

No. 49563-5-II

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

FRANK PORTMAN, Appellant

v.

SALLY HERARD, Respondent

BRIEF OF RESPONDENT

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I. INTRODUCTION

Donald L. Cross (hereafter “Mr. Cross”) and Glen A. Morse (“Mr. Morse”) were in a same-sex relationship for a number of years. During their relationship, Messrs. Cross and Morse consulted with experienced estate-planning and probate attorney Gaylerd Masters (hereafter “attorney Masters”) for preparation of multiple wills between 1992 and 2010. Both parties executed multiple wills through Mr. Masters’ office. Mr. Morse predeceased Mr. Cross in 2000.

The son of Mr. Morse’s niece, Frank Portmann (hereafter “Mr. Portmann”), is contesting the probate of Mr. Cross’ will that was executed October 18, 2010. The will contest is based on the theory that Messrs. Cross and Morse had an oral contract regarding mutual, irrevocable wills in 1998 despite Mr. Cross executing his 1998 Will on January 5, 1998 and Mr. Morse not executing his until September 18, 1998.

Mr. Morse was present with Mr. Cross executed an updated will in January 1998. There is no evidence that indicates Messrs. Cross or Morse conveyed an agreement or plan to execute mutual, irrevocable wills to attorney Masters. In fact, attorney Masters testified that Mr. Morse waited until September 1998 to execute an updated will because he was unsure on the changes to the terms of his will when Mr. Cross signed his in January. The wills contain no language regarding a contract to execute mutual,

irrevocable wills and there is no admissible, persuasive testimony from any witness regarding this alleged oral contract.

Attorney Masters testified that he met with Messrs. Cross and Morse multiple times (both together and Mr. Morse alone) and they never expressed an intent to execute mutual, irrevocable wills. He further testified that it was their intent for the surviving party to do with his money as he wished, which precludes the inference that there was an oral contract between these men to execute mutual wills. Moreover, each of the Cross and Morse wills are different in several ways.

The 1998 wills were executed nine months apart because Mr. Morse was not sure how he wanted to disburse his estate when Mr. Cross executed his 1998 will on January 5. In 1998, Mr. Morse expressed his indecision to attorney Masters repeatedly as to how he wanted to update his will before signing a will on September 18, 1998. There is no evidence of a meeting of the minds by Messrs. Cross and Morse regarding an intent to execute mutual, irrevocable wills. Mr. Morse even attended Mr. Cross' will signing with attorney Masters on January 5, 1998 and delayed signing a draft of his will that day because he had not yet decided how he wanted to distribute his estate.

Much of the evidence presented by Mr. Portmann is barred by deadman's statute or hearsay and the remainder is irrelevant, speculative

and/or conclusory in nature. Oral contracts to make a will are disfavored in Washington. For that reason the burden to prove an oral contract to make an irrevocable will is high – conclusive, definite, certain and beyond all legitimate controversy. Mr. Portmann has failed to provide enough evidence to raise a genuine issue of material fact to overcome summary judgment on the will contest.

II. RESTATEMENT OF THE CASE

Messrs. Cross and Morse began living with one another in the 1960s. CP 36. Throughout their lives, the couple bought and remodeled residential properties; however, it was Respondent's/Sally Herard's ("Mrs. Herard's") belief that it was largely Mr. Cross' construction experience that allowed for the acquiring, remodeling and sale of real property. *Id.*

In 1992, Messrs. Cross and Morse met with attorney Masters' to engage him for preparation of wills. CP 108.

Per the Declaration of Gaylerd Masters, page 2, we know that Mr. Cross executed his 1992 will on September 30, 1992, as Mr. Masters' paper file for Mr. Cross still exists and he has an executed copy of the will. We do not know when Mr. Morse executed his 1992 will, as the paper file has been destroyed. Mr. Masters only has access to unsigned Word Perfect versions of Mr. Morse's 1992 will; therefore, we only know the year it was likely prepared and not the exact date it was executed. CP 107.

