

original

No. 36238-4-II

**COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON**

In Re the Estate of James A. Black

DAVID BLACK,

Appellant

v.

JOAN STONE, Personal Representative of
Estate of James Andrew Black,

Respondent.

APPELLANT'S BRIEF

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I. Assignments of Error

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G. When the meaning and intent of a probated Will is not clear from the face of the document because of alleged drafting errors in the document, does the Court have to make specific findings and rulings as to the decedent’s testamentary intent when rejecting a Will contest?

II. STATEMENT OF THE CASE

James Andrew Black, father to the Contestant/Appellant David Black, died on December 10, 1998. He had previously signed at least two documents titled “Last Will and Testament of James Andrew Black.” The most recent of these documents was filed by James Black’s Personal Representative under that document, Joan E. Stone. CP 30-31.

Despite filing the Will in 1999, a formal probate was not begun until April 21, 2005, when Joan Stone filed a Verified Petition for Probate of Will. Notice of the probate was sent to interested parties, including David Black. David Black contested the Will filed by Joan E Stone, contending that the Will was improper because: (1) James Black lacked capacity; (2) the Will does not reflect James Black’s testamentary intent; and (3) the Will was not properly executed. CP 32.

The Will is universally acknowledged to be a strange document, but the Personal Representative (and Trial Court) dismiss the obvious errors in the document as “typos.” (RP 2/21/07: p 75, l. 11 to p. 76, l. 5.; CP 1-4; CP 30-32; CP 156-57). In fact, these errors are substantial and result in the Will making strange and unusual bequests, result in an unnatural favoring of step-children over children, and result in repeated references to James Black’s “husband.” This Will looks more like the Last Will and Testament of James Black’s wife than of James Black, and Mr. Black may have so taken it.

The Trial Court heard David Black's Will contest and ruled that the document in probate was James Black's Last Will and Testament, denying the contest. In making these rulings, the Court specifically ruled that James Black was not incompetent (CP 150, l. 21; CP 152, l. 16; CP 155-157) and that the fact that James Black did not verbally ask the witnesses to attest to the Will does not invalidate the Will. (CP 147, l. 6; CP 150, l. 3; CP 155-157).

These findings and rulings are incomplete in key respects. First, there was no finding or ruling on James Black's testamentary intent (or alleged lack of testamentary intent). Second, while addressing the challenge to the witnesses insofar as that challenge involved the physical presence of the witnesses when James Black signed the document, the Trial Court failed to address the deeper, and more important, challenge that the witnesses lacked the personal knowledge of the elements of their attestation, thus invalidating the testimonial effect of their signatures and, in turn, invalidating the Will. Finally, the Trial Court's ready and quick dismissal of the obvious strangeness and erroneousness of the probated Will was both too ready and too quick. CP 155-157. All these are reversible errors, and this Court should reverse and remand this case for further probate proceedings.

III. BACKGROUND

A. The Will Document

The probated Will is a three page document that, if taken as the Will of James Black rather than that of his wife, contains significant errors, shocking in a document of this size and simplicity.

For instance, the Will unnaturally favors James Black's wife's five adult children by an earlier marriage over his own two adult sons, giving the wife's children full shares in his distributed estate, while giving his own children half shares. There is no explanation for this disparate and unnatural treatment. Further, each time this occurs, the document refers to Mr. Black's stepchildren as "our children" and to his own children as "my husband's children." CP 2-3; CP 21.

B. The Execution of the Will

It is clear from the testimony of the counsel who prepared the probated Will (Mr. Francis Cushman) and from one of the witnesses (Ms. Sylvia Lang) that there were serious irregularities in the execution of this Will. The most serious of these is that the witnesses to the Will appear to have acted as signatories only – failing to know or to learn the critical facts they were witnessing (that James Black intended the document to be his last Will; that James Black was competent and acting free from unlawful constraint; etc.).

It is the purpose of the statute that the witnesses do more than merely sign a paper.

'The word 'attested' is broader in meaning than the word 'subscribed,' and it was the purpose of the statute in requiring two witnesses to attest the will to have more than the mere signatures of two persons to the will. It was the duty of the attesting witnesses, under the statute, to observe and see that the will was executed by the testator, and that he had capacity to execute the will.'

In re Estate of Chafey, 167 Wash. 185, 189, 8 P.2d 959 (1932)

However, in this case, the witnesses failed to do more than sign the Will. The witnesses failed to know or learn the facts about the document or about James Black that would ensure that James Black was freely making a Will, had capacity to make a Will, and intended to make a Will. CP 39, l. 24; CP 41, l. 23; CP 42, l. 21; CP 43; l. 15; CP 45, l. 17; CP 47, l. 13; CP 53, l. 16; CP 54, l. 6; CP 63, l. 14; CP 64, l. 18; CP 65, ll. 10-20; CP 66, ll. 2-11. (Especially key passages emphasized.)

