Givens Living Trust is unambiguous and thus must be interpreted solely by its language, Respondent cites to the extrinsic testimony of Leora's attorney, Jeffrey Werthan, to claim that "Leora was confident she would ultimately sign an agreement for Roy to purchase her stock," and that the Pantrol stock would have provided Roy with a "substantial asset," thus explaining the purpose of Leora's disinheritance of him. (See Respondent's Brief, pp. 4-5) This extrinsic evidence ignores Leora's stated intent to leave her interest in Pantrol to Roy Anthony, ascribes an intent not reflected in the Trust itself, and also ignores an actual writing by Mr. Werthan to Mrs. Givens referring to Mrs. Givens' desire for "the proceeds going to Tony [Roy Anthony] if the ultimate sale of the business is not completed by a certain stage." (CP 97) As opposed to Mr. Werthan's conclusory restatements of what Mrs. Givens knew or wanted, that letter demonstrates his understanding of her intent to leave Pantrol, or the proceeds of a sale of Pantrol, to Roy Anthony.

Thus, even utilizing the extrinsic intent evidence proffered by the Respondent, Respondent's "undisputed" facts fail to harmonize the dispositional scheme in the Trust. The "substantial asset" that Roy was "given" required him to pay \$1 million, although the Trust also sought to relieve him of the obligation to pay for the stock under a previously executed Stock Cross-Purchase Agreement.

As to Leora Givens' mental competency, the Respondent cites to diagnoses given to Leora at the time of her admission to a psychiatric unit from Dr. Eric Shendel, M.D., who specifically testified he had **no** independent recollection of treating Mrs. Givens, and does little more than identify her admission and discharge dates, and reaches an unsupportable conclusion that, based on the diagnosis of delusion and dementia, Leora Givens could not have managed her own affairs. (CP 331-332) He fails to address her treatment, medications given, or her status on release from the facility. (CP 331-32)

Respondent testified that when Mrs. Givens signed her Will on January 12, 2006, she was not under any restraint, duress, or undue influence, that she appeared of sound and disposing mind and memory, was competent in every respect, that she knew what she was doing, who her family was, and could identify her children. (CP 142) Respondent further testified that Mrs. Givens had the capacity to discuss with

somebody her plan on disposition of her assets on death, that she could describe a plan of disposition, and could generally describe the nature of what she owned. (CP 143)

And relying on the inadmissible declaration from Karen Ingrassia, one of Mrs. Givens' caretakers at her living facility, Respondent also appears to assert that Mrs. Givens had been incapacitated from the point of her stroke in 2005, based on her admission to the "locked" Terrace unit of The Gardens, and her condition and diagnosis of dementia at that time. (CP 327-328) Ms. Ingrassia testifies that Leora Givens' condition was treated at the Northwest Hospital Gero-psych unit, she was given medication, but her condition remained **the same** after she returned as it was before she left. (CP 327-328) However, it is undisputed Mrs. Givens executed a new Will on January 12, 2006, with two witnesses testifying to her competency 12 days before her admission to the psychiatric unit. (CP 152-157) This Will was filed in the probate action by the Respondent. (CP 18-23) It is also undisputed that Mrs. Givens acknowledged consent for treatment on January 24, 2006, witnessed by Respondent. (CP 173) No guardianship existed, and no Power of Attorney was utilized. Respondent cannot disclaim any potential for Mrs. Givens' lucidity at points either before or after her brief admission to

the psychiatric unit (where she received sufficient treatment to return to her previous living situation).

As a result, the trial court failed to adequately address or find that Respondent met the burden of proof to establish Mrs. Givens' incompetency to sign the designation of beneficiaries on February 14, 2006, and similarly failed to establish that the Living Trust unambiguously disinherited Roy Anthony.

III. LAW

A. Roy Givens did not waive his right to an evidentiary hearing if this matter is remanded.

Respondent asserts that, under TEDRA, the trial court was entitled to "find facts" and have the necessary evidentiary hearing solely on the submission of written evidence by the parties, and that Roy Anthony somehow waived his right to claim any basis for an additional evidentiary hearing. However, the trial court analyzed this action under TEDRA in effect as a summary judgment, as is clear from the record and the nature of the court's ruling, which is also appropriate under TEDRA. RCW 11.96A.100(10). While in a TEDRA proceeding, evidence can be submitted through affidavits, and the court can order a fact finding hearing, counsel for Roy Anthony made clear that: "for the most part, this is a summary judgment type proceeding at this point" (RP 5), and noted

that "Summary judgment can be granted if reasonable minds cannot differ to any other conclusion." (RP 6) This is also the relief requested in Roy Anthony's Memorandum in Support of TEDRA Petition: "Pursuant to RCW 11.96A.100, the Superior Court may **summarily** decide a Petition under TEDRA, when the meaning...is unambiguous." (CP 28) (Emphasis added)