In those wills, Messrs. Cross and Morse made differing special bequests and named each other as the primary residual beneficiary. CP

108, 115, 176-180, 194-199. The alternate disposition of the special bequests and residuary differed between their 1992 wills. *Id.*

In 1995, Messrs. Cross and Mr. Morse went to attorney Masters again so each of them could revise their wills.¹ CP 108. Although Messrs. Cross and Morse named each other as the primary residual beneficiary, they made differing special and contingent residuary bequests. CP 181-184, 200-203. Mr. Morse bequeathed part of his contingent residuary estate to charities; however, Mr. Cross did not. *Id.*

On January 5, 1998, Messrs. Cross and Morse met with attorney Masters regarding updating their wills again. CP 108-109. Ultimately, Mr. Cross executed a revised will that day, but Mr. Morse was undecided on how he wanted to disburse his estate; therefore, he held off on executing a new will this day. *Id.* Therefore, arguably Mr. Morse's 1992 will remained valid until September 18, 1998 when he executed another will. In his January 5, 1998 will, Mr. Cross kept the primary special bequests and residuary disposition consistent with his 1995 will, but the alternate disposition of the estate changed. CP 204-208.

During 1998, Mr. Morse had contact with attorney Masters throughout the year because attorney Masters was helping Mr. Morse

¹ Per the same reasoning for the above explanation, we know Mr. Cross executed his 1995 will on June 15, 1995. We do not know the exact date Mr. Morse executed his 1995 will.

probate his sister's estate. CP 109-110. On more than one occasion, attorney Masters inquired with Mr. Morse regarding whether he was ready to update his 1995 will, and Mr. Morse held off for several months because he was undecided on the distribution of his estate. CP 109, 169.

On September 18, 1998, Mr. Morse met with attorney Masters and executed a revised will, which was the will that was ultimately probated when he passed away. CP 109-110. The special bequests in Mr. Morse's 1998 will differ from Mr. Crosses, as does the alternate disposition of the estate. CP 189-193, 204-208. The special bequests in Mr. Morse's 1998 will do not lapse if Mr. Cross predeceased him, while the special bequests in Mr. Cross' 1998 will lapse if Mr. Morse predeceased him. *Id.*

In 2000, Mr. Morse passed away. CP 37, 110. Mr. Cross was appointed the Personal Representative of Mr. Morse's estate. *Id.* The estate was administered via a Small Estate Affidavit in Pierce County. *Id.*

On May 2, 2002, Mr. Cross went to Mr. Masters and executed a will. CP 110, 209-213. It distributed his estate 35% to his sister Donna Warter, or to her daughter Sherrie Pickle should his sister not survive him, 35% to Mrs. Herard, or to her estate should she not survive him, and 30% to be divided equally to Darlene Portmann, Eric Portmann, and Mr. Portmann. *Id.*

Mr. Cross's sister, Donna Warter, passed away on February 8, 2005, leaving Mrs. Herard as his sole surviving sibling. CP 38, 89.

On March 21, 2005, Mr. Cross met with attorney Masters and executed a will. CP 214-218. It distributed his estate 1/9th to each of the following individuals: Mrs. Herard/Respondent, Alfredo Herard, David Herard, Martine Louie, Craig Louie, Sherrie Pickle, Bailey Pickle, Lynsey Pickle; and 1/9th divided equally among Darlene Portmann, Eric Portmann, and Frank Portmann/Petitioner. *Id.*

On October 12, 2010, Mr. Cross went to Mr. Masters and executed a will. CP 219-222. It distributed his estate solely to Mrs. Herard and if she did not survive him, to her husband, Marvin Herard. If both predeceased Mr. Cross, the alternate disposition was to the Herards' daughter, Martine Louie. *Id.*

On October 18, 2010, Mr. Cross went to Mr. Masters and executed a will. CP 224-227. The only change from the October 12, 2010 will was the correction of the alternate residual beneficiary's name: Martine Saphiloff. *Id.*

Mr. Cross made the 2010 changes to his will due to the fact that he wanted to simplify his estate planning, and he was closer to Mrs. Herard than his other relatives. CP 111. On August 20, 2015, Mr. Cross passed away. CP 39.

Mr. Cross and Mr. Morse never expressed any desire to execute mutual wills or enter into a contract to execute mutual wills during any of their appointments with attorney Masters, whether those appointments were together or separate. CP 106-113.

