

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

No. 36222-8-II

In re the Estates of ALFRED S. PALMER and SARAH L. PALMER

DAWN PALMER GOLDEN,

Appellant/Cross Respondent

vs.

WORLD GOSPEL MISSION,

Respondent/Cross Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

BRIEF OF RESPONDENT/CROSS APPELLANT

DOUGLAS N. KIGER, WSBA#26211
Attorney for Respondent/Cross Appellant
World Gospel Mission

BLADO KIGER, P.S.
ATTORNEYS AT LAW
Bank of America Building, 2nd Floor
3408 South 23rd Street
Tacoma, WA 98405
Tel (253) 272-2997

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. ASSIGNMENTS OF ERROR.....	1
A. Assignment of Error.....	1
B. Issues Pertaining to Assignments of Error.....	1
II. STATEMENT OF THE CASE.....	1
III. ARGUMENT.....	7
A. MS. GOLDEN’S REQUEST TO VACATE AND RE-ENTER THE FEBRUARY 22, 2007, ORDER DENYING REVISION SHOULD HAVE BEEN DENIED AND MS. GOLDEN’S APPEAL SHOULD BE DISMISSED BECAUSE SHE WAS FAXED THE COURT’S ORIGINAL ORDER ON MARCH 6, 2007, AND MORE THAN 30 DAYS PASSED BETWEEN THE TIME THE ORDER WAS SENT TO HER AND THE TIME SHE FILED HER APPEAL.....	7
B. THE TRIAL COURT PROPERLY DENIED MS. GOLDEN’S PETITION TO DISQUALIFY WORLD GOSPEL MISSION AS A BENEFICIARY OF THE PALMER TRUST BECAUSE WORLD GOSPEL MISSION’S EMPLOYEES’ ACTIONS OF FILLING IN A FORM TRUST WITH THE PALMERS’ WISHES DOES NOT CONSTITUTE THE PRACTICE OF LAW AND THE ACTION OF FILLING IN THE FORM DID NOT RESULT IN A GIFT TO THE EMPLOYEES WHO FILLED IN THE FORM.....	8
1. <u>The reasoning of <i>Marks</i> has never been extended or applied in the context of a revocable living trust, and it would be inequitable to do so in the present case given Ms. Golden’s abuse of her power of attorney to improperly take the bulk of her parents’ estate contrary to their wishes at a time when they</u>	

	<u>were incompetent, and in light of the running of the statute of repose.....</u>	10
2.	<u>World Gospel Mission was not engaged in the practice of law when its employees inserted the Palmers' wishes into a three and one-half page pre-prepared trust form.....</u>	13
3.	<u>The gift to World Gospel Mission in the Palmer trust was not a personal gift to anyone involved in filling in the Palmer trust, or their family, and the individuals who did so were not owners, directors, or officers of this charitable organization.....</u>	16
IV.	CONCLUSION.....	20
V.	APPENDIX	
A.	79 Am. Jur. 2d Wills § 283.	
B.	<i>In re the Estate of Giacomini</i> , 603 P.2d 218 (Kan. Ct. App. 1979).	
C.	Selections from WASHINGTON LAW OF WILLS AND INTESTATE SUCCESSION (Wash. State Bar Assoc. 2d ed. 2006)	

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

City of Spokane v. Landgren
127 Wn.App. 1001, 107 P.3d 114 (2005).....7, 8

Dexter Horton Bldg. Co. v. King County
10 Wn.2d 186, 116 P.2d 507 (1944).....10

Hornback v. Wentworth
132 Wn.App. 504, 132 P.3d 778 (2006).....11

In re the Estate of Knowles
135 Wn.App. 351, 143 P.3d 864 (2006)..... 9, 15

In re the Estate of Marks
91 Wn.App. 325, 957 P.2d 235 (1998).....6, 8, 9, 11, 13, 14, 15, 16, 17, 18

In re the Estate of Riley
78 Wn.2d 623, 479 P.2d 1, 48 A.L.R.3d 902 (1970).....18

Vasquez v. Hawthorne
145 Wn.2d 103, 33 P.3d 735 (2001).....10, 11

CASES FROM OTHER STATES

In re the Estate of Giacomini, 603 P.2d 218 (Kan. Ct. App. 1979).....18

STATUTES

RCW 11.12.160.....6

RCW 11.24.010.....6, 10, 12

RULES

CR 54.....7

CR 54(f)(2).....7
RAP 5.2.....8
RPC 1.8(c)..... 8, 9, 10, 12, 13, 17, 18

OTHER AUTHORITIES

79 Am. Jur. 2d Wills § 283.....18
WASHINGTON LAW OF WILLS AND INTESTATE
SUCCESSION (Was. State Bar Assoc. 2d ed. 2006).....19

I. ASSIGNMENTS OF ERROR

A. Respondent/Cross Appellant's Assignment of Error

1. The trial court erred by vacating the order of February 22, 2007, when Ms. Golden's counsel received notice of entry of the original order by facsimile on March 6, 2007. CP 65-66.

B. Issues Pertaining to Assignments of Error

1. Was it error for the trial court to vacate the order denying revision on the basis that Ms. Golden's counsel claimed to have not received the order when the order was faxed to her counsel on March 6, 2007? (Respondent/Cross Appellant's Assignment of Error 1).

2. Did the trial court properly decline to disqualify World Gospel Mission as a trust beneficiary where the evidence is insufficient to show that World Gospel Mission engaged in the unauthorized practice of law in the State of Washington and the trust did not contain a gift to World Gospel Mission's employees or their family members? (Appellant's Assignments of Error 1 and 2).

