

No.: 36603-7-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

DAVID FRANK,

Appellant,

v.

FRANK FAMILY FOUNDATION,

Respondent.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
07 NOV 14 PM 1:45
BY DEPUTY

Appeal from Mason County Superior Court
No.: 05-2-01057-0

APPELLANT'S BRIEF

Robert N. Windes, WSBA #18216
William A. Keller, WSBA #29361
MORAN WINDES & WONG, PLLC
5608 17th Avenue Northwest
Seattle, Washington 98107
Telephone: 206-788-3000
Facsimile: 206-788-3001
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
I. ASSIGNMENTS OF ERROR	1
A. Assignments of Error	1
B. Issues Relating to Assignments of Error	1
II. STATEMENT OF THE CASE	3
A. Procedural Status and Claims Asserted in this Action	3
B. Statement of Facts	6
1. Background	6
III. STANDARD OF REVIEW	17
IV. SUMMARY OF ARGUMENT	18
V. LEGAL ARGUMENT	21
A. The Equitable Considerations Regarding the Rescission Action	21
B. The Ademption Ruling	26
C. The Court’s Equitable Decision Ignores the Ramifications Should Rescission Occur and Unfairly Limits Appellant’s Ability to Recoup Financial Contributions to the Foundation	29
D. If the Intervivos Gift to the Foundation Was Based Upon Mistake, Misrepresentation and Undue Influence, Then the Court in Equity Would Have the Power to Reform the Foundation in a Manner Consistent with the Intent of Ken and Kitty Frank	36
VI. CONCLUSION	43
VII. CERTIFICATE OF SERVICE	45

TABLE OF AUTHORITIES

Washington Cases

<i>Ashcraft v. Wallingford</i> , 17 Wn. App. 853, 854, 565 P.2d 1224 (1977)	18
<i>Baille Communications, Ltd. v. Trend Business Systems</i> , 53 Wn. App. 77, 85 (1988)	33, 34
<i>Baker v. Leonard</i> , 120 Wn.2d 538, 548, 843 P.2d 1050 (1993).	30
<i>Bank of America v. Prestance Corporation</i> , 160 Wn.2d 560, 564, 160 P.3d 17 (2007)	18, 22
<i>Barrie v. Hosts of Am., Inc.</i> , 94 Wn.2d 640, 642, 618 P.2d 96 (1980)	18
<i>Biles-Coleman Lumber Co. v. Lesamiz</i> , 49 Wn.2d 436 (1956)	34
<i>Bill v. Gattavara</i> , 34 Wn. 2d 645, 648 (1949)	32
<i>Bryant v. Joseph Tree</i> , 57 Wn. App. 107 (1990)	32
<i>Colfax National Bank v. Jennie Corporation</i> , 49 Wn. App. 364, 368 (1987)	34
<i>Dexter Horton Bldg. Co. v. King County</i> , 10 Wn.2d 186, 191, 116 P.2d 507 (1941)	31
<i>Ellis v. Schwank</i> , 37 Wn.2d 286, 289, 223 P.2d 448 (1950)	30
<i>Estates of Doepke</i> , 182 Wash. 556, 563 (Wash. 1935)	25, 28
<i>Hesthagen v. Gunda Harby</i> , 78 Wn.2d 934, 945 (1971)	32
<i>In re Riddell</i> , 138 Wn. App. 485, 493 (2007)	39
<i>Johnson v. McClure</i> , 5 Wn.2d 123, 104 p.2d 962 (1940)	25
<i>LaPlante v. State</i> , 85 Wn.2d 154, 158, 531 P.2d 299 (1975)	17
<i>Lotzgesell v. Clydell</i> , 62 Wash. 352, 113 p. 1105 (1911)	25
<i>Niemann v. Vaughn Community Church</i> , 118 Wn. App. 824, 838 (2003)	22, 39
<i>Pitzer v. Union Bank of Cal.</i> , 141 Wn.2d 539, 547-48, 9 P.3d 805 (2000)	30
<i>Rummens v. Guaranty Trust Company</i> , 199 Wash. 337, 347 (1939)	39, 40
<i>Scymanski v. Dufault</i> , 80 Wn. 2d 77, 89 (1971).	31
<i>Seventh Elect Church v. First Seattle Dexter Horton Nat'l Bank</i> , 162 Wash. 437, 440, 299 P. 359 (1931)	30

<i>Thompson v. Peninsula Sch. Dist. No. 401</i> , 77 Wn. App. 500, 504, 892 P.2d 760 (1995)	17
<i>Viewcrest Cooperative Association, Inc. v. G.E. Deer</i> , 70 Wn.2d 290, 293 (1967)	31, 32

Other Cases

<i>Buder v. Stocke</i> , 343 Mo. 506 (Mo. 1938)	26, 27
<i>In re Estate of Hegel</i> , 76 Ohio St. 3d 476, 1996-Ohio-77, 668 N.E.2d 474 (1996)	28
<i>Kolb v. City of Storm Lake</i> , 736 N.W.2d 546, 555 (2007)	40
<i>Matter of Estate of Brown</i> , 922 S.W.2d 605 (Tex. App. Texarkana 1996)	28
<i>McGee v. McGee</i> , 122 R.I. 837, 413 A.2d 72 (1980)	28
<i>Mississippi Baptist Foundation, Inc. v. Estate of Matthews</i> , 791 So. 2d 213 (Miss. 2001)	27, 28
<i>Parker v. Bozian</i> , 859 So. 2d 427 (Ala. 2003)	27

Other Authorities

3 W. Fletcher, <i>Private Corporations</i> §§ 796, 799 (1986)	33, 34
5 A Scott, <i>The Law of Trusts</i> , §462.2 at 3414 (3d ed. 1967)	33, 34
Dennison, <i>91 Am. Jur. Proof of Facts</i> 3d 277, § 13	27
Restatement (2d) of Agency §276	33
Restatement of the Law, Restitution §160 (1937)	34, 35
Restatement of the Law, Restitution §167 (1937)	32, 33
Restatement of the Law, Restitution §201 (1937)	32
Restatement of the Law (Third) Property (Wills and Other Donative Transfers) § 12.1 (2003)	40, 41
Restatement Second of Property (Donative Transfers) §34.7 (1992)	41, 42
Restatement (Second) of Trusts §333 (1959)	42
Restatement (Second) of Trusts §381 (1959)	39

I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. Appellant David Frank Assigns Error to the Court's granting summary dismissal of all Appellant's claims against the Frank Family Foundation.

B. Issues Relating to Assignments of Error

1. Whether the Court's ruling must be overturned if Appellant is successful in Case No. 36603-6 – II and the Court rules that the will provision making the gift of the Cranberry Lake Property to the Foundation is adeemed and/or otherwise void?

2. Whether the provision in the Ken and Catherine Frank's will devising their interest in the property known as Cranberry Lake to the Frank Family Foundation adeemed such that Article VII.2 is null and void, when the Franks had divested their entire interest in Cranberry Lake to the Foundation through an inter vivos gift.