The Cross and Morse wills were not identical at any point and they did not contain any clause describing them to be mutual, irrevocable wills. Nor did Messrs. Cross or Morse ever convey an interest in having mutual wills during their long term relationship with attorney Masters. CP 113. Attorney Masters would not have agreed to revise Mr. Cross' wills after the death of Mr. Morse if they had expressed a desire for him to prepare mutual wills at any time during the seven years that he worked with them. *Id.*

III. ARGUMENT

A. Striking of Eric Pickle Declaration. In the Brief of Appellant (hereinafter "Brief"), Mr. Portmann alleges that the trial court erred in striking portions of the Eric Pickle declaration as being inadmissible under the deadman's statute or barred by hearsay. Brief, pp. 10-14. His argument is dependent on the conclusion that Mr. Pickle is not a party in interest and that the testimony should be allowed as an exception to the hearsay rule under ER 803(3).

In her oral ruling, Judge Martin stated the following with regard to the declarations filed in response to the Motion for Summary Judgment:

Largely, I think the declarations contain a lot of information that is really of no import. What happened with regard to the parties having interaction with each other, the two families, the graves, the flowers, all of that, I just do not find relevance. VR 29.

B. Standard for Review of Evidentiary Ruling. A trial court's decision to exclude evidence is reviewed by an appellate court for an abuse of discretion.²

A trial court abuses its discretion when the ruling is "manifestly unreasonable or based on untenable grounds or reasons." An error is harmless, and will not lead to reversal, if it is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case".³

C. Scope of Review. It is Mrs. Herard's position that the issue of striking Eric Pickle's declaration was not preserved for appeal because it was not objected to in the trial court. Since Mr. Portmann raised this issue for the first time on appeal, Mrs. Herard asks the appellate court to refuse to consider this issue in accord with RAP 2.5(a).

By way of background, Mr. Portmann filed the Eric Pickle declaration in response to the Motion for Summary Judgment. CP 253-

² *In re Estate of Hayes*, 185 Wn. App. 567, 595, 342, P.3d 1161 (2015) (citing *State v. Bourgeois*, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997)).

³ *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 311, 898 P.2d 284 (1995).

255. In her reply, Mrs. Herard objected to the Eric Pickle declaration because the testimony was hearsay, irrelevant, speculative, conclusory, and/or represented violations of the deadman's statute. CP 258-283. Mr. Portmann *never objected in writing* to the request to strike the Eric Pickle declaration.

Similarly, Mr. Portmann's counsel *never objected during oral argument* to the request to strike paragraphs of Eric Pickle's declaration. VR 12-25. In fact, during the summary judgment hearing, Mr. Portmann's counsel responded to the issue of striking the Eric Pickle declaration as follows:

Your Honor, the first thing I'd like to address is the declarations of Eric and Sherrie Pickle to which counsel has taken an exception.

What the Court should understand is that the declarations of Eric and Sherrie Pickle, even those portions that are – to which counsel has taken exception, *are not determinative of the outcome in this case*. If you ignore those declarations entirely, there is still insufficient (sic) evidence for us to prevail at summary judgment on this motion.”⁴ VR 12 (emphasis added).

Instead of objecting during oral argument, Mr. Portmann's attorney stated that the Pickle declarations are not determinative of the outcome in the case. Therefore, it is Mrs. Herard's position that the issue of striking

⁴ Counsel believes this line should read “sufficient” evidence as opposed to “insufficient”.

paragraphs of the Eric Pickle declaration was not raised in the trial and should not be addressed by the Court of Appeals. However, if the Court of Appeals disagrees with Mrs. Herard's position and does review this issue, Mr. Portmann's argument regarding the Eric Pickle declaration is not persuasive.

D. ER 803(3). In the Brief of Appellant, Mr. Portmann contends that it was manifestly unreasonable for Judge Martin to exclude paragraphs 5, 6, 7, 8, 9, 10 and 11 of the Eric Pickle declaration. Mr. Portmann bases his argument on the hearsay exception under ER 803(3), which provides that:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. ER 803(3).

Respondent will address each excluded paragraph of the Eric Pickle declaration as it pertains to ER 803(3).

Paragraphs 5 and 6: These paragraphs provide irrelevant information and there are no statements that would be allowed as a hearsay exception under ER 803(3). The Pickle statements in this paragraph address Mrs. Herard's alleged probing into what would happen

with Mr. Cross' assets if he passed away. There are no statements by the deceased that provide information regarding execution, revocation, identification, or terms of declarant's will as contemplated by ER 803(3).

