

No. 49563-5-II

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

FRANK PORTMANN, Appellant

v.

SALLY HERARD, Respondent.

BRIEF OF APPELLANT (corrected)

**David M. Newman, WSBA #24113
Co-counsel for Appellant**

**The Rainier Law Group, PLLC
PO Box 7328, Bellevue WA 98008-1328
12356 Northup Way, Suite A, Bellevue WA 98005**

**Phone: 425-748-5200
Email: newman@rainierlaw.com**

**Nathan James Neiman, WSBA #8165
Co-counsel for Appellant**

**Neiman Law Offices
PO Box 777, Redmond WA 98073-0777
8201 164th Ave NE, Suite 200, Redmond WA 98052**

**Phone: 425-881-3680
Email: nneimail@aol.com**

TABLE OF CONTENTS

Introduction.....	1
Assignment of Error No. 1	2
Issues pertaining to Assignment of Error No. 1.....	3
Assignment of Error No. 2.....	3
Issues Pertaining to Assignment of Error No. 2.....	3
Statement of the Case.....	4
Argument	8
1. Introduction to argument.....	8
2. Standards of review.....	9
3. Eric Pickle is not a party in interest, and the trial court erred by striking portions of his declaration.....	10
4. Washington law recognizes mutual wills.....	14
5. Dissimilar specific bequests in the partners' wills do not destroy the mutuality of provisions regarding distribution of the joint residual estate.....	15
6. The existence of 'Plan B' in the Cross and Morse wills demonstrates their mutuality.	20
7. After Morse's death, Cross continued to honor his promise to Morse, but with the passage of time his commitment to the agreed distribution of the joint residual estate gradually eroded and he unlawfully abandoned his obligation. ...	23
8. Substituting joint ownership of real property for ownership as tenants in common was immediate and irrevocable consideration for the agreement to distribute the joint residual estate.....	24
Conclusion	26

TABLE OF CASES

<i>Allen v. Dillard</i> , 15 Wn.2d 35, 129 P.2d 813 (1942).....	15
<i>Arnold v. Beckman</i> , 74 Wn.2d 836, 447 P.2d 184 (1968)	14
<i>Auger v. Shideler</i> , 23 Wn.2d 505, 161 P.2d 200 (1945).....	15
<i>Carter v. Curlew Creamery Co.</i> , 16 Wn.2d 476, 134 P.2d 66 (1943).....	25
<i>Cent. Puget Sound Reg'l Transit Auth. v. Airport Inv. Co.</i> , 186 Wn.2d 336, 376 P.3d 372 (2016).....	10
<i>Crown Plaza v. Synapse Software Sys.</i> , 87 Wn. App. 495, 962 P.2d 824 (1997). 8	8
<i>Cummings v. Sherman</i> , 16 Wn.2d 88, 132 P.2d 998 (1943).....	16
<i>Duckworth v. Langland</i> , 95 Wn. App. 1, 988 P.2d 1287 (1998), <i>citing Howarth v.</i> <i>First Nat'l Bank</i> , 540 P.2d 486 (Alaska 1975).....	8
<i>In re Estate of Bergau</i> , 103 Wn.2d 431, 693 P.2d 703 (1985)	18
<i>In re Estate of Krappes</i> , 121 Wn. App. 653, 91 P.3d 96 (2004)	13
<i>In re Estate of Richardson</i> , 11 Wn. App. 758, 525 P.2d 816 (1974).....	14
<i>Jones v. Allstate Ins. Co.</i> , 146 Wn.2d 291, 45 P.3d 1068 (2002).....	9
<i>Newell v. Ayers</i> , 23 Wn. App. 767, 598 P.2d 3 (1979), <i>citing Auger v. Shideler</i> , 23 Wn.2d 505, 161 P.2d 200 (1945).....	14
<i>Raab v. Wallerich</i> , 46 Wn.2d 375, 282 P.2d 271 (1955).....	15
<i>Syrovey v. Alpine Resources, Inc.</i> , 80 Wn. App. 50, 906 P.2d 377 (1995), <i>citing</i> <i>Arnold v. Melani</i> , 75 Wn.2d 143, 437 P.2d 908 (1968);.....	26
<i>Volk v. DeMeerleer</i> , 187 Wn.2d 241, 386 P.3d 254 (2016).....	9
<i>Welter v. Seattle First Nat'l Bank</i> , 25 Wn.2d 286, 170 P.2d 867 (1946).....	22
<i>Witzel v. Tena</i> , 48 Wn.2d 628, 295 P.2d 1115 (1956).....	25

TABLE OF STATUTES

RCW 26.16.010.....13
RCW 5.60.0302, 13

Introduction

Life partners Glen Morse and Donald Cross sustained a relationship that endured for 35 years or more, until Morse died in 2000. In the years before Morse's death, both men executed a series of wills specifying essentially similar plans for the disposition of their estates. The wills gifted various items of personal property. After these specific bequests, each will left the residue of the testator's estate to the survivor of this life partnership. Upon the surviving partner's death the residual estate was to be divided between the two men's families. Neither partner knew who would be the survivor, but the will addressed this uncertainty with an express plan for the survivor to divide the estate between the two families.

Petitioner Frank Portmann (Glen Morse's grand-nephew) contends that the wills in effect at the time of Morse's death were mutual. At the very latest, the wills became irrevocable when Cross accepted the benefit of the residual bequest made in the Morse will. In the years following Morse's death, Cross executed four more wills. Each will purported to revoke all of his former wills. Each of the four successive wills executed by Cross diminished the gifts to Morse's family. The last will Cross executed named his sister, Respondent Sally Herard, as the sole

beneficiary of his estate and left none of the jointly acquired estate to Morse's family members.