II. STATEMENT OF THE CASE

Alfred S. Palmer was a retired Methodist minister. CP 38. He and his wife, Sarah L. Palmer, remained active in their Puyallup church well into retirement, often visiting people in the hospital on behalf of their

church. *Id.*

Over the years, the Palmers had occasion to attend conferences at which representatives of the World Gospel Mission made presentations. *Id.* The World Gospel Mission is a non-profit missionary organization with headquarters in Marion, Indiana. CP 53. The World Gospel Mission has a history of missionary service dating back to 1910. *Id.* Today, the organization has 300 missionaries and support staff serving on six continents and in more than 17 countries. CP 54.

While at an annual missionary conference in Portland, Oregon, in January of 1997, the Palmers met and spoke with an employee of World Gospel Mission, Don Fivecoat. CP 38. They asked Mr. Fivecoat if they could speak with him further about charitable giving. CP 38. Mr. Fivecoat agreed, and visited with the Palmers on February 11, 1997. *Id.* During that meeting Mr. Fivecoat filled in blanks on a pre-printed questionnaire about the Palmers' wishes for their estate. CP 43-48. During this meeting, Mr. Fivecoat never made any suggestions to the Palmers about what they should do with their estate. CP 38.

Without prompting from Mr. Fivecoat, the Palmers indicated they wanted to leave 90% of their estate to World Gospel Mission. CP 38. The Palmers indicated they had given a home to their daughter, Dawn Palmer,

during their lifetime and felt that was most of her share of their estate. CP 38-39. The Palmers also stated that their children were older and, “well fixed” financially. CP 39.

Mr. Fivecoat transmitted his notes to a secretary and paralegal at World Gospel Mission in Indiana. CP 39, 49. A World Gospel Mission employee, Kathy Hunicutt, then put the information from Mr. Fivecoat into a three and one-half page pre-prepared form trust agreement. CP 39, 54. World Gospel Mission employees did nothing more than fill in blanks on the trust form that had been prepared by an attorney. CP 54. Mr. Fivecoat, and the employees who filled in the blanks on the form, received no commission, bonus, or other compensation as a result of their involvement with filling in the blanks on the trust. CP 39, 54-55. None of those individuals were owners, directors, or officers of World Gospel Mission. CP 55.

After the three and one-half page form trust was completed, the Palmers reviewed the trust and were advised to review the document with an attorney of their choosing. CP 40. Before signing the trust, the Palmers decided to reduce the gift to World Gospel Mission from 90% of their trust estate, to 75% of their trust estate. CP 40, 50.

Alfred and Sarah Palmer executed the revocable living trust on

April 3, 1997. CP 93-97. The Palmers also executed pour over wills leaving their entire estate to the Alfred S. Palmer and Sarah L. Palmer Trust. CP 123-129. There were no other named beneficiaries of the Palmer wills. *Id.*

No witnesses subscribed to the Palmers' trust, although the Palmers' signatures were notarized by J.S. Gordon. CP 96. Attached to the trust was a Schedule "A" signed by the Palmers that declared they hold certain described property in the trust. CP 97. The trust provided that upon the death of the Palmers their entire trust estate should be distributed .05% to the Puyallup United Methodist Church; 6% to the Warm Beach Conference (Free Methodist Church) of Stanwood, Washington; 75% to World Gospel Mission; 3.5% to their twin grandchildren; and 15% to be divided evenly between their children, Donald A. Palmer, Douglas H. Palmer, and Dawn Lee Golden (appellant herein). CP 95-96.

The Palmers passed away in 2001 and 2003. CP 69, 85. The Palmer wills were admitted to probate on June 22, 2004, under Pierce County Superior Court Cause Nos. 04-4-00774-0 (Alfred) and 04-4-00775-8 (Sarah). CP 69-71, 83-84. The cases were later consolidated under Cause No. 04-4-00774-0. CP 83-84. Dawn Palmer Golden, the decedents' daughter, has actively participated in the probates since at least

March 14, 2005, when her counsel filed a Notice of Appearance in this matter. CP 80. On June 29, 2006, the Palmers' son, trustee, and personal representative, Donald A. Palmer, filed a Report of Trustee in which he noted that Ms. Golden had apparently misappropriated the bulk of the Palmers' assets at a point in time when they were not competent to handle their own financial affairs. CP 85-97.

Ms. Golden and the estate engaged in litigation over the ownership of various assets of the Palmers. CP 81-82, 98-99, 166-181. It turned out Ms. Golden used powers of attorney from her parents to transfer assets of her parents to herself, her family, and her friends, or named herself co-tenant and payable on death beneficiary on various accounts at a point in time when her parents were not competent to handle their own financial affairs. CP 166-181. Following a trial, the court entered a judgment against Ms. Golden for more than \$500,000, plus interest, attorney fees, and costs. CP 178-181.

On November 17, 2006, while litigation was ongoing as to the ownership of assets, Dawn Palmer Golden filed a motion to disqualify World Gospel Mission as a beneficiary of the trust. CP 100-104. Among other things, Ms. Golden alleged that the Palmer wills and trust should be read as a single document. CP 101. Because, as she argued, the wills and

trust were one document, and because the wills had been witnessed by an employee of World Gospel Mission, the gift to World Gospel Mission in the trust should be disallowed under RCW 11.12.160. *Id.* The trial court rejected this argument holding that such a claim was barred by the statute of repose. RCW 11.24.010; CP 56. Ms. Golden did not appeal this part of the trial court's decision. CP 62-64; Brief of Appellant, Assignments of Error.