IV. ARGUMENT

A. Suspect Language of Will Raises a Presumption of Invalidity.

While the burden of proof in a probate case is generally clear, cogent and convincing, and is generally borne by the person contesting the Will (RCW 11.24.030), Washington law provides for a shifting of the burden of proof when the equities so favor. In re Jaaska's Estate (1947) 27

Wn.2d 433, 178 P.2d 321 (burden shifted when evidence raised issues of fraud and undue influence); In re Tresidder's Estate (1912) 70 Wash.15, 125 P. 1034 (burden of proof shifted when a natural son was disinherited in favor of the Will's executor when the executor took steps that appear calculated to insulate the new will from a Will challenge).

In this case, like Tresidder, natural children were disinherited in favor of step-children, with no explanation. Further, unlike the Will in Tresidder, this Will, on its face, is an ambiguous document which is not obviously the Will of the testator. There was evidence here: that the testator was sick and under unusual strains (although the Trial Court ruled that these pressures did not rise to the level of a lack of capacity); that the Will was a rush-job that was not fully examined or executed, by the testator, his attorney, or the witnesses to the Will; that the document reads like the Will of a person other than the testator (the testator's wife) and could easily have been intended as such by the testator.

On these equities, like those in Tresidder and Jaaska, the usual statutory burden of proof should shift from the challenger to the Executor, Joan Stone, who was the principal beneficiary of the new "Will" and whose children were the principal beneficiaries of the testator's unnatural apparent preference for his stepchildren, who the Will calls "our children", over his own sons, who the Will calls "my husband's children."

B. Even if not Presumed Invalid, the Will Was Not Properly Executed.

(1) Every will shall be in writing signed by the testator or by some other person under the testator's direction in the testator's presence, and *shall be attested by two or more competent witnesses, by subscribing their names to the will, or by signing an affidavit that complies with RCW 11.20.020(2), while in the presence of the testator and at the testator's direction or request*: PROVIDED, That a last will and testament, executed in the mode prescribed by the law of the place where executed or of the testator's domicile, either at the time of the will's execution or at the time of the testator's death, shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state.

(2) This section shall be applied to all wills, whenever executed, including those subject to pending probate proceedings.

RCW 11.12.020 (emphasis added).

While formal words of attestation are not required, the attesting witnesses must swear to the essential components of a valid Will and must witness the Will at the request of the testator. Matter of Estate of Lindsay, 91 Wn.App. 944 at 948, 957 P.2d 818 (1998), *citing* In Re Estate of Price, 73 Wn.App. 745 at 751, 871 P.2d 1079 (1994). Although no prescribed formal words of attestation are required, some formality is required. Wills are extremely important documents, and great care must be given to their

creation, execution and administration. The document disposes of the accumulations and desires of an entire human life.

Any person of sound mind age 18 or older may execute a will. Each will must be in writing, signed by the testator or some other person under the testator's direction in the testator's presence, and must be attested to by two or more competent witnesses. The witnesses' signatures must be made in the presence of the testator by the testator's direction or request....

During the signing, the testator should be asked to state to the witnesses that the instrument he or she is signing is his or her last will and testament and that he or she desires them to act as witnesses to the will.

1 WAPRAC § 28.16 “Will execution formalities.” (Emphasis added.)

The witnessing of a Will is the centerpiece of the formalities required in Will execution. The required testimony, setting forth the elements of the witnesses’ proof, is included in the text for the “affidavit of attesting witnesses.” (Something like this affidavit, although in incomplete form, was used here.)

The undersigned, each being of lawful age and competent to testify, and each for himself or herself being first duly sworn upon oath, deposes and states:

1. 1. This Affidavit is made pursuant to RCW 11.20.020 and at the request of *[name of [Testator][Testatrix]]*, the *[Testator][Testatrix]* named in the foregoing Will.

2. The foregoing instrument, entitled “Last Will and Testament of *[name of [Testator][Testatrix]]*” consisting of *[specify number] ([specify number in words])* pages, numbered one through *[specify ending page number in words]* was signed and executed by said *[Testator][Testatrix]* at *[specify city]*, Washington, on the day of , , the date it bears, in the presence of myself and the other witness.

3. At the request of and in the presence of the *[Testator][Testatrix]* and in the presence of each other, the other witness and I subscribed our names as witnesses thereto.