The issue in this case is whether the wills executed in 1998 by Morse and Cross were irrevocable and mutual as to the jointly developed residual estate of the domestic partnership. But the issue on appeal is whether Portmann's evidence, and the reasonable inferences from the evidence, presented genuine issues of material fact, precluding the summary dismissal of Portmann's TEDRA petition.

Portmann requests vacation of the trial court's summary-judgment order and the order awarding attorney's fees and costs to Herard.

Portmann seeks remand for further proceedings under TEDRA.

Assignment of Error No. 1

The trial court erred in striking portions of the declaration of Eric Pickle. The trial court erroneously concluded that the stricken portions were inadmissible under the Deadman Statute, RCW 5.60.030, and also barred by the rule against hearsay.

Issues pertaining to Assignment of Error No. 1

1. Should the trial court exclude the witness' testimony concerning statements by deceased persons when there is no evidence before the trial court showing the witness to be a party in interest?

2. Is testimony concerning out-of-court statements by a declarant concerning the declarant's estate plan, and the declarant's agreement with a domestic partner about disposition of property after death, barred by the rule against hearsay? Or should such testimony concerning a declarant's state of mind be admitted as an exception to the rule against hearsay?

Assignment of Error No. 2

The trial court erred in granting Herard's motion for summary judgment dismissing Portmann's petition for specific performance of irrevocable mutual wills. The trial court erroneously concluded that Portmann "failed to present a material issue of fact" (CP 288) regarding the execution of mutual wills by Glen Morse and Donald Cross.

Issues Pertaining to Assignment of Error No. 2

1. When the distributive provisions of wills executed by two companions are substantially similar, yet not identical, do the differences

preclude them from being irrevocable mutual wills? Must wills be precisely identical to be considered mutual and irrevocable?

2. When evidence of two testators' general trend of benevolences raises inferences from which a fact finder could discern an agreement regarding disposition of their property after both have died, is it permissible to determine the existence and character of the agreement on summary judgment?

Statement of the Case

Glen Morse and Donald Cross began their domestic partnership during the 1960s. CP 36 and 245. Close family members recollect that the two men jointly built a shared estate with pooled financial resources and mutual contributions of labor. CP 245. Beginning with Morse's inheritance of a Kent Valley farm in the mid-1960s, they traded up to ownership of a Seattle apartment building, then up to a home described by family members as a mansion on Lake Washington, then to other properties. CP 245. The manner in which Cross and Morse titled the properties, as described in detail in a later section of this brief, is a key fact concerning Portmann's claim.

Morse and Cross engaged attorney Gaylerd Masters to draft the wills they executed in 1992, 1995, and 1998. CP 108-09. One partner's

will was not a mirror image of the other partner's will, but each pair of wills had substantially similar provisions for division and distribution of the residual estate to family members. Fairly read, the intent was clear: regardless of which domestic partner died first, the families of both partners would ultimately share the residual estate. Copies of the wills appear at CP 49-81.

At his deposition, Attorney Masters testified that each will included a "Plan A" and a "Plan B." CP 168. According to Masters, upon the death of the first member of the domestic partnership, that decedent's property would be distributed under Plan A. Upon the death of the surviving member of the domestic partnership, Plan A was revoked and the will distributed property according to Plan B. CP 168.

Plan A of both wills made bequests of cash and personal property to the testator's own family, with the residual estate left to the surviving partner. Plan B of both wills contemplated that the residual estate (presumably all probate assets, excluding only the specific bequests) was to be divided into fractional shares, with a generous portion left to the survivor's family, and a generous portion left to the family of the previously deceased partner. The distributive schemes are shown in a table appearing at CP 149-52. A copy of the table is attached to this brief as an appendix.

When Morse died in 2000, the wills in effect were Morse's will of September 18, 1998 (CP 77-81), and Cross' will of January 5, 1998 (CP 71-75). As the personal representative of Morse's estate, Cross distributed Morse's property according to the Plan A scheme of Morse's will. CP 166-67. Cross accepted the residue of Morse's estate.

Under Cross' January 5, 1998, will, he was to leave one-half of the residual estate to Cross' own family and one-half to Morse's family. CP 72-73. After Cross had accepted the bequest of the residual estate made by Morse's will, Cross executed a new will on May 2, 2002 (18 months after Morse's death). In that will Cross attempted to unilaterally adjust the residuary distribution: 70 percent to his family (35 percent to his sister, Respondent Sally Herard, and 35 percent to another sister), leaving only 30 percent to Morse's family. CP 82-87. In Cross' next will, of March 21, 2005, he divided the residue into nine equal shares; eight shares were to go to Cross' family, with only one share to Morse's family. CP 90-95. On October 12, 2010, Cross executed another will that left the entire residual estate to Herard. CP 96-100. A later will, executed by Cross on October 18, 2010, corrected the name of a contingent beneficiary, but did not change the distributive scheme. CP 101-05.

Cross died August 14, 2015. CP 89. The Pierce County Superior Court admitted Cross' will of October 18, 2010, to probate and appointed

Herard as personal representative. Court records indicate that Attorney Masters, who drafted all of the wills described above, is the attorney representing Herard in the pending probate case

Portmann filed a petition under the Trust and Estate Dispute Resolution Act on December 18, 2015. CP 2-12. The petition asserted that the wills executed by Morse and Cross in 1998 were irrevocable mutual wills as to the jointly acquired residual estate. Portmann sought specific performance of the estate's obligations under Cross' will of January 5, 1998. CP 2-12. On September 21, 2016, the trial court granted Herard's motion for summary judgment and dismissed Portmann's petition. The trial court's order states in part: "Petitioner has failed to present a material question of fact as to execution of mutual wills by Mr. Cross and Mr. Morse or as to oral contract." CP 286-90. In part, this outcome was the result of the trial court's exclusion of portions of the declaration of Eric Pickle, finding those portions to be inadmissible under the Deadman Statute and the rule against hearsay. CP 289. Portmann timely filed a Notice of Appeal on October 17, 2016, and filed an Amended Notice of Appeal on October 21, 2016, to correct an omission. CP 335-37 and 339-49.