Ms. Golden later amended her petition to assert the alternate theory that World Gospel Mission should be disqualified as a beneficiary of the trust because World Gospel Mission's employees acted as attorneys and therefore its status as a beneficiary is barred by RPC 1.8 and *Estate of Marks*, 91 Wn.App. 325, 957 P.2d 235 (1998). CP 1-5. A Court Commissioner denied Ms. Golden's request, holding that there was insufficient evidence to show the conduct of World Gospel Mission's employees constituted the practice of law in the State of Washington or that it resulted in a gift to those allegedly practicing law. CP 56. Following a motion for revision, Judge Grant upheld the commissioner's ruling. CP 60-61. Ms. Golden has now appealed those decisions. CP 62-66.

III. ARGUMENT

- A. MS. GOLDEN'S REQUEST TO VACATE AND RE-ENTER THE FEBRUARY 22, 2007, ORDER DENYING REVISION SHOULD HAVE BEEN DENIED AND MS. GOLDEN'S APPEAL SHOULD BE DISMISSED BECAUSE SHE WAS FAXED THE COURT'S ORIGINAL ORDER ON MARCH 6, 2007, AND MORE THAN 30 DAYS PASSED BETWEEN THE TIME THE ORDER WAS SENT TO HER AND THE TIME SHE FILED HER APPEAL.

On March 6, 2007, the trial court faxed to Ms. Golden's counsel its order dated February 22, 2007, denying her motion for revision. CP 188, 192-193. However, she did not file her appeal in this matter until 43 days later, on April 18, 2007. CP 62-64. Ms. Golden filed her motion to vacate the order of February 22, 2007, on the basis that she was not given notice of entry of the order pursuant to CR 54(f)(2). CP 182-185, 188. However, CR 54 only refers to opposing parties providing notice prior to entry of an order. CR 54. In the present case the judge entered this order. CP 60-61.

Ms. Golden also relied upon the case of *City of Spokane v. Landgren*, 127 Wn.App. 1001, 107 P.3d 114 (2005), in asking that the original order of February 22, 2007, be vacated. CP 183. That case is very similar to the present case. In *Landgren* the trial court entered written orders based upon oral rulings, and then sent them to the parties. The court of appeals in *Landgren* dismissed the appeal as untimely since the appellant had been sent the written order and did not appeal within 30 days. In this case the trial

judge entered its own written order following argument by the parties. CP 60-61. A copy of the order was faxed to counsel on March 6, 2007. CP 188, 192-193. Ms. Golden has not been prejudiced because, like the appellant in *Landgren*, she had plenty of time to file an appeal after the order was sent to her counsel. Yet she did not do so until 43 days after the order was faxed to her counsel. Under these circumstances and the decision in *Landgren*, the trial court should have denied her motion to vacate and Ms. Golden's appeal should be dismissed as untimely. RAP 5.2.

B. THE TRIAL COURT PROPERLY DENIED MS. GOLDEN'S PETITION TO DISQUALIFY WORLD GOSPEL MISSION AS A BENEFICIARY OF THE PALMER TRUST BECAUSE WORLD GOSPEL MISSION'S EMPLOYEES' ACTIONS OF FILLING IN A FORM TRUST WITH THE PALMERS' WISHES DOES NOT CONSTITUTE THE PRACTICE OF LAW AND THE ACTION OF FILLING IN THE FORM DID NOT RESULT IN A GIFT TO THE EMPLOYEES WHO FILLED IN THE FORM.

This action is Ms. Golden's most recent attempt to take a larger share of her parents' estate than her parents intended. Ms. Golden argues that World Gospel Mission's employees acted as attorneys in "drafting" the Palmer trust and therefore World Gospel Mission is disqualified as a beneficiary under RPC 1.8 and *Estate of Marks*, 91 Wn.App. 325, 957 P.2d 235 (1998). World Gospel Mission has been unable to find any published cases in the state of Washington applying the reasoning urged

by Ms. Golden in the context of trusts. Nevertheless, the present case is more similar to *Estate of Knowles*, 135 Wn.App. 351, 143 P.3d 864 (2006), in which Division II of the Court of Appeals distinguished *Estate of Marks*.

If the court finds the reasoning of these cases applies to a trust, there are at least two things required to disqualify a beneficiary pursuant to RPC 1.8(c).¹ First, the actions of the person in question must rise to the level of practicing law. *Estate of Knowles*, 135 Wn.App. 351, 143 P.3d 864 (2006). Second, the document that was prepared must result in a direct gift to the person “practicing law,” or a family member of that person. *Estate of Marks*, 91 Wn.App. 325, 957 P.2d 235 (1998). The plain language of the rule does not preclude a person allegedly practicing law from drafting an instrument in which his or her employer is given a gift. RPC 1.8(c). Neither of these requirements are present in this case.

1. Ms. Golden refers to this as the “unauthorized practice of law” theory, which is misleading and really has nothing to do with the outcome of the *Marks* and *Knowles* cases. The courts were simply trying to determine whether the actions of the parties involved constituted the practice of law. If the party’s action amounted to the practice of law, then the actor was held to the standard of a lawyer. It is the Rules of Professional Conduct that disallow/void the gift, not the act of practicing law without a license.

1. The reasoning of *Marks* has never been extended or applied in the context of a revocable living trust, and it would be inequitable to do so in the present case given Ms. Golden's abuse of her power of attorney to improperly take the bulk of her parents' estate contrary to their wishes at a time when they were incompetent, and in light of the running of the statute of repose.

All of the cases cited by Appellant in support of her argument that World Gospel Mission should be disqualified as a beneficiary of the trust applied RPC 1.8 to the drafting of, and gifts contained in, wills. Under the particular facts of the present case it would be inequitable to extend this rule to trusts. Further, Ms. Golden is arguing that the Palmer trust is essentially a testamentary instrument. By that reasoning Ms. Golden's claim is barred by the statute of repose. RCW 11.24.010.