3. Whether Appellant has standing to bring claims against the Frank Family Foundation even if a will contest was not brought by Appellant?

4. Whether equity allows Appellant to proceed with the cause of action against the Foundation regardless of the will challenge.

5. Assuming that the Rescission action would be successful and therefore the Foundation held the property in constructive Trust for

Kenneth and Catherine Frank during their lifetime, whether the Foundation owed any duties to Kenneth and Catherine Frank to ensure that they were receiving the proper tax benefits for gifting property to a Foundation?

6. Whether Appellant has standing to bring a rescission action against the Foundation when the action, if successful, would require the return of several hundred thousand dollars, and allow the Estates of Kenneth and Catherine Frank to recover damages for any conscious wrongdoing of the Foundation regarding the use of the property such as removing timber?

7. Whether the Foundation which is to receive the property through the 1996 wills has been set up and established in the manner intended by Kenneth and Catherine Frank?

8. Whether Appellant has standing to bring suit against the Foundation to rescind and/or reform the Foundation's founding documents so that in equity the Court may revise the documents to meet the intentions of Ken and Kitty Frank regarding familial control of the Foundation?

II. STATEMENT OF THE CASE

A. Procedural Status And Claims Asserted In This Action

Catherine and Kenneth Frank (parents of personal representative

David Frank in this action) filed this lawsuit in November 2005 against 1) the defendant/appellee Frank Family Foundation (“Foundation”) based on rescission, breach of fiduciary duties and tort, and 2) against the professional defendants Laurie McClanahan, John Clees, and Mary Gentry (collectively the “Professional Defendants”) based on professional negligence, negligent misrepresentation and undue influence. *CP 457-467*. The essence of the claims is that the Professional Defendants negligently advised the Franks on estate planning strategies and alternatives which caused the Franks to mistakenly create the Foundation and to make certain inter vivos gifts to the Foundation consisting of their largest asset, the Cranberry Lake property, and then several thousand dollars. *Id.* Shortly after filing the lawsuit, Kenneth Frank died, and then shortly after Catherine Frank died. The complaint was amended to substitute the Estates of Catherine and Kenneth Frank through their personal representative and son David Frank. *CP 284-296*. A probate of the wills was opened in January 1996.

The Amended Complaint alleges that the Foundation would never have been created but for the negligence of the professional defendants:

21.7. If Ken and Kitty had been properly advised and informed by competent and independent professional advisors, Ken and Kitty would not have created or funded the Foundation or purportedly conveyed the Property to it.

CP 293.

In December 2006, the Foundation filed three motions, with one filed in the probate matters and the other two filed in the rescission action. *CP 436-456 and CP 310-316*. The wills which had been made in August 1996 had a provision in them which devised the Cranberry Lake property to the Foundation. The motion filed in the probate matters was a TEDRA motion which asked the trial court to declare that if the rescission action was successful such that the Franks' estates required title to the property, the property would then pass by bequest under the will. *See Court of Appeals No. 36603-6-II*. In the other motion filed in the rescission action, the Foundation asked for summary judgment deciding in equity that the Franks had no standing to bring the rescission action in so far as the Cranberry Lake property would pass by bequest under the wills in the event the rescission action was successful in bringing the property back into their estates. *CP 310-316*. At the motions hearing on February 6, 2006, the trial court decided both motions in favor of the Foundation. *See Report of Proceedings 61-74*. The ruling was entered as a final judgment after a further motion and hearing *CP 17-21*.

The ruling on the Tedra motion in the probate matters, which is now subject to appeal at Appeal No. 36603-6-II, decided that the Cranberry

Lake property would be devised to the Foundation under the 1996 wills when the inter vivos gift of that property to the Foundation was rescinded in the rescission action. *CP 310-316*. The court held as follows:

Taking all the facts and reasonable inferences in the light most favorable to the non-moving party, if the conveyance here was the result of fraud, misrepresentation, professional negligence, professional malpractice or any other basis that would result in rescission of the conveyance, then by operation of the wills the property would end up with the Frank Family Foundation in any event.

R.P. at 62.

In so ruling, the probate court rejected the Franks' arguments, including that the will provision was adeemed in so far as the property was not in the Franks' estates when they died. Following the reasoning of a 1936 Missouri case, the court's basis for rejecting the ademption argument was that for ademption to apply, the devised property had to have been in the estates at the time the wills were made.

The ruling on the summary judgment motion (herein appealed) was that equity could not provide a rescission remedy to the Franks where the property subject to rescission would be returned to the Franks and then pass by devise back to the Foundation under the wills. Therefore, the court reasoned that the Franks had no standing to bring the rescission claim. The court did not address any of the claims and issues framed by the Franks' complaint. It is significant to note, therefore, that if this Court reverses the

decision of the trial court regarding the operation of the wills on any basis, it necessarily follows that the court's ruling that the Franks did not have standing to bring the claims against the Foundation in the rescission action must be reversed and remanded as well. In other words, the Foundation argued and the Court accepted that the Franks' wills should be given operative effect to counter and undermine the lawsuit that they filed to recover the property from the Foundation which entity they claimed should never have been created in the first instance.

B. Statement of Facts

1. Background

Laurie McClanahan served as Ken and Kitty Frank's CPA, Executrix of their wills, had a power of attorney, had medical power of attorney, had physical possession of Ken and Kitty's personal checkbook, had control of the checking account for the Frank Family Ltd Partnership, was the trustee of the Frank Family Ltd. Partnership, was the trustee of the Frank Grandchildren's trust, and was the trustee of the Frank Family insurance trust. *CP 188 & 190*. Using her overwhelming power and influence over Ken and Kitty Frank, she convinced them to donate their largest asset (the Cranberry Lake property) to a Foundation she created. Later, McClanahan instigated the Franks' removal from the property,

while at the same time serving as a Foundation director and its Secretary/Treasurer. *CP 194-195.*

McClanahan encouraged the Franks to create the foundation back in 1993 ostensibly to avoid estate taxes. *Cp 188.* In furtherance of her agenda, she met with Ken and David Frank and informed them that the Cranberry Lake Property's value exceeded 12 million dollars and, therefore, Ken Frank at age 86 should shelter it from estate tax liabilities. *CP 188.* She also informed Ken and David Frank that the family would still be able to maintain control over the property and use it in the same manner they had, while still gaining tax advantages associated with placing the property into a foundation. *CP 189-191.* Neither McClanahan nor the Foundation informed Ken, Kitty or David Frank until 2004 that they would be considered "disqualified persons" pursuant to Internal Revenue Code §4946(a)(1)(A)-(B) when the Foundation was created and funded and, therefore, they and their family could not legally be allowed to continue using the property for personal use *CP 194-195; CP 115.* She and the Foundation also failed to inform Ken, Kitty or David Frank that if Frank family members used the property for personal use they could be subject to a self-dealing tax pursuant to Internal Revenue Code § 4941 (a), (b). *CP 189.*