Argument

1. Introduction to argument.

The trial court should not have excluded portions of the declaration of Eric Pickle (husband of Cross' niece) under the Deadman Statute because no evidence shows that he has an interest in the outcome of this case. If the case comes down to a question of whether the partners entered an oral contract, the law disfavors summary judgment because resolution depends on the credibility of witnesses.¹ An oral contract is largely dependent on the credibility of witnesses.² Eric Pickle's declaration contains direct evidence of an oral contract, and a factfinder should assess his credibility at trial.

Aside from the wills, no separate writing has been found which expresses an agreement between Morse and Cross regarding the disposition of their property when both were deceased. But that agreement is inherent in the unique distributive scheme of their wills. Additionally, the manner in which they took title to real property shows

¹ "Oral contracts are often, by their very nature, dependent upon an understanding of the surrounding circumstances, the intent of the parties, and the credibility of witnesses. If a dispute exists with respect to the terms of an oral contract, then summary judgment is not appropriate. Instead, the trier of fact in a trial setting should make the final determination with respect to the existence of the contractual agreement." *Duckworth v. Langland*, 95 Wn. App. 1, 6, 988 P.2d 1287 (1998), citing *Howarth v. First Nat'l Bank*, 540 P.2d 486, 490 (Alaska 1975).

² "[D]isputes about oral agreements depend a great deal on the credibility of the witnesses." *Crown Plaza v. Synapse Software Sys.*, 87 Wn. App. 495, 501, 962 P.2d 824 (1997).

how they pooled resources, and evidenced their intent to make mutual wills. Family history expressed in witness declarations is precisely consistent with their common plan to provide for each other's family members upon the survivor's death.

As the nonmoving party in this summary-judgment proceeding, Portmann is entitled to the benefit of all reasonable inferences from the evidence. Inferences arising from an examination of the wills, the real-property deeds, the general trend of benevolences and the witness declarations preclude summary judgment and require trial.

2. Standards of review.

An appellate court's review of a grant of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.³ Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."⁴ "The court considers the facts and the inferences from the facts in a light most favorable to the nonmoving party."⁵

³ *Volk v. DeMeerleer*, 187 Wn.2d 241, 254, 386 P.3d 254 (2016).

⁴ CR 56(c).

⁵ *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

A different standard applies to the evidentiary issue. A trial court's decision to exclude evidence is reviewed by an appellate court for abuse of discretion.⁶ A trial court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds.⁷

3. Eric Pickle is not a party in interest, and the trial court erred by striking portions of his declaration.

At Herard's request, the trial court struck six paragraphs of Eric Pickle's declaration (CP 253-55) filed in support of Portmann's opposition to summary judgment.⁸ The trial court's order stated that it was striking the material "to the extent that these declarations contain purported statements of persons who are deceased. Such statements are hearsay and inadmissible under the Deadman's Statute." CP 289.

Eric Pickle is the spouse of Sherrie Pickle. CP 254. Sherrie Pickle is the niece of Donald Cross; her mother Donna Warter was Cross' sister. CP251. Cross named Donna Warter as a beneficiary of his 1998 will. CP 72. But Donna Warter died before Cross, making Sherrie Pickle a contingent beneficiary. CP 89.

In an estate dispute, the Deadman's Statute, RCW 5.60.030, prohibits a person who claims an interest in a decedent's estate from

⁶ *Cent. Puget Sound Reg'l Transit Auth. v. Airport Inv. Co.*, 186 Wn.2d 336, 350, 376 P.3d 372 (2016).

⁷ *Id.*

⁸ The trial court also struck two paragraphs of the declaration of Sherrie Pickle (CP 250-52), which ruling Portmann does not challenge on appeal.

testifying in his or her own behalf regarding statements made by the deceased person.

Eric Pickle's declaration included testimony that he heard and was involved in conversations with Morse and Cross regarding their estate plans. If the stricken paragraphs were admitted, the declaration would evidence the agreement between Morse and Cross to make mutual wills, and for the survivor to divide the estate evenly between their two families.

The trial court struck the following content from CP 254-55:

5. Shortly after Don and Glen returned from Arizona in 1997, Sherrie and I got together with them, as we routinely did. During our visit, Don and Glen told us that Don's sister, Sally Herard, had questioned Don about his will. Because of Don's recent health emergency, Sally was inquiring about what would happen to Don's assets upon his death.

6. In our conversation with Don and Glen about Sally's inquiry, Don and Glen let us know they were very upset by Sally's probing about their affairs.

7. Therefore, it was no surprise when Don and Glen started drawing up new wills a few months later. Don gave a copy of his January 5, 1998, will to his sister, Donna Warter, who was Sherrie's mother (who until then had been named executor in both of their wills). Because Donna suffered with terminal cancer at that point, Donna asked me to read the will so that I would be familiar with Don and Glen's agreement in their plans. As I understood the will, if Don were to survive Glen, then upon Don's death

one half of his estate would go to members of Glen's family.

8. In subsequent conversations, Don and Glen emphasized to Sherrie and me the fundamental feature of their agreement in their plan: half of the survivor's estate going to the other's family members. Both men told us that this was their agreement.