Paragraph 7: In sum, the testimony of Eric Pickle in this paragraph relates to three issues: (1) Mr. Pickle's opinion that "it was no surprise when Don and Glen started drafting up new wills a few months later" [after Mrs. Herard allegedly probed into Mr. Cross' affairs], (2) Mr. Pickle's "understanding" of the alternate residuary scheme of Mr. Cross January 5, 1998 Will, and (3) Mr. Pickle's alleged familiarity with "Don and Glen's agreement in their plans".

None of the wills admitted into evidence have any statements supporting a contract between Messrs. Cross and Morse regarding mutual, irrevocable wills; therefore, it is curious how Mr. Pickle was able to arrive at an opinion or "understanding" that it Messrs. Cross and Morse had an agreement to make mutual, irrevocable wills after reading Mr. Cross' January 5, 1998 will.

Mr. Pickle's "understanding" is irrelevant to the issue of an oral contract to make mutual wills so it was not manifestly unreasonable for the Superior Court Judge to strike this paragraph of the declaration. Moreover, there are no statements in this paragraph that should have been admitted under ER 803(3), as an exception to the hearsay rule.

Paragraph 8: In paragraph 8, Mr. Pickle alleges that Messrs. Cross and Morse “emphasized” their plan that half of the survivor’s estate would go to the other’s family members. The wills admitted into evidence do not support this statement. There is only one executed will of Mr. Morse in evidence and six executed wills of Mr. Cross. CP 176-193.

In Mr. Morse’s 1992 and 1995 unsigned wills he gives part of his alternate residuary estate to charities – not half to Mr. Cross’ survivors as alleged by Mr. Pickle in paragraph 8 of his declaration. Although we do not have an executed copy of Mr. Morse’s 1995 will, his bequests to charities would have been valid until he signed a will in September 1998 (nine months after Mr. Cross) and therefore, Mr. Pickle’s statement does not support the theory that Messrs. Cross and Morse had an oral contract to execute mutual, irrevocable wills with one-half going to the survivor’s family.

Similarly, this premise is not supported in the record, especially in light of the nine-month gap in time that Mr. Morse needed to determine what to do with his estate. CP 108-110. Also, if you compare the two executed 1998 wills, they do not support this alleged plan between Messrs. Cross and Morse because the special bequests in Mr. Morse’s 1998 will stand even if Mr. Cross predeceases him, which impacts the alternate residuary distributions in his will and ultimately counters the idea that

these men had an agreement to execute mutual, irrevocable wills wherein the survivor would give one-half of his residuary estate to the other's family. CP 189-193, 204-208.

Paragraph 9: The statement made by Mr. Pickle in that paragraph is irrelevant to a contract to execute mutual, irrevocable wills. Even if Messrs. Cross and Morse stated they did not want anyone to “frustrate” their estate plans”, this does not represent a statement admissible under ER 803(3) that would prove there was a material issue of fact with regard to an oral contract to make mutual, irrevocable wills.

Paragraph 11: Mr. Pickle's testimony in paragraph 11 represents his opinion and not a statement from either decedent that should be admitted into evidence as to their state of mind related to execution, revocation, identification or terms of the declarant's will under ER 803(3).

In sum, the issue of striking paragraphs 5, 6, 7, 8, 9, 10, and 11 of Eric Pickle's declaration was not preserved for appellate review and even if it was, Mr. Portmann's argument fails for the reasons stated above. In addition, even if it was error to strike the paragraphs of Eric Pickle's declaration, it was harmless error because Mr. Portmann has not raised any genuine issue of material fact regarding an oral contract between Messrs. Cross and Morse to make a mutual, irrevocable wills.

E. Summary Judgment. On summary judgment, the Court of Appeals engages in the same inquiry as the trial court.”⁵ Summary judgment is proper if the pleadings, affidavits, depositions, and admissions before the court 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.⁶ The court must view the evidence and make all reasonable inferences in the light most favorable to the non-moving party.⁷

A party may move for summary judgment by: (1) setting out its own version of the facts and alleging that there is no genuine issue as to the facts as set out, or (2) by pointing out that the nonmoving party lacks sufficient evidence to support its case.⁸

If the moving party satisfies its burden, the nonmoving party must present evidence demonstrating that a material fact remains in dispute.⁹

The nonmoving party may not rest on mere allegations or denials from the pleadings.¹⁰ The response, by affidavits or as otherwise provided under

⁵ *Volk v. DeMeerleer*, 187 Wn.2d 241, 254, 386 P.3d 254 (2016).