When McClanahan began the process of preparing the Foundation documents, she retained counsel (Mary Gentry) to prepare the paperwork. McClanahan also hired another CPA, John Clees, to look at estate planning options available to the Franks and, according to Clees and McClanahan, the only viable estate planning options for the property were the Private Foundation, a Charitable Donation, a Charitable Remainder Trust and/or a Family Partnership. *CP 188.* McClanahan, Clees and Gentry failed to advise the Franks of several far superior alternatives for the property which would have ensured the tax savings they desired and also would have kept complete control of the property in the Frank Family. *CP 202-207.* Making matters worse, a review of the billing records of attorney Gentry underscores the undisputed fact that, as the attorney who drafted the documents by which the Foundation was created, Gentry had not even met with or spoken with the Franks to advise them on estate planning options prior to her creating the Foundation. *CP 204.*

Initially, Ken Frank deeded only 4 percent of the property to the Foundation. After Laurie McClanahan took an executive position on the Board, she had Ken Frank deed over the remainder of the property in 1994 and 1997. *CP 189.* The Foundation held several meetings and had an initial flurry of planning. *CP 189-190.* The Franks did not know, however, that McClanahan had been taking excessive tax deductions

based on the IRS classification of the Foundation as a private non-operating foundation. She deducted over \$500,000 in taxes instead of merely deducting the cost basis of the property, which violated IRS rules at the time. *CP 192*. Her inappropriate deductions simply demonstrated her lack of knowledge about foundation planning and taxation. *CP 202-207*.

In 1996 the Franks met with attorney Gentry to draft their wills, in which Gentry included a provision which bequeathed the Cranberry Lake property to the Frank Family Foundation. Gentry's testimony has established, however, that the Cranberry Lake provision was put in the wills only in case they had not yet completed gifting inter vivos all of the Cranberry Lake property to the Foundation before they died:

“Q. Okay. The second page of those notes reflects a plan to transfer the Cranberry Lake property to the foundation, right?

A. Yes. And in this context, as I've indicated, are will notes, so that would be to remind myself that I need to put a provision in the will, as we've talked earlier, that would pick up if there was any Cranberry Lake property left, that it be transferred to the foundation.

Q. If they hadn't yet transferred the property to the foundation prior to their deaths?

A. Exactly.

Gentry Deposition Testimony.¹

¹ Mary Gentry's Testimony was submitted to the Court for review in the case through the supplemental declaration of George Akers, but was filed in a different cause number which is currently on appeal at NO. 36603-6-II.

Ms. Gentry testified that at the time of the making of the will, not all of the property had yet been transferred to the Foundation:

Q. In fact, when the will was executed, all of the property had not yet been transferred to the foundation, right?

A. I assumed that, or I wouldn't have included that provision in the will.

See footnote No. 1.

In short the will was merely a safety net to ensure the inter vivos transfer:

A. Any reference in the will subsequent to the creation of the foundation that directed the personal representative to distribute any Cranberry Lake Property into the foundation was intended as, if you will, a safety measure to make sure if they died before all of the property was transferred in, car accident, they are both gone, that that's where that property goes. It was – they wanted all that property in the Foundation.

See footnote 1.

To further emphasize the point, she testified that, “In drafting those new wills that would, you might say, pick up any loose ends if all of the Cranberry Lake had not gone into the foundation by the time of their death that it would.” *Id.*

Appellant is filing a supplemental designation of clerks papers to account for the document and will provide the proper CP designation upon receipt.

The will was executed on August 30, 1996. *CP 440*. Thereafter, on December 23, 1997 Ken and Kitty Frank took the affirmative act of placing the remainder of the Cranberry Lake property into the Foundation by first acquiring the property in a like-kind exchange². *CP 311*. Simply stated, a significant portion of the transfer took place fifteen months **after** the will was made.

McClanahan was adept at using her considerable influence over Ken and Kitty Frank to have them continue to fund the Foundation after the gifts. *CP 191*. In 1994-1995 she advised Ken and Kitty to donate another \$240,000 to the Foundation. *Id.* In 1999 she advised them to place another \$334,000 into the Foundation coffers even though by that time the Foundation rarely met and was not conducting substantial charitable activities. *CP 191*.

Nevertheless, Ken and Kitty had used the property and the cabin, had unfettered access to it, and allowed their extended family to use the property for vacation purposes, of which the Foundation Board was aware. However, when the Franks tried to reduce to writing the right of the Frank family to continue to use the property as they had been assured they would be able to do in perpetuity, they were shocked and dismayed at the

² The Foundation sought to avoid the ademption argument using the legal fiction on point claiming that an earlier deed transferred after acquired title, and therefore the final gift to the Foundation occurred prior to the will

response they eventually received from the Foundation in February 2003. *CP191-192*. Although the Franks and their extended family had used and managed and had unfettered personal use of the Cranberry Lake property and Cabin prior to and after the creation of the Foundation, Eveleth's February 2003 letter informed the Franks that upon their death no family member would have access to the property without the express written consent of the Board. *CP 192*.

After receiving Eveleth's February 2003 letter, Ken and Kitty Frank realized that they had been duped by Laurie McClanahan into giving away their most valued asset for no value, and with no further right of the family to manage and use the property. Ken and Kitty Frank became angered and stressed. *CP 192-193*.

Norm Eveleth, president of the Board Director of the Frank Family Foundation, agreed that the Franks used and accessed the property at will and was given no reason to believe doing so was improper after deeding the property:

We never interfered with their personal access or use to the property. Now, I'm not -- I think this is something we've learned from Ms. Woods [in 2004] that we were remiss in doing, they weren't supposed to be using it. But anyway, the Board didn't know that and we respected the family, all the members of the family greatly, and we admired the Franks greatly and we had no desire whatsoever to infringe on their use of the property.

CP 118-119; CP 81-82.

But we never interfered with it. So when a family member came or David went out there or whatever, Ken and Kitty were the ones who set the rules.

CP 84.

In fact, Norm Eveleth testified that the Franks managed the cabin on their own up until 2003, when Ken and Kitty Frank met with Norm Eveleth and Mary Gentry. *CP 84; CP 118.* Up until that point they did not know the Franks were disqualified persons prohibited from use by law. *CP 119; CP81-82.*

The situation for the Franks relative to the Foundation went from very bad to worse in 2004. When a tax analysis memorandum was given to the Foundation board by the Franks' then attorney (Gerry Treacy), McClanahan brought it up to the board and advised them that there was a risk that the IRS could assess penalties, fines, and taxes for which the directors would be liable. *CP 119-120; CP 93.* The Franks were still directors at that time. The board then authorized some of its members to get advice from Laverne Woods at Davis, Wright & Tremaine, who they met with sometime after January 2004. *CP 115-116; CP 78.*

As a result of the meeting with Ms. Woods, the board learned for the first time that the foundation, to qualify as a foundation, had to highly restrict the use of the Cranberry Lake property by Ken and Kitty Frank,

and David Frank and his family, as they were (under IRS regulation applicable to foundations) considered “disqualified persons”. The board so notified the Franks. *CP 94-95*. According to Norm Eveleth, no one on the board, including defendant McClanahan knew of these IRS requirements before speaking with Ms. Woods in 2004. *CP 98-99*.