9. Don and Glen were adamant, and told us many times, that they wanted no one in the families to frustrate their estate plans.

...

11 Sherrie and I, and Sherrie's parents, socialized frequently with Don and Glen, all six of us together. Don's other sister, Sally Herard, and her husband on occasion were included, especially for major holidays such as Christmas. Ever since Don's health emergency in 1997, and his decision to make a new will on January 5, 1998, it has always been clear in my mind that Don and Glen had a well-thought-out end-of-life plan. Each partner would leave his estate to the other, and the survivor would be free to use the money and property as he wished. Upon the survivor's death, the remainder of the estate would be divided in half, with half going to Glen's family and half going to Don's family.

Herard argued in her brief regarding the Deadman's Statute that Eric Pickle is a party in interest under the statute, and his testimony regarding conversations with Morse and Cross regarding their estate plans therefore is not admissible. CP 280-83. If Sherrie Pickle were to receive a

portion of Cross' estate, Herard argued, "Her receipt of these monies will also benefit her husband." CP 281.

While typical married couples may expect to share the bounty of one spouse's inheritance, that is not the law. RCW 26.16.010 provides that property acquired by a spouse "by gift, bequest, devise, descent, or inheritance" is the recipient's separate property. A spouse might choose to share her separate inheritance, but that choice is not a result of a court's judgment.

A witness is a party in interest if he or she stands to gain or lose from the judgment. The test is whether the witness will either gain or lose by *direct legal operation and effect of the judgment*. A mere contingency that the witness might be subjected to an independent claim or action depending on the outcome of the action in which she is called as a witness is not a disqualifying interest.⁹

No evidence before the Court tends to show that Eric Pickle would benefit from his spouse's inheritance by the direct legal operation and effect of the judgment. Only through impermissible speculation about the Pickles' marital arrangements could the trial court have classified Eric Pickle as a party in interest. By engaging in such speculation, the trial court abused its discretion. Because Herard has not shown that Eric Pickle is a party in interest, his testimony is not barred by RCW 5.60.030.

⁹ *In re Estate of Krappes*, 121 Wn. App. 653, 666, 91 P.3d 96 (2004) (emphasis supplied).

Nor is his testimony inadmissible hearsay. Eric Pickle's recollection of statements made by Morse and Cross is admissible under an exception to the rule against hearsay, namely, ER 803(a)(3). That portion of the rule permits the introduction of: "A statement of the declarant's then existing state of mind . . . ," including intent, plan, motive, and design.

The portions of Eric Pickle's declaration stricken by the trial court provide direct evidence of the agreement between Morse and Cross, and the trial court's exclusion of that evidence was error.

4. Washington law recognizes mutual wills.

Case law summarizes mutual wills as follows:

[A] mutual will is a will that is executed pursuant to an agreement between two individuals as to the manner of the ultimate disposition of their property after both are deceased. The agreement and the will may be combined in one document. Once the survivor elects to take under the provisions of such a will, he is not free to avoid the obligation to dispose of his property as previously agreed. The existence of the parties' contractual intention is a question for the trier of fact who must be persuaded to a high probability that the parties entered into such an agreement.¹⁰

The language of the decision indicating that the agreement and the will may be combined in one document is permissive. Stated differently, the

¹⁰ *Newell v. Ayers*, 23 Wn. App. 767, 769-70, 598 P.2d 3 (1979), citing *Auger v. Shideler*, 23 Wn.2d 505, 161 P.2d 200 (1945), *Arnold v. Beckman*, 74 Wn.2d 836, 447 P.2d 184 (1968), *In re Estate of Richardson*, 11 Wn. App. 758, 760-62, 525 P.2d 816 (1974).

agreement to make mutual wills need not be contained in the will.

Washington law recognizes that contracts to make mutual wills are valid, and such contracts may be specifically enforced.¹¹ Portmann's petition seeks specific performance of Cross' contractual obligations, as manifested in Cross' will of January 5, 1998.

As with any contract, a contract to make mutual wills must be supported by consideration. "Mutual promises to devise by will are sufficient consideration to sustain such a contract."¹² "The mutual promises would constitute the consideration for the agreement, and the making of each will would be the consideration for the making of the other."¹³ In this case, consideration went far beyond mere promises. Morse and Cross abandoned their practice of taking title to real property as tenants in common and instead chose to take title jointly with right of survivorship, thereby vesting each other with an immediate interest.

5. Dissimilar specific bequests in the partners' wills do not destroy the mutuality of provisions regarding distribution of the joint residual estate.

Nothing in Washington case law requires mutual wills to be precisely identical. In evaluating two decedents' wills in *Cummings v.*

¹¹ *Allen v. Dillard*, 15 Wn.2d 35, 44, 129 P.2d 813 (1942).

¹² *Raab v. Wallerich*, 46 Wn.2d 375,382, 282 P.2d 271 (1955).

¹³ *Auger v. Shideler*, 23 Wn.2d 505, 511, 161 P.2d 200 (1945).

Sherman,¹⁴ the court observed: “The wills were alike in all *essential* details.”¹⁵ The central feature of mutual wills is that each testator agrees not to change the distributive scheme if that testator turns out to be the survivor. Nothing prevents the testators from agreeing to different distributive schemes when they make mutual wills. For example, one testator may agree to leave the estate to A, B, and C, while the other testator agrees to leave the estate to D, E, and F. By this plan the testators achieve the purpose of their agreement: to be certain that the odious G will never benefit from a survivor’s estate. In most, if not all, contracts, the performance of one party differs from the other’s; one party provides a pig in exchange for a load of firewood from the other party.