The Appellant's brief outlined numerous cases in which a TEDRA petition is decided on the basis of summary judgment, which establishes the necessary de novo review on appeal. See, In re Estate of Kuest, 2009 WL 1317484 (Wash.App. 2009).¹ In accordance with a summary judgment proceeding, Appellant asserted that on the written record before the court, there was no issue of fact necessitating further evidentiary hearing, because the evidence established the lack of ambiguity of the Living Trust, and the lack of clear, cogent and convincing evidence of Mrs. Givens' incompetence. As a result, the trial court could have ruled in a summary fashion on that evidence that no issue of fact existed. Agreeing to submission of the TEDRA issue on summary judgment on the

¹ While the Respondent objects to use of unpublished decisions regarding TEDRA petitions, those cases were not utilized for their merits or precedent, but to establish procedurally that TEDRA petitions often are determined on summary judgment type proceedings, with accompanying standards of review.

submitted evidence does not constitute a waiver of the court's obligation to determine the necessity of further trial, or to properly find facts and analyze the admissibility of evidence and the burdens of proof. Roy Anthony's counsel argued the possibility that the written evidence was not enough, necessitating a fact finding, and specifically noted the court will have to resolve the evidentiary questions. (RP 54-56)

And the trial court in fact apparently treated the hearing as a summary judgment based on its Order, which did not constitute a judgment issued after a "fact finding" evidentiary hearing or trial. The trial court's Order failed to make specific findings of fact, failed to actually rule on objections to evidence, and failed to identify or apply the burden of proof. (CP 420-423) The trial court's ruling was unlike the situation in Foster v. Gilliam, 165 Wn.App. 33, 268 P.3d 945 (2011), on which Respondent relies to assert the court can try estate matters. In Foster, the court had held numerous hearings and issued multiple orders and judgments with extensive findings of fact. While oral testimony may not be necessary in order to make findings under TEDRA, the trial court still must treat this evidence appropriately. Here, the trial court did not issue necessary evidentiary rulings based on a full evidentiary hearing on the written record.

Appellant did not waive his right to a full evidentiary hearing if the court improperly ruled on summary judgment, and this Court can remand if it finds that Respondent was not entitled to summary judgment on the record submitted.

B. Respondent's interpretation of Leora's "unambiguous" intent to leave Roy nothing fails to analyze the practical contradiction of the terms of the Trust and does nothing to harmonize the terms of the Trust.

While both parties agree that the duty of the court is to ascertain the intent of Leora Givens to interpret her Trust, Respondent fails to adequately harmonize the provisions with the Trust Agreement in order to give effect to the whole instrument, which is required under the law applicable to will and trust interpretation. See, Cook v. Brateng, 158 Wn.App. 777, 262 P.3d 1228 (2010) (trust must be interpreted by construing all provisions together). In fact, the Respondent agrees that the Living Trust reflected a clear intent to leave Leora's interest in Pantrol to Roy (Respondent's Brief, p. 5), but then inexplicably argues that Leora did not intend Roy Anthony to have the stock, as well as the proceeds of the sale of the stock. This sidesteps the distributional scheme in which Leora would have left all of Pantrol, Inc. to Roy Anthony, if the Stock Cross-Purchase Agreement were invoked, requiring him to pay a million dollars for the Pantrol stock. This "all or nothing" interpretation of the Trust

simply defies logic, and ignores the intent to relieve Roy of his requirement to pay for the stock under the Stock Cross-Purchase Agreement, and leave Leora's interest in Pantrol, Inc. to Roy Anthony.

Respondent's conclusion that the words in the Trust are unambiguous simply does not address the potential internal inconsistency of the dispositional scheme, and fails to adequately interpret or harmonize the provisions as is required under the law. When phrases within a trust or a will simply cannot be read together, the court cannot ignore them; it must go the extra step and determine the true intent. If Leora's intent was simultaneously to give Roy Anthony her 49% of the stock with no financial obligation to pay for it under the original Stock Cross-Purchase Agreement, or conversely to make him pay a million dollars to his siblings and receive nothing from the Estate, those provisions conflict.

And despite the Respondent's claim that the Trust is unambiguous and no extrinsic evidence is appropriate, Respondent argues that the later sale of Pantrol by Roy in 2009 is a factor to be considered in determining the meaning of the Trust. The sale of Pantrol **after** Leora Givens' execution of the Trust cannot assist the court in determining Mrs. Givens' intent at the time of its execution.