The Board of the Foundation had no idea that allowing Ken and Kitty to manage the cabin and use it personally ran afoul of IRS rules and regulations. *CP 94-95*. Furthermore, neither Ken and Kitty Frank, nor any of its family members, or the Foundation had ever been assessed a self-dealing tax for their use of the property for personal use under Code §§ 4946 or 4941, nor were they ever questioned about their personal use of the property by the Foundation or their CPA Laurie McClanahan during the existence of the Foundation. The Foundation Board, including McClanahan had no idea that Ken and Kitty Frank were disqualified persons under IRS regulations and therefore barred from using the property for personal use, and therefore the issue was never raised to Ken and Kitty Frank. *CP 94-95; CP 194-195*.

After being denied access to the property for the first time after Norm’s letter, Ken and Kitty Frank retained counsel and began to investigate the prudence of Laurie McClanahan’s advice to place the property into a Foundation. They soon realized that Laurie McClanahan

served not as an adviser but as an adversary, usurping their property and funds for her own self-aggrandizement and gain. *CP 192-193*. Upon seeking counsel, the Franks learned the extent of McClanahan's incompetent advice and immediately sought to recoup their property from the Foundation. *CP 193-194; CP 202-207*. In response, McClanahan and the Board of the Foundation began browbeating Ken and Kitty to stop their investigation. *CP 193*. After being subjected to further ill-treatment by McClanahan and the Board, Ken and Kitty Frank sent a letter to the Board of the Foundation requesting that they all resign their positions. *CP 193*.

Subsequently, on June 11, 2004, the board (without Ken or Kitty in attendance) removed Ken and Kitty Frank as directors of the Foundation based on advice and assistance from Ms. Woods. *CP 102-106*. According to Eveleth, at least part of the reason that Ken and Kitty were removed was that they filed a records lawsuit in April 2004 that was filed to obtain tax records from the Foundation. *CP 107*.

Once the Franks were ousted from the property, this lawsuit soon followed as Ken and Kitty both expressed a desire to have the property returned to them:

Q. I'm not sure what you mean by you would hope it would be all over by now. What had you hoped would be over by now?

A. Well, that we would get the lake property back.

Q. Back out of the Foundation?

A. Yes.

CP 168.

In addition to creating the Foundation and gifting property to it, Ken and Kitty Frank also donated large sums of money to the Foundation.

CP 191. The sums of money given inter vivos, through the very same undue influence, mistake and misrepresentation, were not also gifted to the Foundation by the will. *Id.*

As set forth in detail by expert Gerry Treacy, an estate planning attorney who has reviewed numerous documents in this case, including but not limited to the Foundation's inception papers and McClanahan advices and activities relating to the creation and operation of the Foundation, the creation of the Frank Family Foundation and the transfer of property to it was based on mistake, undue influence and the abuse of the confidential and fiduciary relationships of the advisers with the Franks. *CP 202-207.* Treacy further testified by declaration that the Foundation

was improperly designed to deny the Frank Family control of the Foundation. *CP 202-207*. Normally, families creating foundations and gifting property to them ensure a significant level of family control. As set forth above, Laurie McClanahan advised Ken and Catherine Frank to create the Foundation in such a manner that there could be no family control, management or use of the Foundation whatsoever, which is currently the case.

III. STANDARD OF REVIEW

When reviewing a summary judgment order, the appellate court undertakes the same inquiry as the trial court. *Thompson v. Peninsula Sch. Dist. No. 401*, 77 Wn. App. 500, 504, 892 P.2d 760 (1995). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). The moving party bears this burden of proof. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). “A material fact is one upon which the outcome of the litigation depends.” *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980). All facts and inferences are considered in the light most favorable to the nonmoving party. *Ashcraft v. Wallingford*, 17 Wn. App. 853, 854, 565 P.2d 1224 (1977).

In considering claims based on rescission, the courts apply equity. In its ruling on standing of the Franks in this matter, the trial court based its dismissal on equitable grounds. The question as to whether equitable relief is appropriate is a question of law, and all such issues of law are reviewed *de novo* on appeal. *Bank of America v. Prestance Corporation*, 160 Wn.2d 560, 564, 160 P.3d 17 (2007).

IV. SUMMARY OF ARGUMENT

The Court is here asked to review the decision of the trial court wherein it granted summary judgment on the grounds that Appellant had no standing to bring their claims for rescission of gifts the Ken and Catherine Frank made to the Frank Family Foundation because the same court sitting in probate of the their estates applied a will provision to devise the same property to the Foundation that the Appellants sought to take back from the Foundation. To be clear, prior to their deaths, the Franks brought this lawsuit against the Foundation to rescind a gift it had made during their lifetimes, basing their rescission claims on the allegations that they had given the property to the Foundation based on mistake caused by negligent estate planning advice they received from the professional defendants. To be still clearer, the lawsuit against the Foundation claimed that they never would have created the Foundation in

the first instance but for the negligent estate planning advice received from the professional defendants.

The effect of the probate decision on appeal was to affirmatively give operative effect to a will provision that was interpreted by the court to give certain property to the Foundation, which same property the Franks had sued to have returned to them from the Foundation because of mistake made in giving the property to the Foundation. Therefore, the further effect of the probate decision on appeal was to affirmatively give operative effect to a will provision that was interpreted by the court to give the property to the very entity that the Franks claimed would never have been created by them but for the negligent advice provided by the professional defendants.

Building on this absurd result, the trial court, sitting in equity on the rescission claim, dismissed on summary judgment the lawsuit in which the Franks had sued the Foundation in order to regain ownership of the property from the Foundation which complaint alleged that they never would have created the Foundation but for the negligent advice. Incredibly, the court's reasoning in dismissing this lawsuit was that if the property would go to the Foundation under the wills, then the Franks did not have standing to claim that the property must be returned to them from

the Foundation. Even more incredible, the court reasoned that it should do so applying equitable principles.

Fortunately, on appeal, a trial court's decisions based in equity are questions of law reviewed *de novo*. The trial court's decision herein is patently flawed from the point of view of equity. Moreover, the court made a number of other appealable errors in reaching this inequitable result.

First, the court refused to find that the will provision was adeemed even though the property was not in the estate at the time of the Appellants' deaths. This decision was clearly in error whether one considers the evidence before the court or the legal issues on which the motion was decided, or both.

Second, applicable law provides that trusts can be reformed whether created by testament or by inter vivos gift. Applying such law and equity, the court should have reformed the Foundation (a trust) to conform to the Franks' intentions in creating the Foundation, i.e. one controlled by the Frank Family in accordance with sound estate planning advice. Then, if the court found the will provision operative, the property would be devised to a foundation controlled by the Franks.