When distributions expressed in mutual wills are not identical, it may be more difficult to recognize them as mutual, absent an explicit writing which identifies the wills as the product of an agreement. But when two testators’ plans resemble each other in significant ways, a reasonable inference of mutuality arises.

In each pair of the Cross/Morse wills, the testator made specific bequests of personal property, with the residue of the estate going to the

¹⁴ *Cummings v. Sherman*, 16 Wn.2d 88, 132 P.2d 998 (1943).

¹⁵ *Id.* at 90 (emphasis supplied).

survivor.¹⁶ In each pair of wills, if the testator turned out to be the survivor, he made specific bequests of fine art *identical* to the other testator's bequests. If the testator turned out to be the survivor, he left a significant fraction of the estate to his partner's family. With the passage of time and the relationship proving ever more durable, by 1998 wills of the two men expressed precisely identical schemes for distributing the survivor's estate: one-half of the residue to Morse's family, and one-half of the residue to Cross' family. The 1998 wills were in effect at the time of Morse's death. Arguably, Cross could have rejected the benefit of Morse's will but he chose to accept and did in fact accept the benefit of Morse's will.

There is -- at the very least -- a reasonable inference of contractual intent to be drawn from the striking similarity of their estate plans. As the nonmoving party Portmann was entitled to the benefit of the reasonable inference that these similarities were not mere happenstance. As the nonmoving party Portmann was entitled to the benefit of the reasonable inference that Morse and Cross deliberately planned mutual and beneficial bequests of the jointly earned residual estate.

When determining a testator's intent, pertinent circumstances must be considered. Our Supreme Court observed:

¹⁶ The tables appearing as an appendix (CP 149-51) show the strikingly similar distributive schemes of the Cross and Morse wills.

Because a testator employs language in the will with regard to facts within his knowledge, the court must consider *all the surrounding circumstances*, the objects sought to be obtained, the testator's relationship to the parties named in the will, his disposition as evidenced by provisions to be made for them and the *general trend of his benevolences* as disclosed by the testament. It will be presumed that the testator was familiar with the surrounding circumstances which could affect the construction materially, such as the value of his property. Although a will speaks as of the date of the testator's death, the testator's intentions, as viewed through the surrounding circumstances and language, are determined as of the time of the execution of the will.¹⁷

The trial court erred when it failed to consider many circumstances surrounding the execution of the wills by Cross and Morse. Of great importance, the trial court denied Portmann the benefit of the inferences from the general trend of the benevolences. The circumstances of the Cross/Morse relationship, their ever-increasing interaction with members of each other's families, and the trend of their wills in 1992, 1995, and 1998 are among the surrounding circumstances which a court must consider, according to the *Bergau* court. As their relationship became enduring, as the love for members of each other's family increased, a trend in the provisions for division and distribution of the residual estate of upon the death of the last surviving partner moved constantly toward and eventually achieved equalization.

¹⁷ *In re Estate of Bergau*, 103 Wn.2d 431, 436, 693 P.2d 703 (1985) (emphasis supplied, citations omitted).

The circumstances and trend of benevolences, viewed in a light most favorable to Portmann as nonmoving party, necessitated denial of the motion for summary judgment. Because Portmann knew and respected “Uncle Don and Uncle Glenn,” to Portmann it is unquestionable that Cross and Morse loved each other and wanted to equally benefit their respective families. What is clear to Portmann may not be clear under the sharp scrutiny of the Court. If a fair reading of the wills did not clearly reflect the testators’ joint intent create binding mutuality, then on summary judgment the wills must be regarded as ambiguous. The law addresses treatment of ambiguous language on summary judgment. The *Bergau* court continued:

To control the admissibility of extrinsic evidence, courts have defined species of ambiguities. The distinction between a latent and a patent ambiguity has traditionally been made. A latent ambiguity is one that is not apparent upon the face of the instrument alone but which becomes apparent when applying the instrument to the facts as they exist.¹⁸

If the language of the will did not expressly establish mutuality, then the trial court should have recognized the latent ambiguity and considered a general trend of benevolences, the manner of taking title, the testimony of family members, and the fact that Cross did not abruptly eliminate the residuary bequest to Morse’s family but honored it after

¹⁸ *Id.*

Morse died and then, only after the passage of years, eroded then dishonored his pact with his life partner. Accordingly, the trial court should have considered surrounding circumstances, the change in the manner of taking title to real property, and the testimony of the witnesses who knew Cross and Morse. If considered in the light most favorable to Portmann, summary disposition was improper.

6. The existence of ‘Plan B’ in the Cross and Morse wills demonstrates their mutuality.

Attorney Gaylerd Masters stated in his declaration that he counseled Morse and Cross and drafted their 1992, 1995, and 1998 wills. CP 108-10. Masters remarked in his declaration: “They both made it clear to me that the last *one living (Mr. Morse or Mr. Cross)* would be able to give his money to anyone he wanted *after the first one died.*” CP 108 (emphasis in original). “They were very adamant and it was important to each of them to be free to do as they pleased with their resources – especially after one of them passed away.” CP 112. The trial court impermissibly weighed evidence on summary judgment and accepted Master’s characterization that *it was important to each of them to be free.* However, Master’s testimony is inconsistent with all other evidence.

If Masters is correct that Morse and Cross wanted to be “free” to do as they wished, and for the survivor to give his money to anyone after the first one died, it would have been unnecessary to structure distinctively different distributive schemes in the wills; Plan A for distribution if the testator is the first to die, and Plan B if the testator is the survivor. Stated differently, if the first to die had no concern whether any part his hard earned residual estate ever reached his family, then it would have been sufficient to leave the entire residual estate to the surviving partner.