All cases involving trusts fall within the equitable jurisdiction of the court. *Dexter Horton Bldg. Co. v. King County*, 10 Wn.2d 186, 191, 116 P.2d 507 (1944).

When equitable claims are brought, the focus remains on the equities involved between the parties. Equitable claims *are not* dependent on the 'legality' of the relationship between the parties....

Vasquez v. Hawthorne, 145 Wn.2d 103, 107, 33 P.3d 735 (2001)

(emphasis added). The court's equitable power includes the right to prevent a party from enforcing what would otherwise be a legal right in

order to prevent inequity under the circumstances. *Hornback v.*

Wentworth, 132 Wn.App. 504, 513, 132 P.3d 778 (2006).

Further, “rather than relying on analogy, equitable claims must be analyzed under the specific facts presented in each case.” *Vasquez*, 145 Wn.2d at 107-108.

In the present case, Ms. Golden is arguing that the court should exercise its equitable power to disqualify World Gospel Mission as a beneficiary of the Palmer trust by analogizing this case to the *Marks* case. Brief of Appellant, pages 5-6. As stated above, this is just the latest attempt by Ms. Golden to obtain a greater share of her parents’ estate contrary to their wishes. Prior to their deaths, Ms. Golden went so far as to abuse her powers under a power of attorney by transferring nearly half a million dollars of her parents’ assets into accounts on which she was a joint tenant or payable on death beneficiary. CP 166-181. She then claimed at trial that it was her parents who transferred the assets, even though they were incompetent or physically incapable of doing so at the time. CP 168. She also made loans and gifts to friends and family, contrary to her powers under the power of attorney and contrary to her parents’ wishes. CP 169-172. Following her parents’ deaths, she also removed various items of personal property from the Palmer cabin, for

which she did not provide reimbursement, instead claiming the personal property had been loaned to her parents. CP 169-170.

Ms. Golden has also been arguing that the Palmer trust is really a testamentary instrument and should be analyzed as such. CP 3. Yet the statute of repose has long since run on such claims. RCW 11.24.010; CP 56. Ms. Golden only brought her claims once it was evident she stood to lose the assets she improperly took for herself prior to her parents' deaths. The argument that World Gospel Mission should be disqualified as a beneficiary is merely the latest variation on her pattern of taking any steps she can think of to obtain more of her parents' estate than they intended her to have.

In contrast, Ms. Golden has presented no evidence of undue influence on the part of World Gospel Mission or its employees in this case. Her claim at this time is solely limited to her technical argument that World Gospel Mission should be held to the standard of an attorney and be disqualified as a beneficiary under RPC 1.8(c). It is important to note that RPC 1.8(c) addresses the problem of attorneys exercising undue influence over clients for the purpose of obtaining gifts from clients. RPC 1.8, Comments 6-8. Here Ms. Golden is asking this court to extend this rule to a non-lawyer charitable organization in a case where there is no showing

of undue influence in order to obtain a larger share of her parents' estate, which she was unsuccessful in accomplishing through improper means during their lifetime.

Under the circumstances of this case, given the relative equities presented by the parties, the court should decline to extend the decision in *Marks* to the facts of this particular case, and the trial court's orders denying her petition should be affirmed. But even if the court does choose to apply the reasoning of *Marks* to the facts of the present case, the trial court's orders should be affirmed.

2. World Gospel Mission was not engaged in the practice of law when its employees inserted the Palmers' wishes into a three and one-half page pre-prepared trust form.

In the *Marks* case, Division III of the Court of Appeals was presented with a situation where the testator, Diana Marks, left a will leaving much of her estate to her friends Eldon and Judith Blanford and their *personal* religious organization. *Marks*, 91 Wn.App. 325 (1998). Ms. Marks' brother contested the will alleging undue influence, unauthorized practice of law by the Blanford's, and violation of RPC 1.8 by the Blanford's. Among other things, the Blanford's purchased a will kit at an Office Depot, took instructions from Ms. Marks about her testamentary wishes, contacted Ms. Marks' investment advisor to obtain investment

information, typed out Ms. Mark's will in full (after the Blanford's had trouble completing the forms in the kit), made several revisions to the will, and received gifts under the will both individually and on behalf of their personal religious organization. In particular, Ms. Marks left Ms. Blanford some diamonds and gave the Blanford's personal religious organization \$100,000.00. The court observed that the religious organization was administered by the Blanford's on a day to day basis. Ms. Marks also left portions of her estate to other charitable organizations and some family members.

The court of appeals affirmed the trial court in finding that the will had not been obtained by undue influence. The court also upheld gifts under the will to the other charities and family members. It was only the gifts to the Blanford's personally and to their personal religious organization that the court disallowed. The court reasoned that if the Blanford's had been attorneys, they would not have been allowed to draft a will making gifts to themselves or their personal religious organization. *Estate of Marks*, 91 Wn.App. at 335-336.

In contrast to the *Marks* decision, Division II of the Court of Appeals recently declined to apply the reasoning of *Marks* by holding that merely filling out a pre-printed form does not amount to the practice of

law. *Estate of Knowles*, 135 Wn.App. 351, 143 P.3d 864 (2006). In *Knowles*, the testator's son filled in a pre-printed will form for his father in which much of the father's estate was left to the son. The testator's daughters contested the will arguing their brother exercised undue influence and engaged in the "unauthorized practice of law," relying on the *Marks* decision. In declining to follow the *Marks* decision the court of appeals agreed with the trial court that, "...simply adding [the testator's] provisions to a preprinted form did not rise to 'the degree of overwhelming control that was evinced by the defendants in *Marks*.'" *Estate of Knowles*, 135 Wn.App. at 364. The court went on to state, "We disagree with *Marks* to the extent it holds that merely completing a preprinted will form is the practice of law." *Estate of Knowles*, 135 Wn.App. at 365.

