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52315-9-II

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

IN RE THE MATTER OF: THE GILBERT MILLER TESTAMENTARY CREDIT SHELTER TRUST

AND

THE ESTATE OF MARY EVELYN MILLER

RENE REMUND, Personal Representative of the ESTATE OF MARY EVELYN MILLER,

Appellant,

v.

THE HEIRS OF THE GILBERT MILLER TESTAMENTARY CREDIT SHELTER TRUST,

Respondents.

REPLY IN SUPPORT OF APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The issue before the Court is whether property owned by Mary Evelyn Miller ("Evelyn") at the time of her death should be distributed to her chosen beneficiary or whether the trial court erred in exercising its equitable power to override Evelyn's clear intent and impose an equitable trust for intestate beneficiaries neither she nor her husband Gib intended to benefit.

These facts are undisputed: When Evelyn died, she held title to a half interest in the real property now in dispute. The parties agree that Evelyn never transferred her half interest in the property to Gib's testamentary trust. CP 220, ¶ 10; CP 59-62. Under Evelyn's Will, the residue of her estate passes to a trust for the benefit of the City of Winlock, Washington. CP 175-76.

When Gib died, *his* half interest in the property was distributed to a trust (the "Trust") for the benefit of Evelyn and his daughter Leah. CP 59-62. Gib and Evelyn's daughter predeceased Evelyn. CP 67. The Trust was silent as to who would receive the remaining assets of the Trust after Evelyn's death. A TEDRA proceeding was initiated to determine who was to receive the remainder of the Trust under Chapter RCW 11.04, the statutes that determine intestate distribution. CP 1-6. An heir search was commenced and attorneys were appointed for the intestate heirs of both Gib and Evelyn. Under the terms of Gib's Trust, Respondents were not beneficiaries and had no interest in the Trust. Through the TEDRA proceeding, the parties ultimately agreed that the intestate heirs of both

Evelyn and Gib would inherit. Respondents are "windfall" takers of the remaining assets of the Trust under the laws of descent and distribution and were never intended by either Evelyn or Gib to be beneficiaries.

Because Respondents' claim is time barred by the applicable statute of limitations relating to express trusts (which Respondents admit), Respondents now argue that they have been defrauded and asked the trial court to exercise its equitable authority and determine that Evelyn held her half of the property in a constructive trust for Respondents. CP 322. Respondents equitable argument is that they would have received a greater windfall if Gib's Trust had been fully funded, and therefore the court should take Evelyn's property from her intended beneficiary to increase their windfall. Put bluntly, Respondents seek to cover naked greed with a mantle of equity.

Because Respondents were never beneficiaries of the Trust and were not intended to inherit from either Gib or Evelyn their equitable claim to Evelyn's property should fail and the trial court should be reversed.

II. ARGUMENT

A. Statute of Limitations is Dispositive.

Correct application of the statute of limitations makes disposition of this case simple: Respondents' claims regarding the funding of the Trust are time barred. The Trust established under Gib's Will is an express trust. The Trust was funded in 1998 during the administration of Gib's estate, by Evelyn as personal representative of his estate. Evelyn and Leah served as co-trustees of the Trust. Any claims regarding the

funding of that Trust are squarely barred by RCW 11.96A.070(1)(c), which directs that any such claims must have been commenced within three years of Leah's or Evelyn's deaths, which occurred in 2011 and 2012, respectively. Respondents did not commence this action until 2017.

RCW 11.96A.070(3) expressly confirms the legislature's long-standing public policy of promoting prompt and efficient resolution of matters involving trusts and estates, and this Court should uphold that policy by enforcing the applicable three year statute of limitations, which clearly time bars Respondents' claims.

B. Imposition of Constructive Trust Is Not Appropriate Here.

Respondents claim that the Trust—an express trust created under Gib's Will—was not properly funded. Because that claim is time barred under RCW 11.96A.070, Respondents argue, based on the constructive trust doctrine, that Evelyn held her property in a constructive trust for their benefit. For the reasons outlined below, a constructive trust is not an appropriate remedy here.