The following example illustrates how the Plan A / Plan B structure works. Sections 6(A)-(C) of Cross’ will of January 5, 1998 (CP 71-75) included bequests of cash to his two sisters, and left the residue to Morse. CP 72. After listing those gifts, the will continued:

D. If GLEN ARTHUR MORSE predeceases me or he does not so survive my death by thirty (30) days, then the bequests indicated above to GLEN ARTHUR MORSE shall lapse, and the specific cash bequests indicated above for my two sisters, DONNA WARTER and SALLY HERARD, shall not be given to them so that my estate can be distributed as follows: CP 72-73.

The will then lists a gift of fine art to Marvin and Sally Herard, with the rest of the survivor’s estate left as described in the previous section: one-half to members of Cross’ family (Donna Warner and Sally Herard), and one-half to members of Morse’s family (Minnie Campbell, Darlene Portmann, Eric Portmann, and Frank Portmann).

Section 6(D) of the will, quoted above, revokes entirely the bequests expressed in Sections 6(A)-(C), and substitutes a different scheme. As described by Attorney Masters, Sections 6(A)-(C) constitute Plan A (the plan if Cross dies before Morse), and Section 6(D) constitutes Plan B (the plan if Cross survives Morse). Plan B does not *supplement* Plan A, it *replaces* Plan A.

If, as Masters stated in his declaration, Morse and Cross wanted the survivor “to be able to give his money to anyone after the first one died” (CP 108), it would not be necessary to revoke Plan A. As the beneficiary of the residue of the partner’s estate, with no further restrictions expressed, the survivor could bequeath to anyone. The survivor would then enjoy unlimited freedom with the jointly earned estate, but that is not how the wills were drafted or executed.

Because a court must give effect to every part of a will,¹⁹ Plan B must not be treated as surplusage. It should be treated as the objective manifestation of an agreement between Cross and Morse about how the residual estate shall be distributed upon the survivor’s death.

Curiously, in Morse’s will of September 18, 1998 (CP 77-81), Plan A is not revoked if Morse survives Cross. In this respect it differs from the other wills of Cross and Morse executed in 1992, 1995, and 1998. But, as

¹⁹ *Welter v. Seattle First Nat’l Bank*, 25 Wn.2d 286, 290, 170 P.2d 867 (1946).

with Cross' 1998 will, Morse's 1998 will divides the residue of the survivor's estate equally between the two families. As discussed in the previous section of this brief, mutual wills need not be perfect reflections. The differences between the 1998 wills of Morse and Cross do not destroy their mutuality.

The unavoidable inference from the decision of Cross and Morse to include Plan B is that the two partners agreed to a specific plan for distribution of property after both had died.

7. After Morse's death, Cross continued to honor his promise to Morse, but with the passage of time his commitment to the agreed distribution of the joint residual estate gradually eroded and he unlawfully abandoned his obligation.

Following Morse's death in 2000, Cross returned to Attorney Masters' office and executed wills in 2002, 2005, and 2010. CP110. In the 2002 will (CP 83-87) Cross reduced the portion of residue going to members of Morse's family from 50 percent (as expressed in his 1998 will) to 30 percent, while leaving 70 percent to his two sisters. In the 2005 will (CP 91-95), Cross further reduced the share of residue left to Morse's family. The 2005 will divides the residue into nine equal shares, with one share left to Morse's family and eight shares left to Cross' family. CP 92-93. The wills executed in 2010 by Cross (CP 97-100 and 102-05) leave 100 percent of the estate to Sally Herard. CP 98 and 103.

Each of the wills executed by Cross after Morse's death nibbled away at the legacy planned for the Morse family. It is reasonable to infer that in 2002 and 2005, relatively soon after Morse's death, Cross included gifts to Morse's family because he recognized an obligation arising from an agreement with his life partner of 35 years. It is reasonable to infer that if Cross never recognized an obligation, he would not have included *any* gift to Morse's family in the 2002 and 2005 wills. These circumstances imply the agreement between Morse and Cross to make mutual wills, and their lives substantiated this objective.

8. Substituting joint ownership of real property for ownership as tenants in common was immediate and irrevocable consideration for the agreement to distribute the joint residual estate.

Real property constituted a portion of the assets owned by Cross and Morse. According to Portmann's declaration, the men got their start when Morse inherited a Kent Valley farm during the mid-1960s. CP 245. With the proceeds of the farm's sale, Morse purchased an apartment building in Seattle during 1967. CP 245. The apartment building was held by "Glen A. Morse, a single man," according to the conveyance documents. CP 228-29. Thereafter, as they would sell one property to purchase the next, they took title in both names. Copies of the deeds appear at CP 232-43, and the granting language of the deeds is summarized in a table appearing at CP 142. According to the deeds, the

two men held the properties acquired in 1971 and 1977 as tenants in common. As their relationship proved increasingly durable, they ceased taking title as tenants in common and acquired new properties in 1986, 1988, and 1995 as joint tenants with right of survivorship.

As tenants in common during the early years of the relationship, each owned a separate estate in the properties. To the extent that their separate estates may have been of unequal value, those estates were equalized when they became joint tenants in 1986. Because the farm inherited by Morse was the initial building block for their real-property acquisitions, it is reasonable to infer that Morse made a greater financial contribution to the venture than Cross. The substitution of joint tenancy for tenancy in common reflected absolute trust and reliance on the plan for distribution of the joint residual estate.

After agreeing to joint ownership of real property, Cross was estopped from stripping Morse's family of its share of the residual estate.