4. At the time of executing said instrument, said *[Testator][Testatrix]* and the witnesses were of the age of majority and said *[Testator][Testatrix]* appeared to be of sound and disposing mind, and not acting under duress, menace, fraud, undue influence or misrepresentation.

5. I reside in *[specify]* County, State of Washington.

26 WAPRAC § 2.14 Affidavit of attesting witnesses—Form (italics in original)

The *purposes* of the statutory requirements regulating the execution of wills are *to ensure that the testator has a definite and complete intention to dispose of his or her property and to prevent, as far as possible, fraud, perjury, mistake and the chance of one instrument being substituted for another.*

Matter of Estate of Malloy, 134 Wash.2d 316 at 322-323, 949 P.2d 804 (1998), *citing to Page on Wills* § 19.4, at 66 (emphasis added).

Thus, the witnesses do not merely swear that the testator signed the document, but also make sworn assertions about the nature of both the document and the testator. That is, the witnesses must be asked, in some manner, to witness the Will, and, by witnessing the Will, must swear that: 1) the testator is of age and competent; 2) the testator appeared to be executing the document of his own free will; and 3) the testator intended the document to be his Last Will and Testament. These requirements of the attestation, in turn, require that the witnesses be in a position to know the things which they swear they are witnessing.

It is well established that a Will is invalid, even if it bears the attesting signatures of witnesses, if those witnesses lacked personal knowledge of the facts which they were attesting. A Will is invalid if the attesting witnesses lack the information needed to attest to validity.

It is the purpose of the statute that the witnesses do more than merely sign a paper.

‘The word ‘attested’ is broader in meaning than the word ‘subscribed,’ and it was the purpose of the statute in requiring two witnesses to attest the will to have more than the mere signatures of two persons to the will. It was the duty of the attesting witnesses, under the statute, to observe and see that the will was executed by the testator, and that he had capacity to execute the will.’

‘Attestation is not a mere form. It has a vital object. That object is to certify that the will was acknowledged in the presence of the witness and that the signature was genuine.’

In re Estate of Chafey, 167 Wash. 185 at 188, 8 P.2d 959 (1932) (citations omitted).

On this standard, James Black’s Will was not properly executed or attested. The witnesses to this Will, on their own testimony, merely acted as signatories to the document, but did not know, and failed to ascertain, the information necessary to verify that the Will was right, proper and lawful.

The current case is substantively identical to In re Estate of Cronquist, 45 Wn.2d 344, 345, 274 P.2d 585 (1954).

The statute governing the execution of wills, RCW 11.12.020, Rem.Rev.Stat. § 1395, reads as follows:

‘Every will shall be in writing signed by the testator or testatrix, or by some other person under his or her direction in his or her presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator or testatrix by his or her direction or request’.

Under the above statute, a will can be attested only by two or more competent ‘witnesses.’ A witness, in the sense there used, is one who has personal knowledge of some fact or transaction. The fact or transaction concerning which a witness to a will must have personal knowledge is that

the will was signed by the testator or testatrix, or by some other person under his or her direction in his or her presence. Attestation by such persons constitutes a certification that the signature was genuine.

The persons who signed as 'witnesses' to this will witnessed nothing, in so far as the acts of the testator are concerned. They did not see him sign the will. They did not see any one sign for him. We need not decide whether it would have been sufficient for them to have heard the testator acknowledge that he had signed the will, since there was no such acknowledgment here. These 'witnesses' do not know, of their own personal knowledge, whether the signature of the testator on the will is genuine. It follows that this will was not attested, as that term is used in the statute and defined in the above-cited decisions.

Cronquist at 345 (case citations omitted).

Therefore, on the facts of this case, the probated Will of James Black is invalid because it was not properly executed. It was not properly executed for several reasons, with each error compounding the other. First, the Will itself is so inartfully drafted as to raised a question as to whether James Black intended that it be his (rather than his wife's) Will. Second, the witnesses to the Will, despite these warning signs, failed to inquire into or otherwise verify James Black's intent (or his capacity, or his freedom, or even his signature). The witness acted (improperly) as

mere signatories to the Will – lacking the personal knowledge needed to attest that the will is right, proper and lawful.

Nothing in the execution of this Will resolved these problems.

James Black was never asked to confirm that the Will and signature was his. James Black never stated, unasked, that the Will and signature was his. James Black did not say or do anything in the presence of the witnesses which would give the witnesses a good basis on which to believe that the Will and signature was his. The witnesses rely on Mr. Black's silence – his failure to object to the proceeding – as a sufficient basis on which to sign the Will as attesting witnesses. The Trial Court ruled that this silence was a sufficient foundation on which to sustain this Will. The law of Washington requires otherwise. This matter should be reversed and remanded to the Trial Court to probate James Black's earlier and (given the invalidity of the probated Will) unrevoked Will.