Third, in the further alternative, the court erroneously collapsed its analysis of the effects of the property transfer being with the subsequent

transfer of the property under the will. In this hypothetical and combined transaction, the court failed to consider the ramifications of and remedies allowed by rescission. The court failed to consider that the Franks had also gifted several thousands of dollars to the Foundation money was also based on the mistake alleged, but not devised to the Foundation under the will. The court also failed to consider that if the rescission claims were successful, Foundation had to provide an accounting to the Franks of revenues generated by its use of the property between the original gift and the rescission of it.

Appellant asks that this Court review *de novo* the decisions made by the trial court, and to correct errors made in applying the law and equities of the case, remanding the case for trial on the merits.

V. ARGUMENT

A. The Equitable Considerations Regarding the Rescission Action

As set forth above, the Court made an equitable determination on summary judgment. Whether the court made the right determination is a question of law reviewed *de novo* by this Court. *Bank of America v. Prestance, supra*; see also *Niemann v. Vaughn Community Church*, 154 Wn. 2d 365, 374 (2005). The respondent's summary judgment motion argued, and the trial court ruled, that appellant had no standing to pursue

its rescission claim against the Foundation because once returned to the Franks' estates, it would then be transferred back to the Foundation under the 1996 will. This ruling in equity ignores two very important premises for the lawsuit that Ken and Kitty filed herein, both which bear heavily on the equitable grounds in the case. First, entirely inconsistent with such a hypothetical testamentary disposition of the property, the Franks alleged in this lawsuit that the inter vivos gift of Cranberry Lake property to the Foundation would not have occurred but for the misrepresentation, mistake and undue influence of the professional defendants McClanahan (an executive board member of the Foundation), Clees and Gentry. *CP 284-296*. Second, Appellants further alleged that the Foundation itself *would never have come into existence but for the negligence, misrepresentation, mistake and undue influence of the same professional defendants. CP 293.*

Ken and Catherine Frank began investigating the Foundation when they first learned that they and their family would no longer be allowed access and control of the property in February 2003 when they received a letter from director Norm Eveleth. *CP 192*. Thereafter, the Foundation retained counsel and formally changed its IRS classification in 2004, with the legal effect of forever banning any member of the Frank Family from stepping foot on the property for personal use. *CP 194-195; CP 120*. As

set forth above, up to that point ten years after the Foundation was created, not even the Foundation president or CPA (much less the Franks) had any idea what a Foundation was or what restrictions the IRS placed on such an entity. The Foundation then altered its original by-laws, and promptly removed the Franks as directors of the Foundation ensuring that no family member had a presence or input on the Foundation board. *CP 120*. All the while, one of the professional defendants (McClanahan) who advised the Franks to create and fund the Foundation as an estate planning tool, sat on the executive committee and/or otherwise had a leadership role at the Foundation.

In considering the issues of equity herein, the Court should take close notice of the first of these premises – that the inter vivos gift of the property to the Foundation would not have occurred but for the Franks' mistake based on the negligence, misrepresentation and undue influence of the Professional Defendants. This premise is reflected in Appellant's amended complaint which states as follows:

- 21.7. If Ken and Kitty had been properly advised and informed by competent and independent professional advisors, Ken and Kitty would not have created or funded the Foundation or purportedly conveyed the Property to it.

CP 293.

Can the Court do equity by giving to the Foundation by will that which the Franks claimed that they would not give to Foundation but for mistake based on tortuous acts of third parties? Under the circumstances presented by the evidence, is it likely that the will provision was a remnant of an earlier plan related to the original transfer of the property as defendant Gentry has testified, or was the will provision intended to undermine the future efforts and claims of the Franks in bringing this lawsuit against the Foundation?

The second premise is related to the first and helps be certain of the validity of that first premise. The Franks have filed suit claiming that the Foundation would not have even been created in the first instance but for mistakes they made based on negligent advice, misrepresentation and undue influence. Would the Franks have knowingly devised a property to an entity that they created by mistake and which they claimed should never have been created by them in the first instance? Or is it more likely that the will provision was an anachronism from an earlier plan which was only overlooked due to an assumption on the Franks' part that it would have no effect given that the property had already been deeded to the Foundation and was not owned by the Franks at the time?

The trial court was presented with an opportunity to apply ademption to the will provision, which is a doctrine founded on the

proposition that a property not owned by the estate at the time of death is deemed and so rendered a nullity. This doctrine not only makes intuitive sense as a concept, it happens to correlate quite well with the apparent and or understandable intentions of the Franks.

The Court should ask whether there is any evidence regarding the circumstance of the Franks which would lead the Court in one direction or the other in determining the Franks' intent as between ademption and testamentary gift.

In construing a will, the court will consider the language thereof and circumstances surrounding the testator at the time of its execution. (citations omitted) It is equally true that the intention of the testator is to be ascertained as of the time of the execution of the will; and that, in endeavoring to ascertain this intent, the entire purpose and scheme of the instrument shall be considered. (citations omitted)

In re Doepkes' Estate, 182 Wash. 556, 563 (1935). See also *Johnson v. McClure*, 5 Wn.2d 123, 104 P.2d 962 (1940); *Lotzgesell v. Clydell*, 62 Wash. 352, 113 p. 1105 (1911).

The only evidence in the record bearing on the circumstances surrounding the Franks at the time of execution of the wills was the testimony of the attorney/defendant (Gentry) who made the will as well as prepared the documents to gift the property inter vivos before and after the wills were made. As above quoted, defendant Gentry has testified clearly and repeatedly that the will provision at issue was only to serve as a safety net in case the Franks died before the inter vivos gifting of the property

was completed, and that if such gifting had been completed at the time of the making of the wills, the provision would not have been placed in the will. From this we know that which is otherwise apparent – that the will provision was not inserted with the intent to undermine or cancel out the future lawsuit that the Franks would bring based on having created the Foundation based on mistake.

B. The Ademption Ruling

Appellant does not wish to burden the Court with a detailed briefing of the ademption issue as that will be fully briefed in Appeal 36603-6-II, which appellant will move to have consolidated for oral argument after filing this brief. Appellant notes, however, that the Court's ruling on ademption was based in large part upon the *Buder v. Stocke* 343 Mo. 506 (Mo. 1938) and the outdated proposition that ademption can only occur if the gift or sale of property occurs after the making of the will. The opinion in *Buder v. Stocke* was not only wrong by confusing different types of ademption as set forth in the related appeal briefing, even the *Buder* reasoning would require the application of ademption to the bequest of property in Ken and Catherine's 1996 wills.