⁶ *Ray v. Cyr*, 17 Wn. App. 825, 565 P.2d 817 (1977); *Kruse v. Hemp*, 121 Wn.2d 715, 853 P.2d 1373 (1993).

⁷ *Id.* at 826.

⁸ *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 350, 144 P.3d 276 (2006); *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 689 (1993).

⁹ *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

¹⁰ CR 56(c) (emphasis added).

CR 56, must set forth specific facts that reveal a genuine issue for trial.¹¹

“[C]onclusory statements of fact will not suffice.”¹²

“[A] complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.”¹³ If the nonmoving party fails to demonstrate that a material fact remains in dispute, and reasonable persons could reach but one conclusion from all the evidence, then summary judgment is proper.¹⁴

In this case, Mr. Portmann’s case is based on the theory that Messrs. Cross and Morse had entered into a contract to execute mutual, irrevocable wills.

Contracts to make mutual wills are recognized under Washington law as valid and, when *sufficient facts* are proven by *competent evidence*, such contracts may be specifically enforced. In principle, such contracts bear great similarity to agreements to devise or bequeath property in return for services to be rendered to the testator, or for more some similar consideration moving to him.

If there has been no attempted revocation by either party during the lifetime of both...courts generally will enforce such contracts, if a valid agreement is proven; and it is the general rule that a party or a beneficiary to such a contract may maintain a suit for specific performance or some other appropriate relief.

Because, however, of the great opportunity for fraud, and because of reluctance on the part of courts to render

¹¹ *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

¹² *Id.* at 360 (emphasis added).

¹³ *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

¹⁴ *Vallandigham*, 154 Wn.2d at 26.

ineffective a subsequent will of a testator, the contract to make mutual wills must be established by clear and convincing evidence.¹⁵

In this case, there is no specific provision in any of the wills executed by Messrs. Cross and Morse indicating that they intended to execute mutual, irrevocable wills. Thus, Mr. Portmann's claim is based on the premise that Messrs. Cross and Morse entered into an oral contract to execute mutual wills.

Oral contracts to make a will or devise property are not favored in Washington State.¹⁶ Such agreements are "regarded with suspicion and will be enforced only on the strongest evidence that they are founded upon valuable consideration and deliberately entered into by the decedent."¹⁷

The proponent of the contract, in this case Mr. Portmann, has the burden of proving its existence.¹⁸ A high degree of proof is required to support an oral contract to make mutual, irrevocable wills.¹⁹ The burden of proof must be met by evidence which is conclusive, definite, certain, and beyond all legitimate controversy.²⁰

¹⁵ *Cummings v. Sherman*, 16 Wn.2d 88, 92, 132 P.2d 998 (1943) (citations omitted) (emphasis added).

¹⁶ Thomas R. Andrews, et al., *Washington Probate Deskbook*, (Wash. State Bar Assoc. 2005), pp. 9-27.

¹⁷ *Thompson v. Henderson*, 22 Wn.App. 373, 375, 591 P.2d 784 (1979) (emphasis added).

¹⁸ *Resor v. Schaefer*, 193 Wash. 91, 74 P.2d 917 (1937).

¹⁹ *Arnold v. Beckman*, 74 Wn.2d 836, 447 P.2d 184, 187 (1968).

²⁰ *Id.*, (citing *Jennings v. D'Hooghe*, 25 Wn2d 702, 172 P.2d 189 (1946)).

There is often confusion between a reciprocal will and mutual will. Couples can execute reciprocal wills, in which they devise and bequeath their property to each other, trusting the survivor to make provisions for children or other objects of their bounty, with no intention that the wills shall be mutual in the sense that neither will can be revoked without the consent of the other, or after the death of the one of the individuals.²¹ In fact, the general rule for lawyers preparing wills is to prepare reciprocal wills that are revocable and only occasionally do the couples desire to actually create mutual wills that are irrevocable.²²

In his Brief, Mr. Portmann repeatedly asserts that summary judgment was improper as he contends the court failed to draw proper inferences from his evidence. Actually Mr. Portmann's case is totally dependent on inferences and lacks any true basis in fact.