In the present case no individual employee did anything more than insert the Palmers' wishes into a three and one-half page pre-prepared trust form. CP 54. A review of the trust agreement shows how very basic and general the trust form is. CP 131-135. Don Fivecoat merely gathered information from the Palmers. He did not give any legal advice to the Palmers. He then passed that information on to a paralegal, Cathy Hunnicutt, who filled in the blanks on the trust. Under the circumstances there is no evidence of undue influence or "overwhelming control" that

was evident in the *Marks* case. Clearly the Palmers were not vulnerable trustors, having demonstrated strong opinions as to their wishes, and changing the provisions in their trust prior to executing it. Also, as in *Knowles*, the gifts in the Palmer trust are consistent with the Palmers' wishes and their history of participation in charitable causes.

As in our case, the family member contesting the will in *Marks* was obviously left less of the estate than if the contest was successful. There was evidence in *Marks* that the testator felt her son had received a fair share of her estate during his lifetime. It was her intent to make sure her money went to, "the Lord's work." *Estate of Marks*, 91 Wn.App. at 331. In the present case the Palmers felt their children were "well set." It was clear that the Palmers were "missionary minded" and wished to leave a large share of their estate to charity.

Given the limited involvement of World Gospel Mission employees in the preparation of the Palmer trust, this court should affirm the trial court's determination that there is insufficient evidence to find that its employees' actions amounted to the practice of law.

3. The gift to World Gospel Mission in the Palmer trust was not a personal gift to anyone involved in filling in the Palmer trust, or their family, and the individuals who did so were not owners, directors, or officers of this charitable organization.

The gift to World Gospel Mission that Ms. Golden is asking this court to set aside was not a personal gift to any of the individual employees involved or their family members, nor was it a gift to their personal organization. World Gospel Mission is a large charitable organization that has been in existence since the early 1900's. CP 53. It has hundreds of employees throughout the world. CP 54. None of the employees involved in the preparation of the Palmer trust, including Don Fivecoat, Cathy Hunnicutt, or Peter Rhetts, had any personal interest in the Palmers' trust. CP 39, 54-55. None of those individuals received any personal gift from the Palmers for assisting with the document preparation. *Id.* And World Gospel Mission is not the "personal organization" of any of those individuals. *Id.* In fact, none of those individuals were owners, directors, or officers of World Gospel Mission. CP 55.

The status of these individuals as employees of World Gospel Mission does not void the designation of World Gospel Mission as a beneficiary under the Palmer trust. RPC 1.8(c) bars attorneys from drafting instruments giving a substantial gift to him or her self, or his or her family, unless the instrument is prepared on behalf of a family member. RPC 1.8(c). The rule does not bar attorneys from drafting

instruments giving a substantial gift to an employer of the attorney. RPC 1.8(c). In order for Ms. Golden's petition to prevail, the court would have to find that employees of an organization are the alter ego of their employer for purposes of undue influence analysis in these types of cases. *Marks*, 91 Wn. App. 325 (1998). To hold otherwise would be contrary to decisions in this and other jurisdictions, especially when the employer/beneficiary is a charitable organization.

In the context of wills, as a general rule, "membership in a charitable corporation or association does not disqualify a person to attest as a witness to a will in which the church, corporation, or other body is named beneficiary." 79 Am. Jur. 2d Wills § 283. Further, "...witnesses to a will naming a charitable corporation beneficiary are not rendered incompetent by the fact they are trustees of the corporation, where they receive no compensation for their services as such..." *Id.* A Kansas court has held that a gift to charities did not fail even though the lawyer who drafted the will and served as one of its witnesses was also a trustee and fund raiser for those charities. *In re the Estate of Giacomini*, 603 P.2d 218 (Kan. Ct. App. 1979).

Like other states, Washington has adopted the same approach. *In re the Estate of Riley*, 78 Wn.2d 623, 479 P.2d 1, 48 A.L.R.3d 902 (1970);

WASHINGTON LAW OF WILLS AND INTESTATE SUCCESSION

(Wash. State Bar Assoc. 2d ed. 2006), page 38. While the *Riley* opinion is lengthy and involved several issues, many of the issues are remarkably similar to the ones presented in the present case. In *Riley*, Mrs. Reilly (the lawyer who prepared her will misspelled her name) died with a last will and testament leaving all of her estate to charity. The will was prepared and witnessed by an attorney who was on retainer to the charity to which she left her entire estate. The other witness to the will was another employee of the charity. The court in *Riley* (and the cases cited above from other jurisdictions) observed that the witnesses/employees in those situations did not stand to gain personally under the will, and therefore the charities/employers should not be disqualified as beneficiaries under the will. In *Riley*, the fact the church's attorney drafted the will did not disqualify the church as a beneficiary of the will.

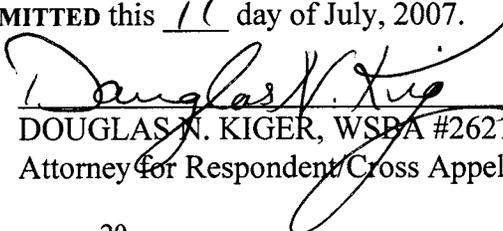
In the present case there is primarily one individual alleged to be interested in the Palmer trust. That is Mr. Fivecoat. However, the declarations of Mr. Fivecoat and Mr. Moore show that Mr. Fivecoat had nothing to gain personally by his actions relating to the preparation of the Palmer trust. He did not get any additional compensation, commission, gift, or other funds as a result of the Palmers having their trust prepared.

