

No. 36238-4-II

COURT OF APPEALS *Cmm*
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 REPLY BRIEF

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I. Assignments of Error

Assignments of Error

A. The Court did not apply the proper burden of proof in a Will contest when the Will was ambiguously drafted such that it did not appear necessarily to be the Will of the Testator.

B. The Court erred in ruling that the Will was properly executed under RCW 11.12.020 when the Testator did not acknowledge that he intended the document to be his Will, and when the witnesses did not have personal knowledge of the critical facts needed to validate the Will.

C. The Court committed error in failing to enter findings or make rulings on the Testator's testamentary intent.

II. HIGHLIGHT OF ESSENTIAL FACTS

Contrary to the Respondent's contention that the Will challenge was limited to a claim that James Black, the Testator, lacked capacity to make a Will, David Black contested the Will 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).

It is clear from the testimony of the counsel who prepared the probated Will and from one of the witnesses that there were serious irregularities in the execution of this Will. The witnesses to the Will appear to have acted as signatories only. They failed 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.). Rather, they relied on the report and past-practices of the attorney in this regard – treating the attorney’s request that they sign the Will as proof of the critical facts of the Will. In other words, the witnesses did not have personal knowledge of the things they purported to be witnessing (capacity and intent). 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; RP 2/21/2007, p. 59 l. 14 - p. 65 l. 2. (Especially key passages emphasized.)

III. ARGUMENT

A. **This Will Should Have Been Presumed Invalid.**

The probated Will is a three page document. However, it contains significant errors, shocking in a document of this size and simplicity. For instance, without explanation, the Will unnaturally favors James Black’s wife’s five adult children by an earlier marriage over his own two adult sons and refers to Mr. Black’s stepchildren as “our children” and to his own children as “my husband’s children.” CP 2-3; CP 21.

While a person challenging a Will must usually prove, by cogent and convincing evidence, that the Will is invalid, this burden can shift under appropriate circumstances. This is a matter of equity. In re Jaaska's Estate, 27 Wn.2d 433, 178 P.2d 321 (1947) (burden shifted when evidence raised issues of fraud and undue influence); In re Tresidder's Estate, 70 Wash.15, 125 P. 1034 (1912) (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).

This case presented the Court with a suspect document, which appears to unnaturally favor step-children over children without explanation, which further has language and characteristics that suggests it is James Black's wife's Will, rather than James Black's Will, and which was executed while Mr. James Black was dying of cancer and in a position of extreme reliance on his wife. On these facts, the Trial Court should have applied the established equitable principles of Jaaska and Tresidder and shifted the burden.

B. The Execution of the Will

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. For a Will to be valid, 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). That oath has the force of testimony, and therefore must meet the requirements of testimony under the rules of evidence. First among these, ER 602, states, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

In this case, not only was there no adequate foundation to the attesting witnesses' personal knowledge, the evidence was to the exact contrary. The attesting witnesses were asked by the attorney to witness a Will – and took that request as the basis on which they believed that the Testator was competent and intended the document to be his Will. In other words, this Will was witnessed based on hearsay (the attorney's report about the condition and intent of the Testator) rather than

knowledge (the witnesses' own observations and knowledge).

The current case is indistinguishable from In re Estate of Cronquist, 45 Wn.2d 344, 345, 274 P.2d 585 (1954). The ruling in Cronquist can be quoted verbatim, without much more elucidation, as the proper decision in the current case.

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).

C. The Findings are Incomplete 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).

To make a Will, the 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). To verify this intent, the witnesses must discover that the Testator intended to make a Will and report that discovery in an attestation. Without having a proper attestation (because the witnesses did not inquire into or learn the intent of the Testator), we cannot know the intent of the Testator. Without proof that

James Black intended this document to be his Will, the document is invalid as a Will.

In Response, the Respondent asserts that the challenge to the Testator's intent is a new issue raised for the first time on appeal. It is not. It was a specific issue in this case. CP 32. In fact, the issue of testamentary intent is the underlying issue in all arguments raised in this case. The assertion that the Testator lacked capacity is nothing more than the assertion that, due to some cognitive deficit or coercive force, the Testator lacked testamentary intent. The argument about execution is essentially the argument that there is no proof of testamentary intent because the witnesses never inquired into or discovered that intent. The argument that the Testator lacked intent (and that the Trial Court failed to make adequate findings of intent) is the opposite of an unraised argument – it is the distillation of each and every argument that was raised.

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 is invalid as being proven to reflect James Black's testamentary intent. The findings and rulings of the Trial Court did not resolve the questions of James Black's intent. Therefore, if this Court does not invalidate this "Will", this matter should be remanded to the Trial Court for further exploration of James Black's intent in signing the document at issue in this case.

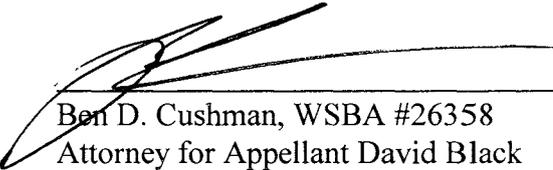
V. CONCLUSION

The Will at issue in this case is rife with errors. To diminish their import, these errors have been characterized as innocent typographical errors even though they have the significant effects of favoring the decedent's wife and step-children over his surviving sons. Further, there was strong evidence that the attorney (who prepared the Will) and the attorney's staff (who attested it) failed to satisfy the substantive requirements of executing Wills required by RCW 11.12.020. Finally, 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 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 14 day of December, 2007.

CUSHMAN LAW OFFICES, P.S.



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.

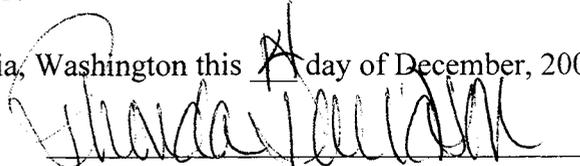
2. On December 14, 2007, I placed with ABC Legal Messengers for next business day filing, an original and one copy of Appellants' Reply Brief for filing with the Court of Appeals, Division II.

3. On December 14, 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 14 day of December, 2007.


Rhonda Davidson