F. Similar Wills. In the Brief, Mr. Portman maintains that the Court should make a reasonable inference of contractual intent to execute mutual, irrevocable wills based on the similarity in the wills executed by Messrs. Morse and Cross. Brief, pp. 15-18.

Citing to *Cummings v. Sherman*,²³ Mr. Portmann argues that the court erred by not inferring a genuine issue of material fact regarding an

²¹ *Auger v. Shideler*, 23 Wn.2d 505, 161 P.2d 200, 202 (1945).

²² *Id.*

²³ 16 Wn.2d 88, 132 P.2d 998 (1943).

oral contract to make mutual, irrevocable wills because the wills are “alike in all essential details”.²⁴ Mrs. Herard questions whether this is even authority, as it is not a holding in that matter, but just a statement in the fact section of the opinion.²⁵

In addition, this statement is totally taken out of context as the *Cummings* matter is significantly different as the two wills in question there referenced one another and the drafting attorney testified that it was the intent of the deceased husband and wife to enter into an oral contract to execute mutual, irrevocable wills.²⁶ Those facts are distinctly different from this matter, as attorney Masters testified that Messrs. Cross and Morse never expressed an intention to enter into a contract to execute mutual, irrevocable wills. CP 113. Thus, Mr. Portmann’s reliance on the *Cummings* matter as authority supporting the theory of mutual, irrevocable wills is misplaced.

G. Surrounding Pertinent Circumstances and Ambiguities.

Mr. Portmann relies on the case *In re Estate of Bergau*²⁷ for two premises. First, he contends that the court erred by not looking at the surrounding circumstances (similar wills and general trend of benevolences) to conclude that there was a contract between Messrs. Cross and Morse to

²⁴ Appellant’s Brief, page 16; *Cummings* at 90.

²⁵ *Id.*

²⁶ *Id.* at 90-94.

²⁷ 103 Wn.2d 431, 693, P.2d 703 (1985).

execute mutual, irrevocable wills. Second, he argues that the Cross and Morse wills were ambiguous, so the court erred by not considering extrinsic evidence to resolve the ambiguity.

It is necessary to understand the facts of the *Bergau* matter to determine whether it is applicable persuasive authority to the case at hand. The *Bergau* matter is not an oral contract/mutual wills case, but a case where the language of a will was ambiguous because the testator gave a beneficiary the option of purchasing land at 110% of fair market value.²⁸ The term “fair market value” could not be determined from the language of the will as fair market value could have had several connotations in that case due to a change in assessment practices.²⁹ Thus, in that matter, the court looked at the surrounding circumstances and admitted extrinsic evidence to resolve an ambiguity in interpreting the will, not to prove an alleged oral contract.

The primary duty of a court called upon to interpret a will is to ascertain the intent of the testator. While a will speaks at the time 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.³⁰

If possible, the testator's intent should be derived from the four corners of the will and the will must be considered in its entirety. When, after reading the will in its entirety, any

²⁸ *Id.* at 433.

²⁹ *See Id.* at 433-444.

³⁰ *In re Estate of Mell*, 105 Wn.2d 518, 524, 716 P.2d 836 (1986).

uncertainty arises about the testator's intent, extrinsic evidence...may be admitted to explain and resolve the ambiguity.³¹

The testator is presumed to be familiar with the surrounding circumstances that could affect the wills construction.³²

Mr. Portmann provides no authority for the proposition that the court should draw an inference that there was an oral contract because Messrs. Cross and Morse had similar wills or from their "trend of benevolences". In 1992 and 1995, evidence shows that Mr. Morse likely bequeathed part of his alternate residuary to charities, while Mr. Cross never designated a charitable beneficiary in his wills.

The 1998 wills in question were not even executed at the same time or in close proximity. Likewise, the parties *lack* of an oral contract is evident from their interactions with Mr. Masters during 1998:

Q. Did you always meet with Mr. Morse and Mr. Cross together? Or were there some meetings where one attended but not the other?

A. At the last will that he did, they both came in January. And Don signed his will then, and Glen didn't want to. He (Glen) wanted to think more about it.

And then in – he was doing his – Glen was doing his sister's probate, and I was helping him with that probate. So I was in contact with Glen about what was going on with the probate and all those procedures.

³¹ *Id.*

³² *In re Estate of Price*, 73 Wn. App. 745, 754, 871 P.2d 1079 (1994) (citation omitted).