The *Buder v. Stocke* decision confuses the doctrines of ademption by extinction with revocation in that part of the opinion relied on by the

trial court in this case. There, the *Buder* court states that because ademption is “equivalent to revocation or indicative of an intent to revoke ... [a]cts or events which . . . work the ademption of a specific legacy . . . occur, if at all, after the will is made.” *Buder* 342 Mo. at 519. This reasoning does not follow from the traditional application of ademption by extinction, which occurs whenever the property is not a part of the Estate on death of the testator. The *Buder* court cited no authority to the contrary, and has not itself been even cited in a published opinion since it was decided seventy years ago. Indeed the *Buder* court conceded that:

“Of course where the bequeathed specific property and everything received for it has completely disappeared from the testator’s estate before his death, there could be no other result reached except an ademption or revocation by complete failure of the bequest or devise...”

Buder v. Stocke, supra. at 520.

Thus, even the *Buder* decision allows for the rule of ademption law that (as noted above), when considering ademption by extinction as opposed to ademption by revocation, the inquiry focuses only on whether the specific legacy is found in the estate at the time of the testator’s death. If it is not, the legacy is adeemed whether or not any particular act or event occurred before or after the making of the will. *Estates of Doepke*, 182 Wash. 556, 563 (Wash. 1935); Dennison, 91 *Am. Jur. Proof of Facts* 3d 277, § 13, citing *Parker v. Bozian*, 859 So. 2d 427 (Ala. 2003); *Mississippi*

Baptist Foundation, Inc. v. Estate of Matthews, 791 So. 2d 213 (Miss. 2001); *In re Estate of Hegel*, 76 Ohio St. 3d 476, 1996-Ohio-77, 668 N.E.2d 474 (1996); *McGee v. McGee*, 122 R.I. 837, 413 A.2d 72 (1980); *Matter of Estate of Brown*, 922 S.W.2d 605 (Tex. App. Texarkana 1996).

However, even if the trial court was not in error as a matter of law in applying this unsupported legal concept from the *Buder* case, the evidence before the trial court should have led the trial court to apply the doctrine of ademption to the testamentary provision at issue. As set forth above, the defendant lawyer Gentry, who drafted the will and transfer deeds for the Franks, has testified repeatedly that the only reason that the Cranberry Lake provision was in the will at all was because the inter vivos transfer of that property had not yet been completed in 1996 when the will was made, and the will provision was only for the purpose of a safety net in the event the Franks died before the inter vivos transfer was completed. As the Franks owned a part of the Cranberry Lake property when the wills were made, even the *Buder* case adopted by the court here would find that ademption applied.

From these facts and from the fact that Ken and Kitty Frank brought this lawsuit, an intent to transfer the property under their wills cannot be inferred, and must be soundly rejected. In this case, neither of the Franks owned or possessed the Cranberry Lake property at the time of death, and

therefore it should be presumed that they believed that the gift would adeem – and applicable law so provides. Or, even if *Buder* is applied, ademption would still apply under the circumstances of this case.

C. The Court's Equitable Decision Ignores The Ramifications Should Rescission Occur and Unfairly Limits Appellant's Ability to Recoup Financial Contributions to the Foundation.

The Court's decision failed to account for the fact that having the property returned to the Estate, even for a brief period before distribution, would have extremely severe consequences to the Foundation, the professional defendants, and possibly the Estates. If successful in the rescission action, the legal effect would be that the Frank Family Foundation held the property in constructive trust for Ken and Catherine Frank for ten years.

By way of primary example, if the Foundation received the property by mistake in 1994 – 1997, then the Foundation was unjustly enriched by having possession of the Cranberry Lake property for the ten years prior to Ken and Catherine Frank's deaths. Appellant has the right to bring such a claim for damages in order to benefit the estate. Under circumstances where a party obtains property through misrepresentation, mistake and undue influence, the Court imposes a constructive trust.

A constructive trust is the formula through which the conscience of

equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." *Pitzer v. Union Bank of Cal.*, 141 Wn.2d 539, 547-48, 9 P.3d 805 (2000) (quoting *Ellis v. Schwank*, 37 Wn.2d 286, 289, 223 P.2d 448 (1950)). A court sitting in equity may impose a constructive trust when there is clear, cogent, and convincing evidence of the basis for imposing a trust, including fraud, misrepresentation, bad faith, overreaching, or "some element of wrongdoing." *Baker v. Leonard*, 120 Wn.2d 538, 548, 843 P.2d 1050 (1993).

Under Washington law, the principle controlling the application of constructive trusts is set forth in *Seventh Elect Church v. First Seattle Dexter Horton Nat'l Bank*, 162 Wash. 437, 440, 299 P. 359 (1931):

Where, for any reason, the legal title to property is placed in one person under such circumstances as to make it inequitable for him to enjoy the beneficial interest, a trust will be implied in favor of the persons entitled thereto. This arises by construction of equity, independently of the intention of the parties. Equity will raise a constructive trust and compel restoration, where one through actual fraud, abuse of confidence reposed and accepted, or through other questionable means, gains something for himself which, in equity and good conscience, he should not be permitted to hold. 26 R.C.I. 1236, 1237, 35 A.L.R. 307; *Rozell v. Vansyckle*, 11 Wash. 79, 39 Pac. 270; *Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679, 101 N.W. 9; *Quinn v. Phipps*, 93 Fla. 805, 113 South. 419, 54 A.L.R. 1173; *Scott v. Thompson*, 21 Iowa 599.

In *Dexter Horton Bldg. Co. v. King County*, 10 Wn.2d 186, 191, 116 P.2d 507 (1941), the Court stated:

When property has been acquired under such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity coverts such holder into a trustee. Perry on Trusts, 309, sec 183.

Id; See also Restatement of the Law, *Restitution*, § 167.

Furthermore, a constructive trust may arise even if the acquisition of the property was not wrongful. *Scymanski v. Dufault*, 80 Wn. 2d 77, 89 (1971). See also *Viewcrest Cooperative Association, Inc. v. G.E. Deer*, 70 Wn.2d 290, 293 (1967).

Although a constructive trust differs from an express trust and does not impose fiducial duties, a constructive trustee may not be unjustly enriched by property and profits from the property at the expense of the true owner. In such cases, where a donee receives property through misrepresentation, mistake or undue influence, the donor is entitled to rescission and restitution regardless of whether the donee is innocent or fraudulent:

A person should not be permitted unjustly to enrich himself at the expense of another. The obligation to do justice rests upon all persons; and if one obtains the property of another, or the proceeds of the property of another, without a right to so obtain, equity can, in a proper case, compel restitution or compensation. It

is not necessary in order to create an obligation to make restitution or to compensate, that the party unjustly enriched should have been guilty of any tortious or fraudulent act. The question is: did he, to the detriment of someone else, obtain something of value to which he was not entitled? See 46 Am Jur. 99, Restitution and Unjust Enrichment.

Bill v. Gattavara, 34 Wn. 2d 645, 648 (1949).

Indeed, Restatement of Restitution §201, *quoted in Hesthagen v. Gunda Harby*, 78 Wn.2d 934, 945 (1971) sets forth another tenet of Washington law applicable in this case:

Where a fiduciary in violation of his duty to the beneficiary transfers property or causes property to be transferred to a third person, the third person, if he gave no value or if he had notice of the violation of duty, holds the property upon a constructive trust for the beneficiary.