Ultimately, Respondent's recitation of the language of the terms of Leora Givens' Living Trust does not resolve the interpretation sufficient to

disinherit Roy Anthony from all interest in Pantrol. The Appellant's position, which will not be repeated here, is that instead the dispositional scheme was meant to leave the Pantrol stock that Mrs. Givens owned, "or that may be distributed to [her] estate" to Roy Anthony.

To the extent this Court cannot make that finding based on the language therein, issues of fact apparently exist, and an evidentiary hearing which fully explores testimony of the parties is appropriate. See, In re Melter, 167 Wn.App. 285, 273 P.3d 991 (2012). Such a hearing was not waived by submission of the issue as a summary judgment on an initial hearing.

C. The trial court failed to apply the appropriate burden of proof on competency and did not properly make sufficient findings to establish Mrs. Givens' incompetence.

1. The court did not identify or properly analyze the burden of proof.

Contrary to Respondent's assertion, Washington law is clear that a person challenging capacity bears the burden to show the invalidity of the instrument. Pedersen v. Bibioff, 64 Wn.App. 710, 828 P.2d 1113 (1992); In re Estate of Nelson, 85 Wn.2d 602, 537 P.2d 765 (1975). The party challenging the capacity overcomes that presumption of validity only with clear, cogent, and convincing evidence. In re Johnson's Estate, 20 Wn.2d 628, 148 P.2d 962 (1944). It is also undisputed that an appellate court will

review as error whether the trial court failed to apply the correct burden of proof. Petters v. Williamson & Associates, Inc., 151 Wn.App. 154, 210 P.3d 1048 (2009).

The Respondent's reliance on Hackett v. Whitley, 150 Wash. 529, 273 P. 752 (1929), to assert that the burden rests on the party claiming the benefit of the conveyance or contract is misplaced. The Hackett court analyzed an assignment given by an elderly man on real property; the court was analyzing issues relative to undue influence in real property transactions and largely discussed the relevance of unfair consideration provided for a transaction in property, which is not relevant to a testamentary disposition. Moreover, the court found the burden shifted only once mental incapacity has been shown, which is circular reasoning and does not overcome the clear body of law on the necessary burden to establish testamentary incompetence.

What remains clear is that the trial court here did not identify or apply the clear, cogent and convincing burden, which was error.

2. The trial court did not exclude inadmissible evidence.

Apparently recognizing the necessity that the court rule on the evidentiary objections to the testimony submitted on Leora Givens' competency, the Respondent argues that the court "did rule on Roy's evidentiary objections, holding that it would not consider the testimony of

interested parties under the Deadman Statute, RCW 5.60.030." (Respondent's Brief, p. 21) There is no indication that the court so ruled. The court did no more than state each side submitted affidavits "which were properly objected to because they violate the dead man's statute." (CP 421) It did not identify them, it did not order exclusion, and it certainly did not establish that the trial court relied only on admissible and uncontested evidence, as Respondent argues. (Respondent's Brief, p. 21)

And in addition to the lack of ruling on the objections to evidence, the court also erred in its inclusion of detailed medical conclusions from the DSM-IV-TR. Respondent's reference to the DSM-IV-TR as a "standard reference manual" which a lay person can analyze to specific diagnoses and reach a conclusion is simply incorrect. A lay application of a DSM-IV diagnosis without resort to medical opinion is inappropriate; diagnoses under the DSM-IV standards are analyzed in Washington as scientific expert evidence under the Frye Test. See, Carlton v. Vancouver Care LLC, 155 Wn.App. 151, 231 P.3d 1241 (2010).

Ultimately, the court's Order fails to properly address the admissibility of the evidence, which was necessary were this the only full evidentiary hearing on the issues, as argued by Respondent. Proper analysis of the admission of evidence and improper use of evidence thus constitute error that requires reversal.

3. Evidence submitted did not meet Respondent's burden to prove Leora's incompetence.

The evidence on which Respondent would rely to argue Leora Givens' incompetence to execute the beneficiary designation underscores the failure to meet the necessary burden of proof and the error in the trial court's decision. First, Karen Ingrassia, a nurse at The Gardens where Leora resided beginning in 2005, testified generally that Mrs. Givens was incapacitated "after her stroke," that she was unable to make any important decisions, unable to read, unable to comprehend, and had dementia and memory loss. However, it is undisputed that Leora Givens made decisions about health care and made a new Will during that time without objection or interference from Ms. Brown or her other children. The conditions to which Ms. Ingrassia testified, which allegedly made Leora incompetent, were present on January 12, 2006 when Leora executed a new Will, with witnesses properly testifying to her competency. Mrs. Givens also returned to that living situation after brief treatment at a psychiatric unit, obviously retaining her ability to return to her previous level of abilities.