And I kept saying, you know, “Do you want to finish your will? Don did his, but you were still thinking about it as to who and what and whatnot.” And he (Glen) goes, “Yeah. I need to do that.”

And when we were ready to wrap up his sister’s probate and do the declaration of completion and all those documents, I reminded him again, you know, “Are you fine the way your will was? Do you want to change it? You know, I redid the draft back in January.” And he (Glen) said, “Let me think about it.”

And so he came in by himself a few weeks later, and we polished up his will. I printed it out and signed it and witnessed it. And he was by himself on those occasions. CP 267-268.

Q. When Mr. Morse was attending those meetings regarding the McConnell estate, did you have conversations about his estate plan or Mr. Cross’s estate plan?

A. His, only because they both came in earlier in the year and I put up – you know, we worked on drafts. And he said, “I want to think about this.”

And so because it was kind of undone, I asked him, “Do you want to finish? What do you want to do? If you don’t change it, your prior will is the one that counts. If you are going to change it, it needs to be signed and properly executed. So you decide and let me know. CP 269-270.

...He just knew that he wanted some changes made, and he expressed that, but he wasn’t sure what changes he wanted made. He said, “I need to think about whether I want this person or that person.” It was a beneficiary, I think, decision-making that he needed to do. CP 270.

...But later, like I said, in August, he came back for the probate. We discussed it. And in September, we pulled it up. And I did the exact same thing, “Is that what you want?” Print and sign. CP 276.

Q. Mr. Cross was present while you were making the revisions you described for Mr. Morse's will?

A. In the January meeting. But Don was not there in August or the September when Glen signed that will. CP 276.

Q. Got it. In the January meeting, was Mr. Morse present while you were making changes the changes on Mr. Cross's?

A. Yeah. Both men were seated in my office. Both men watched me do the one, and then both men watched me do the other. CP 276.

Although the 1998 wills are similar, they are not exact mirror images of each other and lack any language of mutual promises. In 1998, Mr. Cross will gave \$10,000 each to his sisters and the remainder to Mr. Morse if he survived him by 30 days, while Mr. Morse gave \$25,000 to Minnie Campbell a painting and necklace to Darlene Portmann, grandfather clock to Eric Portmann and \$3,000 to Eric Portmann. CP 189-190, 205-206. The language of the alternate residuary distribution is similar, yet Mr. Cross' special bequests stood even if Mr. Morse predeceased him, which ultimately impacted the similar alternate residuary clauses. *Id.*

The bottom line is that there is no authority supporting the idea that similar wills rise to the level of creating a genuine issue of material fact as to an oral contract. Here the ultimate burden is on Mr. Portmann to produce evidence which is conclusive, definite, certain and beyond all

legitimate controversy. On summary judgment he has to put forth evidence that raises a genuine issue of material fact, and he has not done so.

There are no ambiguities in the Morse and Cross wills that were executed in 1998 and counsel for Mrs. Herard could not locate authority to determine to what extent the line of cases interpreting testator's intent in an ambiguous will case apply to this matter. But, nonetheless, here the drafting attorney testified that he met with Messrs. Cross and Morse on several occasions to prepare and revise wills before Mr. Morse passed away. Attorney Masters confirmed that the men never discussed any desire to have mutual, irrevocable wills. Attorney Masters was familiar with mutual wills and had had experience with them with several clients. Messrs. Cross and Morse felt strongly that the sole surviving heir be able to do as he pleased with his inheritance. CP 108, 112-113.

Evidence showed that it was important to the deceased that one another was supported during his life. Attorney Masters further testified that if Messrs. Cross and Morse ever expressed a desire to execute mutual, irrevocable wills between 1992 and 1998, he would never have prepared additional wills for Mr. Cross after Mr. Morse passed away. CP 113.

The overwhelming amount of admissible evidence supports the fact that there was never a contract between Messrs. Cross and Morse to

execute mutual, irrevocable wills. If you apply the authority in *Mell*, that intent is determined at the time of execution of the will, all of the inferences Mr. Portmann asks the court to make related to periods of time outside of execution should be disregarded. Mr. Portmann's position that the court should infer that the deceased changed the manner in which they held title to property because it was consideration for a contract suggests that these men were well versed in property issues and would have raised the issue of their intent to have a contract to execute mutual wills to their attorney whom they had had a relationship for several years, had they indeed reached such an agreement.