Id.; see also *Bryant v. Joseph Tree*, 57 Wn. App. 107 (1990); *Viewcrest Coop. Asso v. Deer*, 70 Wn.2d 290 (1967). See also the Restatement of Restitution §167, which states as follows:

Where the owner of property transfers it to another, being induced by fraud, duress or undue influence of a third person, the transferee holds the property upon a constructive trust for the transferor, unless before notice of the fraud, duress or undue influence the transferee has given or promised to give value.

Restatement of Restitution, § 167.

In a situation where the party receiving the property is not a party to the fraud, the Court still treats the acquisition as wrongful: See Restatement of Restitution §167, comment b:

b. Gratuitous transfer. . . This situation is in substance the same as though the third person had by fraud obtained a transfer of the property and had subsequently transferred it gratuitously to another. It is immaterial whether the transfer is made by the defrauded owner directly to such other or is made to the fraudulent person and is subsequently transferred by him.

Id.

In this case there is ample evidence in the record that the Foundation had knowledge of the misrepresentation, undue influence and misrepresentation as one of the Foundation directors was advising the Franks regarding the decision to gift property and other funds to the Foundation. When the Franks made the gifts of the majority of the property to the Foundation and each of the monetary gifts, the Foundation was charged with the full knowledge of Laurie McClanahan, its director and secretary/treasurer, regarding the reasons the Franks decided to gift the property. *See e.g. Baille Communications, Ltd. v. Trend business Systems*, 53 Wn. App. 77, 85 (1988), *citing* 3 W. Fletcher, *Private Corporations* §§ 796, 799 (1986) (Principal charged with knowledge of agent “whenever and however such knowledge may have been acquired”); *See also* Restatement (2d) of Agency §276.

Further and regardless of the conduct of the Foundation a constructive trust still arises where the retention of property would result in unjust enrichment of the person retaining it. 5 A Scott, *The Law of*

Trusts, §462.2 at 3414 (3d ed. 1967); *see also* Restatement of Restitution §160 (1937). The Foundation has been unjustly enriched for several reasons: (1) the Foundation received and retained the proceeds of the professional defendants' negligence and undue influence knowing of the Frank's rights; *See* 3 W. Fletcher, *Private Corporations*, *supra*; and (2) the Foundation did not pay value for any of the property. Either of these reasons would make the Foundation's otherwise lawful acquisition and retention of the property unjust. *Id*; *See e.g. Baille Communications, Ltd. v. Trend business Systems*, 53 Wn. App. 77, 85 (1988).

The only way the Franks' interest in the property being held as a constructive trust could be extinguished is if it was purchased by a bona fide purchaser, whose interest would trump that of the plaintiffs. The Foundation is not a bona fide purchaser. To be classified as bona fide purchaser, the purchaser must be (a) a *purchaser, not a donee, heir or devisee*, (b) be bona fide, that is act in good faith, (c) have paid value as the law defines value, and (d) be without notice, actual or constructive of the rights, equities, or claims of others to or against the property. *Colfax National Bank v. Jennie Corporation*, 49 Wn. App. 364, 368 (1987)(emphasis added); *Biles-Coleman Lumber Co. v. Lesamiz*, 49 Wn.2d 436 (1956).

Under such a situation where a party has been unjustly enriched by

property belonging to another, the cause of action for rescission includes not only the property gifted, but also any funds made by wrongful use of the property. *Id.*, at comment d. As set forth in the Restatement of Restitution §160 at comment d, if a constructive trust exists, the holder of the property could be required to not only return the property but also be required to surrender any profit made from wrongfully disposing of the property. In this case, if the case were allowed to go forward, Appellant could inquire into the use of the property and trace the funds gifted. If the Foundation wrongfully used those funds, logged the land or took actions detrimental to the Franks' interest in the property, then Appellant should be allowed to recover the funds and profits earned from the property.

As set forth above, Ken and Kitty gifted nearly a million dollars in cash and stocks to the Foundation, which if rescinded would be returned to the Estate to be distributed through the residuary clause in the will. If the jury finds at trial that the Foundation would not have been created or funded as alleged in the Amended Complaint, then Appellant would be entitled to recover the gifted funds and recover the damages to the property caused by the Foundation while holding it in constructive trust. Appellant should be allowed to further litigate whether these duties have been violated regardless of whether the property were ultimately to be bequeathed to the Foundation through the will.

The Court's decision to deny the Estate standing based upon gifting property in the will does not allow Appellants to recoup several hundred thousand dollars in funding, which Appellants gifted through mistake, misrepresentation and undue influence even though such funds were not made part of the will. Whether or not the Foundation is ultimately entitled to the property, Appellants certainly should be able to go forward with the rescission action in order to recoup nearly a million dollars for the Estate.

D. If the Intervivos Gift to the Foundation Was Based Upon Mistake, Misrepresentation and Undue Influence Then The Court In Equity Would Have the Power to Reform the Foundation In a Manner Consistent With the Intent of Ken and Kitty Frank.

The Foundation argued and the trial court accepted the equitable argument that Appellant had no standing to sue the Frank Family Foundation because even if the rescission action was successful, the Foundation would regain the property through the 1996 wills. To simply revert property back to the same foundation which was created through misrepresentation, undue influence and mistake (and directed by one of the parties responsible for the same) is a perversion of equity. In both the original and amended complaint Ken and Catherine Frank, and their successor personal representative in the suit, alleged that the professional defendants breached a duty to the plaintiffs by failing to design the

Foundation “in such a way so that Ken and Kitty would not be deprived of control of the Foundation and the Property (*CP 289-291*). . . In fact, the Foundation did not substantially assist Ken and Kitty in realizing their goals but instead created a situation that substantially defeated their goals.” *CP 292*. As further set forth in the court below through the declaration of Gerry Treacy (*CP 202-207*), the Frank Family Foundation was imprudently set up, and done so in a manner highly inconsistent with the Franks’ intent and any other family foundation for that matter. The Franks never exhibited an intention to have their family barred from the property and eliminated from the Board of Directors. The ability for such a scenario to play out, however, was accomplished at the outset of forming the Foundation as Laurie McClanahan improperly informed the Franks that they could not have familial control of the Board, but instead must have a majority non-family members in order to steer clear of IRS violations.

McClanahan’s advice, coupled with the testimony of Norm Eveleth (*CP114-123 & CP 72-113*), the Foundation President who testified that he had no knowledge regarding the type of Foundation created and/or the regulatory laws governing the Foundation, (*CP 115*), prove that the Franks did not have any knowledge as to what it was they were actually creating through their gift of the property. As Norm

Eveleth's testimony also made abundantly clear, neither the Franks, the Board of the Foundation, nor even CPA Laurie McClanahan had any knowledge whatsoever of the IRS regulations which rendered the Franks "disqualified persons" and barred them from using the property. They first learned this from Laverne Woods, who they retained as counsel in response to the Franks' requests regarding further use of the cabin. It was not until 2004, after the Franks were removed from the Foundation and the property by vote of the Board, that the Foundation actually established its status with the IRS, and began enforcing the laws and regulations required of a private operating foundation.