Neither did any other employee of World Gospel Mission. Mr. Fivecoat and the other World Gospel Mission employees were not owners, officers, or trustees of World Gospel Mission. They were merely employees. Because these individuals were only employees of World Gospel Mission, and not directly interested in the estate of the Palmers, this does not disqualify World Gospel Mission as a beneficiary under Washington law. Therefore the trial court's decision should be affirmed.

IV. CONCLUSION

Ms. Golden's appeal should be dismissed for being untimely. However, if her appeal is not dismissed on the basis of timeliness, the trial court decision should be affirmed given the equities in this case, including Ms. Golden's repeated attempts to acquire a large share of her parents' estate through improper means, and the clear lack of undue influence on the part of World Gospel Mission. Finally, the trial court should be affirmed because the actions of the World Gospel Mission employees did not constitute the practice of law; and did not result in a gift to the employees, their family, or their personal organization.

RESPECTFULLY SUBMITTED this 11 day of July, 2007.


DOUGLAS N. KIGER, WSPA #26211
Attorney for Respondent/Cross Appellant

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 21st day of July, 2007, she placed with ABC Legal Messengers, Inc. an original Brief of Respondent/Cross Appellant and Certificate of Service for filing with the Court of Appeals, Division II, and true and correct copies of the same for delivery to each of the following parties and their counsel of record:

Attorney for Appellant/Cross-Respondent, Dawn Golden:

JOHN A. ROREM
3022 Harborview Dr.
Gig Harbor, WA 98335

and to Attorney for Respondent, Donald A. Palmer:

JAMES V. HANDMACHER
Morton McGoldrick, P.S.
820 "A" Street, Suite 600
Tacoma, WA 98401

DATED this 21st day of July, 2007, at Tacoma, Washington.

BLADO KIGER, P.S.



Lisa Carr
Paralegal


STATE OF WASHINGTON
BY _____
07 JUL 12 PM 2:11
COURT OF APPEALS
DIVISION II

APPENDIX "A"

79 Am. Jur. 2d Wills § 283

Westlaw

AMJUR WILLS § 283

Page 1

79 Am. Jur. 2d Wills § 283

American Jurisprudence, Second Edition
Database updated May 2006

Wills

Laura Hunter Dietz, J.D., Rosemary Gregor, J.D., Alan Jacobs, J.D., Theresa Lemming, J.D., Bill Lindsley, J.D., Lucas Martin, J.D., Jeffrey J. Shampo, J.D., Eric Surette, J.D., and the National Legal Research Group, Inc.

- VI. Formal Requisites: Preparation, Execution, Publication, and Attestation
D. Publication and Attestation
5. Competency and Qualifications of Witnesses; Interest of Witness
b. Interest of Witness; Persons in Particular Relationship with Testator or Beneficiary

Topic Summary Correlation Table References

§ 283. Membership in or other connection with religious or charitable body named beneficiary

Membership in a charitable corporation or association[FN1] does not disqualify a person to attest as a witness a will in which the church, corporation, or other body is named a beneficiary. The witnesses to a will naming a charitable corporation beneficiary are not rendered incompetent by the fact that they are trustees of the corporation, where they receive no compensation for their services as such, since they will not profit or lose financially through the admission of the will to probate or the refusal of probate.[FN2] However, under a peculiar form of statute containing special limitations upon bequests for religious or charitable uses and prohibiting such bequests except under a will attested by credible and disinterested witnesses, [FN3] it has been held that a person is not qualified to attest a will if he is interested, at the time of attestation, in a religious or charitable institution to be benefited thereby, [FN4] at least not as to the parts favoring the institution. [FN5]

[FN1] Matter of Giacomini's Estate, 4 Kan. App. 2d 126, 603 P.2d 218 (1979).

[FN2] Boyd v. McConnell, 209 Ill. 396, 70 N.E. 649 (1904).

[FN3] In re Stinson's Estate, 232 Pa. 218, 81 A. 207 (1911).

[FN4] In re Stinson's Estate, 232 Pa. 218, 81 A. 207 (1911).

© 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.

AMJUR WILLS § 283

Page 2

79 Am. Jur. 2d Wills § 283

A reverend, who was an officer, treasurer and member of the executive committee of a church, which committee acted as the legal trustee of the church's property, and who was a subscribing witness to a will containing a bequest of property to the church, was not a "disinterested witness." Estate of Tkachuk, 73 Cal. App. 3d 14, 139 Cal. Rptr. 55 (2d Dist. 1977).

[FN5] In re Palethorp's Estate, 249 Pa. 389, 94 A. 1060 (1915).

© 2006 Thomson/West

AMJUR WILLS § 283

END OF DOCUMENT

© 2006 Thomson/West. No Claim to Orig. U.S. Govt. Works.

APPENDIX "B"

603 P.2d 218; Matter of Giacomini's Estate; 4 Kan. App.2d 126

Page 218

In the Matter of the ESTATE OF Italo GIACOMINI, Deceased.

No. 50350.

Court of Appeals of Kansas

November 30, 1979

Syllabus by the Court

1. One is not a beneficiary under a will unless he has a pecuniary interest in the distribution of the estate of the deceased.

2. A lawyer who draws a will for a client in which the lawyer is named as executor and which leaves a substantial portion of the estate to charities in which the lawyer is interested as trustee or fund raiser is not "the sole or principal beneficiary" of the will so as to invalidate it under K.S.A. 59-605, and is not disqualified to serve as a subscribing witness.