Equitable estoppel advances the "principle that man shall not be permitted to deny what he has once solemnly acknowledged" Application of the doctrine requires (1) acts, statements, or admissions inconsistent with a claim subsequently asserted; (2) action or change of position by another in reliance upon such acts, statements, or admissions; and (3) a resulting injustice to such other party if the first is allowed to contradict or repudiate his or her former acts, statements, or admissions. When applicable, equitable estoppel may preclude a party from

exercising a right which might otherwise have existed.²⁰

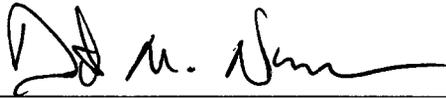
Under these circumstances, the shift from holding real property as tenants in common to holding real property jointly with right of survivorship is highly significant. It signifies a contribution of significant value to the joint estate, and each man's abandonment of property he could claim as his own separate and divisible estate. It is reasonable to infer from these facts that the contributions were part of the consideration given for their agreement to make mutual wills.

Conclusion

Portmann has not responded to Herard's summary judgment motion with mere conclusory statements. Portmann has offered facts tending to show the existence of an agreement to make mutual wills. Reasonable inferences from the facts should be construed in Portmann's favor. The facts and inferences, preclude summary judgment. This Court should vacate the orders of the trial court and remand the case for further proceedings under TEDRA.

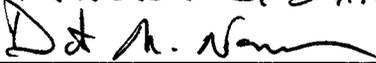
²⁰ *Syrovey v. Alpine Resources, Inc.*, 80 Wn. App. 50, 52-53, 906 P.2d 377 (1995), citing *Arnold v. Melani*, 75 Wn.2d 143, 147, 437 P.2d 908 (1968); *Witzel v. Tena*, 48 Wn.2d 628, 632, 295 P.2d 1115 (1956); *Carter v. Curlew Creamery Co.*, 16 Wn.2d 476, 491, 134 P.2d 66 (1943).

Respectfully submitted: MARCH 23, 2017



David M. Newman, WSBA #24113
Co-counsel for Appellant

APPROVED BY EMAIL MESSAGE



Nathan James Neiman, WSBA #8165
Co-counsel for Appellant

Certificate of Service

On March 23, 2017, I delivered a copy of the Brief of Appellant to Respondent's counsel, Heather Crawford, via email addressed to:

hc@balsamlaw.com

Counsel for the parties have stipulated to exchange of pleadings and correspondence via email.

I declare under penalty of perjury that the foregoing is true and correct. Signed at Bellevue, Washington, on the date written below.

MARCH 23, 2017
Date

David M. Newman
David M. Newman

APPENDIX

APPENDIX

1992 WILLS COMPARISON

GLEN MORSE (Exhibit 1)	DONALD CROSS (Exhibit 5)
<p>September 1992 PR: Donald Cross Alternate PR: Florence Pike Beetham</p> <p>-----</p> <p>\$50,000 to Ina McConnell (sister) \$15,000 to Minnie Campbell (sister) “Cleft 3” painting to Darlene Portmann (niece) Residue to Donald Cross</p> <p>-----</p> <p>If Morse survives Cross:</p> <p>“Totemic Cleft” painting to Florence Beetham “Goat/horse” urn to Estol W. Walz Marvin Herard art to Marvin Herard</p> <p>Residue:</p> <p>1/4 to Ina McConnell (sister) 1/4 to: Minnie Campbell (sister) Darlene Portmann (niece) Eric Portmann (gr-nephew)</p> <p>1/4 to: Donna Warter (Cross sister) Sally Herard (Cross sister)</p> <p>1/8 to Florence Pike Beetham</p> <p>1/8 to Childrens Hospital and Salvation Army</p>	<p>September 30, 1992 PR: Glen Morse Alternate PR: Florence Pike Beetham</p> <p>-----</p> <p>\$10,000 to Donna Warter (sister) \$10,000 to Sally Herard (sister) Residue to Glen Morse</p> <p>-----</p> <p>If Cross survives Morse:</p> <p>“Totemic Cleft” painting to Florence Beetham “Goat/horse” urn to Estol W. Walz Marvin Herard art to Marvin Herard</p> <p>Residue:</p> <p>1/4 to Ina McConnell (Morse sister) 1/8 to: Minnie Campbell (Morse sister) Darlene Portmann (Morse niece) Eric Portmann (Morse gr-nephew)</p> <p>1/4 to Donna Warter (sister) 1/4 to Sally Herard (sister)</p> <p>1/8 to Florence Pike Beetham</p>

1995 WILLS COMPARISON

GLEN MORSE (Exhibit 2)	DONALD CROSS (Exhibit 6)
<p>June 1995 PR: Donald Cross Alternate PR: Donna Warter (Cross sister)</p> <p>-----</p>	<p>June 15, 1995 PR: Glen Morse Alternate PR: Donna Warter (sister)</p> <p>-----</p>
<p>\$50,000 to Ina McConnell (sister) \$10,000 to Minnie Campbell (sister) "Cleft 3" painting to Darlene Portmann (niece) Residue to Donald Cross</p> <p>-----</p>	<p>\$10,000 to Donna Warter (sister) \$10,000 to Sally Herard (sister) Residue to Glen Morse</p> <p>-----</p>
<p>If Morse survives Cross:</p> <p>Marvin Herard art to Marvin and Sally Herard if Herards survive Cross, otherwise to Donna Warter</p>	<p>If Cross survives Morse:</p> <p>Marvin Herard art to Marvin and Sally Herard if Herards survive Cross, otherwise to Donna Warter</p>
<p>Residue:</p> <p>1/4 to Ina McConnell (sister) 1/4 to: Minnie Campbell (sister) & Darlene Portmann (niece) & Eric Portmann (gr-nephew)</p> <p>1/4 to: Donna Warter (Cross sister) & Sally Herard (Cross sister)</p> <p>1/8 to Union Gospel Mission</p> <p>1/8 to Children's Hospital and Salvation Army</p>	<p>Residue:</p> <p>1/4 to Ina McConnell (Morse sister) 1/8 to: Minnie Campbell (Morse sister) 1/8 to: Darlene Portmann (Morse niece) & Eric Portmann (Morse gr-nephew)</p> <p>1/4 to Donna Warter (sister) 1/4 to Sally Herard (sister)</p>