C. Unresolved Questions Exist as to Intent of Testator.

In Washington, “All courts and others concerned in the execution of last Wills shall have due regard to the direction of the Will, and the true intent and meaning of the testator, in all matters brought before them.” RCW 11.12.230. “When called upon to construe a Will, the paramount duty of the court is to give effect to the testator's intent.” Matter of Estate of Bergau, 103 Wn.2d 431 at 435, 693 P.2d 703 (1985), citing to In re Estate of Riemcke, 80 Wn.2d 722, 728, 497 P.2d 1319 (1972).

Obviously, the first, and most important, intent of the testator is to make a Will (to intend that the document he is signing become his Will). To have this intent, the testator must believe that the document he is signing is his Will, and not that of another person (here, his wife).

This fundamental issue is not usually in question. Fortunately, Wills in Washington State are usually more carefully drafted than this Will was. However, this Will, on its face, appears more likely that of the testator's wife than that of the testator.

The Court had an obligation to resolve this issue. However, the Court made no finding or conclusion that James Black intended the document he signed to be his Will. Findings and Conclusions were limited to the arguable adequacy of the request by James Black that the "witnesses" acknowledge his signature. There was no showing that James Black understood that he was signing his Will, or intended that the document he signed would be his Will. Without these findings and conclusions, James Black's intent is still an open question.

Further, unlike the ordinary case, this open question is not a stupid question. An ordinary person reading this document would not automatically conclude that the document was intended by James Black to be his Last Will and Testament. On the contrary, the document appears more like the Will of James Black's wife than the Will of James Black.

Therefore, even if the Will is not presumptively invalid for its facial irregularity, or legally invalid as a result of the defects in its execution, it may be invalid as not being in accord with James Black's testamentary intent (or lack of testamentary intent). The findings and rulings of the Trial Court did not resolve the questions of James Black's intent. The findings and rulings of the Court are largely silent in this regard. Therefore, even if this Court does not invalidate this "Will" for the reasons stated in this brief, this matter should be remanded to the Trial Court for further argument, fact finding, and legal ruling on the issue of James Black's intent in signing the document at issue in this case.

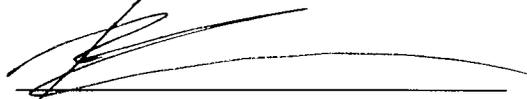
V. CONCLUSION

The Will at issue in this case is acknowledged by all parties to be rife with errors, characterized as innocent typographical errors, but having the effect to favor the decedent's wife (and Executor) and step-children over his surviving sons. Further, there was strong evidence that the attorney who prepared the Will (and his staff, who attested it) used their standard practice, but this standard practice failed to satisfy the substantive requirements of executing Wills required by the RCW 11.12.020. Finally, despite these issues, the Trial Court failed to make adequate or complete findings of fact and conclusions of law, completely neglecting to make findings or conclusions on the most fundamental question in a probate – the intent of the testator.

All these are reversible errors, and this Court should reverse and remand this case for further probate proceedings.

Respectfully Submitted this 10 day of September, 2007.

CUSHMAN LAW OFFICES, P.S.

A handwritten signature in black ink, appearing to read "Ben D. Cushman", written over a horizontal line.

Ben D. Cushman, WSBA #26358
Attorney for Appellant David Black

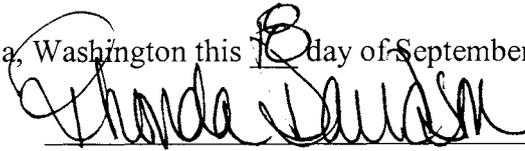
Rhonda Davidson certifies and declares as follows:

1. I am a Legal Assistant at Cushman Law Offices, P.S. I am over the age of 18, not a party to this action and competent to testify to the facts set forth herein.
2. On September 18, 2007, I placed with ABC Legal Messengers for next business day filing, an original and one copy of Appellants' Opening Brief for filing with the Court of Appeals, Division II.
3. On September 18, 2007, I caused to be mailed, first class postage prepaid, a true and correct copy of the document identified above to the Respondents' attorney at the following address:

Jack Micheau
Micheau & Associates
PO Box 2019
Cosmopolis WA 98537

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED at Olympia, Washington this 18 day of September, 2007.


Rhonda Davidson

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BY  Rhonda Davidson
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