The Foundation in its current form is not the Foundation as intended by Kenneth and Catherine Frank. Certainly the Franks did not want the Foundation to remove the Franks and bar their family from use of the property and control of the Foundation. That is precisely why they have claimed in their amended complaint that they would not have funded the Foundation or created it in the first place. The Appellant as the personal representative of their estates and successor in their lawsuit (*See CP 284-296*) should have standing to bring suit against the Foundation not only to rescind the gift but also to equitably reform the Foundation to meet the goals and intents of the Franks.

The Court could accomplish this equitably through the elements of

the Cy Pres doctrine and Equitable Deviation, which allows for the terms of a trust to deviate from its current form if “compliance is impossible or illegal, or that owing to circumstances not known to the settler and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the Trust.” *Niemann v. Vaughn Community Church*, 118 Wn. App. 824, 838 (2003); see also Restatement (Second) of Trusts §381 (1959). Courts apply equitable deviation to make changes in the manner in which a charitable trust is carried out while courts apply cy pres in situations where trustees seek to modify or refine the settlor’s specific charitable purpose. *Niemann*, 154 Wn. 2d 365, 378 (2005).

In *Niemann*, the Washington Supreme Court also specifically adopted the Restatement (Third) of trusts and noted that the Restatement (Third) of Trusts requires a lower threshold finding than the older Restatement and gives courts broader discretion in permitting deviation. *Niemann*, 154 Wn.2d at 381. *See also In re Riddell*, 138 Wn. App. 485, 493 (2007)

Allowing for equitable deviation, if the ademption argument is defeated, would promote the “most important of the equitable maxims, namely, that equity will not suffer a wrong (or as sometimes stated, a right) to be without a remedy.” *Rummens v. Guaranty Trust Company*,

199 Wash. 337, 347 (1939). Neither novelty of claim nor absence of precedent furnishes sound reason to deny relief when the situation equitably demands it and no principle of law prohibits it. *Id.*

If there is ever a case where equity dictates that a Court perform equitable deviation and or otherwise reform the Foundation to meet the intent of the grantor, this is it. Equitable deviation is applicable to make changes in how a charitable organization is administered. *Kolb v. City of Storm Lake*, 736 N.W.2d 546, 555 (2007). This doctrine would be useful in the situation here where the Court could then decide whether the Foundation has been inappropriately set up based on the negligent advice of the Professional Defendants so as not to allow family control by the Frank Family.

By virtue of the rescission lawsuit, it is clear, and or it will be clear after trial, that the Franks intended the Foundation be used in a manner far different from the current one, which has never accomplished any charitable goals and/or done anything of substance in the charge of its alleged mission and in fact has removed the Frank Family from having any control over the Foundation or property. Restatement of the Law (Third) Property (wills and Other donative Transfers) § 12.1 states as follows:

A donative document, though unambiguous, may be reformed to

conform the text to the donor's intention if it is established by clear and convincing evidence (1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and (2) what the donor's intention was. In determining whether these elements have been established by clear and convincing evidence, direct evidence of intention contradicting the plain meaning of the text as well as other evidence of intention may be considered.

Equity provides the rationale for reformation on two related grounds, giving effect to the donor's intention and preventing unjust enrichment. *Id.* at comment b. Reformation of donative documents is granted on an adequate showing of proof even after the death of the testator. *Id.* at comment c.

The uniform trust code §415 provides that testamentary as well as intervivos trusts can be reformed "if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement." Furthermore, Restatement Second of Property (Donative Transfers) §34.7 comment d, also has set forth the proposition that wills as well as other donative documents can be reformed to correct mistakes:

The general law of mistake, under which a mistake may be significant enough to justify the conclusion that the donative transfer should be set aside or reformed, is incorporated herein by reference and made applicable to both wills and other donative documents or transfer.

Restatement Second of Property (Donative Transfers) §34.7

comment d.

Furthermore, an intervivos gift or gift by will may be reformed upon the same grounds as any other transfer of property, such as the case when the transfer is induced by misrepresentation, mistake and undue influence. See Restatement of the Law (Second) Trusts §333 (1959). This is particularly true when an organization is created because of a material mistake:

The settler can rescind a trust created by him as a result of a material mistake. When no consideration is paid for the creation of the trust, it is sufficient that the settler was induced by mistake to create the trust, although neither the trustee nor the beneficiary shared in the mistake or knew of it, since in the case of gratuitous transfers a mistake by the transferor is a sufficient ground for setting aside the transfer, although the mistake was not cause or shared by the transferee and he did not know or have reason to know of the mistake of the transferor.

Restatement of the Law (Second) Trusts §333 (1959), comment e.

Ken and Catherine Frank initiated this lawsuit to rescind the gift of property to the Frank Family Foundation because of undue influence, mistake and misrepresentation. They further alleged that they never would have created or funded the Foundation in its current form. The fact that the 1996 wills were not challenged does not change the Franks intent in this lawsuit, and certainly indicates and provides evidence that the will

provision gifting the property to the Foundation could not be the very same form of Foundation as currently constituted, wherein the Frank family has no control or ability to work with the Foundation but instead a significant amount of control is placed in the hands of the professional defendant Ken and Catherine suit for negligence, misrepresentation, undue influence and mistake.

VI. CONCLUSION

This Court has two appeals before it which are inextricably related by virtue of the one decision having been based on the decision in the other. If the trial court is found to have been in error in the probate matter by applying the will provision to the property referred to in the wills, the court's decision in this matter on summary judgment must necessarily be reversed as well. However, if the Court does not reverse the probate decision, the trial court has committed reversible error in applying equity to the claims and issues arising independently in the rescission action. Appellant submits that the decisions made by the trial court on both motions were made in error, and both decisions should be reversed and remanded for further proceedings.

DATED this 13th day of November 2007.

MORAN WINDES & WONG, PLLC

By: 
ROBERT N. WINDES, WSBA #18216
WILLIAM A. KELLER, WSBA#29361
Attorneys for Appellant / Cross
Respondent

CERTIFICATE OF SERVICE

The undersigned certifies that on this day he/she caused to be served in the manner noted below, a copy of the document to which this certificate is attached, as on the following:

Via Regular Mail

Attorneys for Respondent
Ladd Leavens
Zachary Tomlinson
Davis Wright Tremaine, LLP
1201 3rd Avenue, Suite 2200
Seattle, Washington 98101

Via Regular Mail

Clerk of Court
State of Washington Court of Appeals
Division II
950 Broadway
Suite 300 MS TB-06
Tacoma, WA 98402-4454

FILED
COURT OF APPEALS
DIVISION II
07 NOV 14 PM 1:05
STATE OF WASHINGTON
BY WJK
DEPUTY

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 13th day of November, 2007.



William Keller