1998 WILLS COMPARISON

GLEN MORSE (not executed) (Exhibit 3)	GLEN MORSE (filed in PCSC) (Exhibit 4)	DONALD CROSS (Exhibit 7)
<p>January 1998 PR: Donald Cross Alternate PR: Gaylerd Masters</p> <p>-----</p> <p>\$12,500 to Minnie Campbell (sister) \$12,500 and "Cleft 3" painting to Darlene Portmann (niece) \$12,500 to Eric Portmann (gr-nephew) \$12,500 and grandfather clock to Frank Portmann (gr-nephew) Residue to Donald Cross</p> <p>-----</p> <p>If Morse survives Cross:</p> <p>Marvin Herard art to Marvin and Sally Herard</p> <p>Residue:</p> <p>1/2 to: Minnie Campbell (sister) & Darlene Portmann (niece) & Eric Portmann (gr-nephew) & Frank Portmann (gr-nephew)</p> <p>1/2 to: Donna Warter (Cross sister) & Sally Herard (Cross sister)</p>	<p>September 18, 1998 PR: Donald Cross Alternate PR: Gaylerd Masters</p> <p>-----</p> <p>\$25,000 to Minnie Campbell (sister) "Cleft 3" painting to Darlene Portmann (niece) \$3,000 to Eric Portmann (gr-nephew) Grandfather clock to Frank Portmann (gr-nephew) Residue to Donald Cross</p> <p>-----</p> <p>If Morse survives Cross:</p> <p>Marvin Herard art to Marvin and Sally Herard</p> <p>Residue:</p> <p>1/2 to: Minnie Campbell (sister) & Darlene Portmann (niece) & Eric Portmann (gr-nephew) & Frank Portmann (gr-nephew)</p> <p>1/2 to: Donna Warter (Cross sister) & Sally Herard (Cross sister)</p>	<p>January 5, 1998 PR: Glen Morse Alternate PR: Gaylerd Masters</p> <p>-----</p> <p>\$10,000 to Donna Warter (sister) \$10,000 to Sally Herard (sister) Residue to Glen Morse</p> <p>-----</p> <p>If Cross survives Morse:</p> <p>Marvin Herard art to Marvin and Sally Herard</p> <p>Residue:</p> <p>1/2 to: Minnie Campbell (Morse sister) & Darlene Portmann (Morse niece) & Eric Portmann (Morse gr-nephew) & Frank Portmann (Morse gr-nephew)</p> <p>1/4 to Donna Warter (sister) 1/4 to Sally Herard (sister)</p>

2002 AND LATER DONALD CROSS WILLS COMPARISON (GLEN MORSE DIES IN 2000)

DONALD CROSS (Exhibit 8)	DONALD CROSS (Exhibit 9)	DONALD CROSS (Exhibit 10)
<p>May 2, 2002 PR: Gaylerd Masters Alternate PR: Sally Herard -----</p>	<p>March 21, 2005 PR: Sally Herard Alternate PR: Marvin Herard -----</p>	<p>October 12, 2010 PR: Sally Herard Alternate PR: Marvin Herard -----</p>
<p>Marvin Herard art to Marvin and Sally Herard</p>	<p>Marvin Herard art to Marvin and Sally Herard</p>	<p>Residue: 100% to Sally Herard (sister)</p>
<p>Residue: 35% to Donna Warter (sister) 35% to Sally Herard (sister)</p>	<p>Residue: 1/9 to Sally Herard (sister) 1/9 to Alfredo Herard (nephew) 1/9 to David Herard (nephew)</p>	<p>DONALD CROSS (Exhibit 11)</p>
<p>30% to: Darlene Portmann (Morse niece) & Eric Portmann (Morse gr-nephew) & Frank Portmann (Morse gr-nephew)</p>	<p>1/9 to Martine Louie (niece) 1/9 to Craig Louie (Martine's son) 1/9 to Sherrie Pickle (niece) 1/9 to Bailey Pickle (Sherrie's daughter) 1/9 to Lynsey Pickle (Sherrie's daughter)</p>	<p>October 18, 2010 Admitted to probate August 20, 2015 PR: Sally Herard Alternate PR: Marvin Herard -----</p>
	<p>1/9 to Darlene Portmann (Morse niece) & Eric Portmann (Morse gr-nephew) & Frank Portmann (Morse gr-nephew)</p>	<p>Residue: 100% to Sally Herard (sister) (Identical to will executed 10-12-2010 except contingent beneficiary "Martine Louie" changed to "Martine Saphiloff")</p>

THE RAINIER LAW GROUP
May 05, 2017 - 9:49 AM
Transmittal Letter

Document Uploaded: 4-495635-2017.03.23 Appellant's Brief No. 49563-5-II.PDF

Case Name: Portmann v. Herard

Court of Appeals Case Number: 49563-5

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: _____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: Brief of Appellant corrected

Comments:

No Comments were entered.

Sender Name: Claudia Miernowski - Email: claudia.m@rainierlaw.com

A copy of this document has been emailed to the following addresses:

nneimail@aol.com
hc@balsamlaw.com