Similarly, Respondent's reliance on Dr. Schendel's brief statement that he does not remember Leora Givens, and restating the diagnoses with which she was admitted to the psychiatric facility, fails to meet the burden Respondent has to prove incompetence. Dr. Schendel does not address the

treatment Leora received during that time, he does not note that she was released to her previous living situation, he does no more than express an apparent belief that anyone who is diagnosed with delusions simply cannot ever execute any testamentary documents. As outlined previously, the mere fact of a diagnosis of mental instability does not destroy testamentary or contractual capacity. Page v. Prudential Life Ins. Co., 12 Wn.2d 101, 108-109, 120 P.2d 527 (1942).

Instead, the mental capacity to contract must be determined at the time the transaction occurred, Harris v. Rivard, 64 Wn.2d 173, 390 P.2d 1004 (1964). The mere fact of a diagnosis such as "dementia with behavior disorder" is insufficient to avoid a contract. Woodall v. Avalon Care Center-Federal Way, LLC, 155 Wn.App. 919, 231 P.3d 1252 (2010). In fact, courts specifically look beyond diagnoses of delusions, hallucinations, or paranoia to determine whether a party was being treated, and whether medications were suppressing symptomology; when a party is medicated for conditions which could cause a degree of mental impairment, a patient's compliance with treatment is analyzed to determine competency. See, In re Jack, 390 B.R. 307 (S.D. Texas Bkcty. 2008). The mere existence of the conditions do not as a matter of law establish incapacity.

And contrary to Respondent's characterization of Appellant's argument, it was not the mere signing of Mrs. Givens' name that establishes her ability to execute the designation of beneficiary, but the apparent acceptance of her competence by all parties surrounding her to allow her to continue to execute documents regarding her health care, as well as a Will. Such conduct establishes that they believed she had necessary mental capacity to be aware of and understand the nature, terms and effect of her assets, and the appropriate distribution of those assets. That is exactly the lucidity necessary for her to sign that designation of beneficiary, and what Respondent had the burden to disprove.

Ultimately, the trial court's reliance solely on its extrapolation from a mention of a DSM-IV diagnosis cannot be the basis for the substantial evidence that overcomes the clear, cogent and convincing burden of proof on Respondent. As a result, Roy Anthony was entitled to a summary determination that Leora was competent or, at a minimum, a full evidentiary hearing in which the court analyzed the burden of proof, the admissible evidence, and made findings on Leora Givens' competency.

D. The trial court properly refused to award attorney fees below, and no equitable basis exists for their award now.

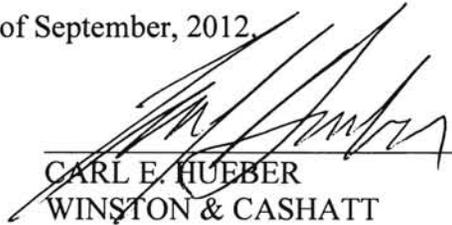
The trial court properly exercised its discretion to refuse to award Respondent fees below, and no new equitable basis demands their award

now. TEDRA exists so that a party can engage in a dispute process regarding estate distribution, and the facts of this case do not suggest that Roy Anthony pursued that right either here or below in bad faith or without a tenable basis. The terms of Leora Givens' Living Trust contemplated the distribution of Leora's interest in Pantrol to her son Roy, who had revitalized the company and provided his parents with a source of profit and income through the last 20 years of their lives. That Roy should challenge the seeming inconsistency of disinheriting him from all assets, and requiring him to provide his siblings with \$1 million, was pursued to effectuate the intent expressed in Leora Givens' written estate plan. Based on the court's discretion to consider "any and all factors" in this determination and the equities of this dispute, no basis exists for an award of fees for seeking appropriate relief. See, RCW 11.96A.150.

IV. CONCLUSION

For the foregoing reasons, Appellant requests that this Court reverse the trial court's decision and enter judgment in favor of Appellant, or remand for trial.

DATED this 24th day of September, 2012.



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DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of that on September 24, 2012, I caused a true and correct copy of the foregoing document to be served on the following counsel via first class US Mail postage prepaid and via email:

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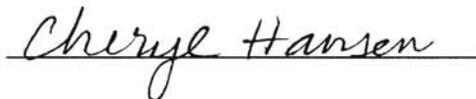
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DATED at Spokane, Washington, on September 24, 2012.

A handwritten signature in cursive script that reads "Cheryl Hansen". The signature is written in black ink and is positioned above a solid horizontal line.

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