Although it is questionable to what extent the surrounding circumstances are relevant to this matter, it is clear that the wills were not ambiguous, but for Mr. Portmann's allegation that there was a contract to execute mutual wills, so there was no reason for the court to look any further than the actual wills. Even if you look to extrinsic evidence, Mr. Portmann has not provided any evidence of a genuine issue of material fact on the oral contract mutuality issue.

H. Plan A and Plan B. Mr. Portmann contends that the existence of a "Plan B" in the Cross and Morse wills is evidence of mutuality from which the court should conclude that there was an oral contract between the deceased. Brief, pp. 20-22. Mr. Portmann has read

way too much into attorney Masters' testimony regarding "Plan A" and "Plan B".

During his deposition, attorney Masters coined the term "Plan A" for the primary bequests (special and residue) and "Plan B" when referring to the alternate bequests in the deceaseds' wills. Attorney Masters references to "Plan A" and "Plan B" were not unique to the wills he drafted for Messrs. Cross and Morse, but was just a term of reference. I think it's safe to assume that you could locate a "Plan A" and "Plan B" in almost every, if not every, will. Therefore, there was no significance to this term and the court did not err by not inferring an oral contract to execute mutual, irrevocable wills based on attorney Masters reference to a "Plan A" and "Plan B".

Mr. Portmann argues that the trial court improperly weighed attorney Masters' testimony that Messrs. Cross and Morse wanted the survivor to do as he wished with any inheritance. There is nothing in the record that shows how much weight the trial court gave to this testimony; therefore, this argument fails on that alone. In addition, attorney Masters' testimony is consistent with the evidence and the fact that there was never an oral contract between the deceased regarding mutual wills.

IV. CONCLUSION

In the Brief, Mr. Portmann asks the court repeatedly to make inferences because he has no evidence which raises a genuine issue of material fact with regard to an oral contract.

Oral contracts to execute mutual wills are disfavored in Washington due to the opportunity for fraud and the reluctance on the part of the court to render ineffective a subsequent will of a testator, which is why the burden of proof on the proponent of an oral contract to execute a mutual, irrevocable will requires evidence which is conclusive, definite, certain, and beyond all legitimate controversy.³³ Similarly, there must be evidence of valuable consideration and that the parties deliberately entered into the contract.³⁴

Mr. Portmann's contentions are not grounded in fact and are presented in declarations barred by hearsay. Summary judgment cannot be avoided with speculative, conclusory statements, but must be supported by evidence which raises a genuine issue of material fact.³⁵

Even if the court admits Eric Pickle's declaration, it does not raise a genuine issue of material fact in light of the language of the wills and testimony of experienced estate-planning attorney, Gaylerd Masters, who

³³ *Arnold*, 74 Wn.2d at 841(citation omitted).

³⁴ *Thompson*, 22 Wn. App. at 375.

³⁵ *Grimwood*, 110 Wn.2d at 359.

had a continuing relationship with Messrs. Cross and Morse from 1992 to 1998. Similarly, the evidence supports the idea that had Messrs. Cross and Morse entered into an oral contract, they would have conveyed this information to attorney Masters and the idea of an oral contract would not have to be inferred from speculative, hearsay statements of Mr. Morse's distant family.

RAP 18.1(a) authorizes an award of attorney's fees and costs on appeal if applicable law grants to the party the right to recover reasonable attorney fees. Here, RCW 11.48.210 and 11.96A.150 both support an award of attorney fees and costs from Mr. Portmann to reimburse Mrs. Herard or the Estate of Donald Cross for attorney's fees and costs incurred in defending this appeal. Based on this authority, Mrs. Herard requests an order requiring Mr. Portmann to reimburse the Estate of Donald Cross for all attorney fees and costs related to this appeal.

RESPECTFULLY SUBMITTED this 23 day of May, 2017.



HEATHER L. CRAWFORD, WSBA #29962
Attorney for Respondent

DECLARATION OF SERVICE

I certify that on the date indicated below, I served a true and correct copy of the foregoing document on all parties or their counsel of record as follows:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Tacoma, Washington, this 24th day of May, 2017.



Christine M. Buoy, Declarant

ROBIN H. BALSAM P.S.

May 24, 2017 - 4:09 PM

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