John E. Ivan, Shawnee Mission, for appellant Josephine Hauber.

Page 219

Robert D. Beall, Leavenworth, for appellee estate.

Before FOTH, C. J., and ABBOTT and REES, JJ.

REES, Judge:

The will of Italo Giacomini, deceased, dated June 14, 1976, was admitted to probate by order entered in the Leavenworth County district court on June 28, 1978. This appeal is brought by Josephine Hauber from that order as demonstrated by the certified copy of the order filed in this court with her notice of appeal pursuant to Rule 2.04, 224 Kan. xxxiv.

Although her written objections to admission of the will to probate set forth multiple assertions including, among others, denial of testamentary capacity, the sole contentions relied upon on appeal are three in number, each of which challenges the status of Robert E. Davis as a witness to the will.

Decedent left two sisters and a brother who would take by intestate succession: Julia Strout, Josephine Hauber and Hugo Giacomini. The will includes five specific monetary bequests in the amount of \$1.00 each; one of these is to Julia and one is to Hugo. In addition there are specific bequests of \$2,000 to Josephine and \$5,000 to the Immaculata High School of Leavenworth. The will quarters the residue of decedent's estate and leaves it as follows: one-fourth to St. John Hospital, Tulsa, Oklahoma; one-fourth to St. John Hospital, Leavenworth; one-fourth to Immaculate Conception Church and St. Joseph of the Valley Church, both of Leavenworth, in equal shares; and one-fourth to Leavenworth County Handicapped Association and St. Mary's College, Xavier, in equal shares.

[4 Kan. App.2d 127] The nature and extent of decedent's estate is not disclosed by the record before us; it appears its approximate value may be in excess of \$100,000. Although depositions were taken, the parties have included none in the record on appeal for our review.

Robert E. Davis, a Leavenworth attorney, was the legal adviser of the decedent and the scrivener of the will. He is named in the will to serve as executor without bond, and within his specifically enumerated powers is the power to employ his own law firm to whom compensation may be paid without court approval. He is one of the two subscribing witnesses to the will. Although not shown by the record, counsel for the estate does not dispute appellant's factual assertion that Davis was a member of the board of trustees of St. John Hospital, Leavenworth, and served on the fund-raising advisory council of St. Mary's College, both testamentary beneficiaries. It is not disputed that the decedent had no "independent advice" with reference to the will (see K.S.A. 59-605).

Appellant bottoms her argument before us on three specific statutes, K.S.A. 59-604, 59-605 and 59-606. The relevant language of these statutes is as follows:

"A beneficial devise or bequest made in a will to a subscribing witness thereto shall be void, unless there are two other competent subscribing witnesses who are not beneficiaries thereunder. But if such witness would have been entitled to any share of the testator's estate in the absence of a will, then so much of such share as will not exceed the value of the devise or bequest shall pass to the witness from the part of the estate included in the void devise or bequest." K.S.A. 59-604.

"If it shall appear that any will was written or prepared by the sole or principal beneficiary in such will, who, at the time of writing or preparing the same, was the confidential agent or legal adviser of the testator, or who occupied at the time any other position of confidence or trust to such testator, such will shall not be held to be valid unless it shall affirmatively appear that the testator had read or knew the contents of such will, and had independent advice with reference thereto." K.S.A. 59-605.

"Every will . . . shall be in writing, and signed at the end thereof by the party making the same, or by some other person in the presence and by express direction of the testator and shall be attested

Page 220

and subscribed in the presence of such party by two or more competent witnesses, who saw the testator subscribe or heard the testator acknowledge the same." K.S.A. 59-606.

To ascertain whether the will in this case is invalid by reason of K.S.A. 59-605, the question is whether Davis is the principal beneficiary in the will. This question is readily answered. Davis is not a beneficiary in the will. This being so, there is no need to concern ourselves with arguments concerning whether he is the [4 Kan. App.2d 128] principal beneficiary. See *In re Estate of Barclay*, 215 Kan. 129, 134-135, 523 P.2d 376 (1974); *Stunkel v. Stahlhut*, 128 Kan. 383, 389, 277 P. 1023 (1929); *Kelty v. Burgess*, 84 Kan. 678, 681-682, 115 P. 583 (1911).

Why is Davis not a testamentary beneficiary? He has no pecuniary interest in the distribution of the estate unlike an heir, devisee, legatee, or creditor. The fact Davis was nominated as executor and had the right and duty to petition for probate of the will, and would be compensated when appointed, gave him no such pecuniary interest; his interest in the estate after appointment as executor, aside from his duty to faithfully serve as such fiduciary, was for reasonable compensation only in return for services rendered. *In re Estate of Harper*, 202 Kan. 150, 160-161, 446 P.2d 738 (1968). Cf. *In re Estate of Porter*, 164 Kan. 92, 95-96, 187 P.2d 520 (1947) (G.S.1945 Supp. 59-605 not applicable to trustee); *Gilpin v. Burch*, 145

Kan. 224, 232-233, 65 P.2d 308 (1937) (trustee not ordinarily considered beneficiary under G.S.1935, 22-214). That Davis was empowered to employ his law firm to represent him in his capacity as executor and compensate his firm without court approval gives rise to no pecuniary interest in the estate distribution. In the exercise of his fiduciary duty as executor, it would be incumbent upon him to compensate his firm only in reasonable amount for services rendered. We are satisfied his faithful exercise of his fiduciary duty is subject to judicial review and approval in the event of challenge regardless of the will language. See K.S.A. 59-1104; K.S.A. 59-1502.

To say that because Davis was a member of the board of trustees of St. John Hospital and served on the fund-raising advisory council of St. Mary's College (we are shown nothing more) requires the conclusion that Davis has a pecuniary interest in the estate distribution, is an argument necessitating speculation of the most extreme order. The truth of the matter is that appellant makes no suggestion of pecuniary interest; she suggests only that the benefit to Davis is the intangible benefit of good repute. See *In re Estate of Williams*, 158 Kan. 734, 737-741, 150 P.2d 336 (1944) (husband of testamentary beneficiary not disqualified as attesting witness to will); *Kennett v. Kidd*, 87 Kan. 652, 656, 125 P. 36 (1912), *Aff'd on rehearing* 89 Kan. 4, 130 P. 691 (1913) (membership in lodge does not render witness incompetent where lodge is testamentary beneficiary); 53 A.L.R. 211; 79 Am.Jur.2d, Wills, § 297, n. 7.

[4 Kan. App.2d 129] The reasoning for our determination of appellant's contention that the will is rendered invalid upon application of K.S.A. 59-605 also disposes of the contention that K.S.A. 59-604 is a meritorious basis for appellant's challenge of the admission of the will to probate. Aside from other good and sufficient reasons negating application of K.S.A. 59-604 to render the will ineligible for probate, the bottom line is that since Davis is not a beneficiary in or under the will, K.S.A. 59-604 simply does not come into play.

The third and last argument made by Hauber is that the will was not attested and subscribed by at least two competent witnesses and it therefore does not comply with K.S.A. 59-606. Appellant's argument continues as before, that is, Davis was rendered incompetent by reason of his status as a testamentary beneficiary. We say again Davis is not a beneficiary in or under the will. It is not necessary that we undertake a dissertation on the meaning of "competent witnesses" as that term is used in the cited statute.

Affirmed.

Lawriter Corporation. All rights reserved.

The Casemaker Online database is a compilation exclusively owned by Lawriter Corporation. The database is provided for use under the terms, notices and conditions as expressly stated under the online end user license agreement to which all users assent in order to access the database.

APPENDIX “C”

The presumption of fraud or other unlawful conduct should be fairly easy to rebut in those cases, often decried by commentators, in which a person clearly in no position (or clearly with no inclination) to overreach the testator has inadvertently acted as a witness.⁶⁴

It should be emphasized that the presumption of fraud, undue influence, etc., created by the statute is merely a fictional device created for the purpose of avoiding unfairness under this statute. It cannot be used to prejudice the interested witness in any other respect (as in a lawsuit for tortious interference with a testamentary gift).⁶⁵

RCW 11.12.160(1) defines an interested witness as "one who would receive a gift under the will." Unfortunately, the statute does not define what is considered a "gift." This has thus been left for the courts to interpret.⁶⁶

It has been held that not only are both an attorney on retainer to, and an employee of, the sole legatee competent witnesses,⁶⁷ but the attestation by these "indirectly interested" witnesses does not prejudice the gift to the employer-client legatee.⁶⁸ Presumably the same would apply to other witnesses whose benefit ("gift") was similarly indirect.

⁶⁴ See, e.g., *Estate of Parsons v. Winelander*, 103 Cal. App. 3d 384, 392, 163 Cal. Rptr. 70 (1980). Interestingly, the particular dilemma posed in *Parsons*, that two of the three witnesses were interested although the gift to one, Nielson, was merely a token, might not have been fully resolved by the current Washington statute even if Nielson had rebutted the statutory presumption. Unless witness Gower could have rebutted the presumption of her own misbehavior, the fact that Nielson apparently could easily have done so for herself would not have rendered Nielson disinterested (thereby leaving two disinterested witnesses), but only innocent of wrongdoing and eligible to take her own small legacy.

⁶⁵ RCW 11.12.160(4).

⁶⁶ The former statute used the more elaborate phrase, "all beneficial devises, legacies, and gifts whatever, made or given in any will" Although one could argue that this is a broader category than just "gifts," it would seem to be merely an example of the modern use of the term "gift" to include all types of benefits under a will, whether involving real or personal property. The former statute did, however, explicitly exempt creditors from its effects, while the current statute does not address the issue. In any event, it seems likely that decisions defining who is an interested witness under the former statute will continue to apply to the current version.

⁶⁷ *In re Estate of Reilly*, 78 Wn.2d 623, 479 P.2d 1 (1970). However, although it is proper for an attorney to witness the will he drew, it would not be proper for him to act as counsel for the proponent in a subsequent will contest, in which he would be a principal witness. *In re Torstensen's Estate*, 28 Wn.2d 837, 863-67, 184 P.2d 255 (1947).

⁶⁸ *Estate of Reilly*, 78 Wn.2d 623. The court emphasized that the employee/witness was no longer an employee at the time of trial, but of course this could affect only the witness's testimony at trial, and not his competency or interest at the time of execution, when any undue influence or other misconduct would have occurred. Cf. *Estate of Parsons*, 103 Cal. App. 3d 384.

Beyond this t
there is consic

Note that th
ested witness
but rather th
"that would b
lished." That
of the deceder
would validat
have received
determining t
will. It is als
that under th
beneficial inte
from its displ

Finally, the
legacy to an i
or legatees n
devised and t
abatement ar
interested witr

⁶⁹ See, e.g., *Tl*
1953); 2 William

⁷⁰ The former
wording of both
receives (at mos
have received if
terms "descend"
at least one cour
133-34 (Fla. App
clause, to the ex
overturned. *In*
u. Tomasian, 237
the Washington
clearly nonintes

The statute's
the will is bette
witness's intere
his share under
the will witness
witness would tr
under the will h
later will, becau
ington statute t
will and therefo

⁷¹ See, e.g., *In*