1. There Is No Clear, Cogent, and Convincing Evidence to Support the Imposition of a Constructive Trust.

In contravention of well-established law, the trial court below erroneously imposed a constructive trust in the absence of clear, cogent, and convincing evidence. Washington law is clear that a constructive trust cannot and should not be imposed absent such proof. Manning v. Mt. St. Michael's Seminary of Philosophy & Sci., 78 Wn.2d 542, 546, 477 P.2d 635 (1970) ("Clear, cogent, and convincing proof is essential for the

imposition of a constructive trust."); Baker v. Leonard, 120 Wn.2d 538, 547, 843 P.2d 1050 (1993).

Respondents' reliance on a mistake made 20 years ago and assumptions regarding the Trust's ownership of Evelyn's property is misplaced. These mistakes created no equitable interest in Respondents because they were never beneficiaries intended to receive anything from the Trust. When Gib died, survived by both Evelyn and Leah, Evelyn and Leah were the only beneficiaries of the Trust. When Evelyn died there was no beneficiary of the Trust, making the remaining assets subject to escheat to the state. It was then that a TEDRA petition was filed to determine who should receive Trust assets under the laws of intestacy.

Evelyn's retention of her half interest in the property did not defraud Respondents, it just reduced the assets in the Trust, which were distributed under the laws of intestacy as a pure windfall to Respondents. Never having been beneficiaries of the Trust, Respondents have never had an equitable claim. Their interests arose under the laws of intestacy.

Respondents acknowledge that a constructive trust is an equitable remedy to be imposed only when "clear, cogent and convincing evidence" supports it. *See Baker v. Leonard, 120 Wn.2d 538,547, 843P.2d 1050, 1054 (1993).* Under the plain language of the Trust, nothing was to pass to Respondents. Evelyn was never under any obligation to fund the Trust with her own property and there is no evidence, let alone "clear, cogent, and convincing" evidence that she wanted her property to go to Respondents. Evelyn's property was not acquired or retained by

"questionable means" or held by someone who was not the intended beneficiary, which the cases cited by Respondents require. For whatever reason, most likely attorney error, the Trust was never fully funded. This did not result in any loss to any intended beneficiary of the Trust. It simply reduced the assets left in the Trust when all beneficiaries of the Trust had died. By then, claims for underfunding the Trust against Evelyn as personal representative or Evelyn and Leah as co-trustees had long since been barred.

As Gib and Evelyn's estate planning attorney testified, Gib's Trust was created solely for tax purposes. The intent of the Trust was to provide for Evelyn and Leah by using Gib's estate tax exemption to reduce the assets subject to estate tax in Evelyn's estate.

There is no evidence, let alone clear, cogent, and convincing evidence that Gib or Evelyn intended anyone other than the surviving spouse and their daughter to benefit. Respondents were not the objects of Gib's or Evelyn's affections. Their Wills did not name the Respondents as contingent beneficiaries of the Trust if Evelyn survived Leah. Respondents' recitation of the misunderstanding regarding the Trust's ownership of the property are irrelevant in determining whether Respondents were intended to be beneficiaries of the Trust, which is necessary to assert an equitable claim. Because Respondents were never beneficiaries of the Trust, they have no equitable claim.

Not only is there no "clear, cogent, and convincing evidence" that Gib or Evelyn intended Respondents to benefit from the Trust, there is

clear evidence that only Evelyn and Leah were to benefit from the Trust. After her daughter's death, Evelyn revised her Will to designate the City of Winlock as her beneficiary.

In simple terms, the mistakes regarding funding of the Trust cannot give Respondents an equitable interest in Evelyn's property because neither Evelyn nor Gib ever intended Respondents to benefit from the Trust.

2. Equity Does Not Support Imposition of a Constructive Trust.

Constructive trusts are imposed when:

> ...equity compels the conveyance of property interests unjustly or unconscionably to the person justly entitled thereto, and **fraud, misrepresentation, bad faith or overreaching** usually forms the base upon which a constructive trust is erected.

Manning v. Mt. St. Michael's, 78 Wn.2d at 546. Courts impose constructive trusts to right a moral wrong, not to transfer property to unintended beneficiaries. Here, equity compels giving Evelyn's property to her intended beneficiary: the City of Winlock. Respondents have been careful not to allege that Evelyn underfunded the Trust in breach of her fiduciary duties as personal representative of Gib's Estate or as trustee, because they acknowledge those claims are time barred under the statute of limitations.

Rather, Respondents argue that Evelyn mistakenly retained title to her property while attempting to avoid alleging any specific wrong. In arguing that a constructive trust should be imposed, Respondents assert

that RCW 4.16.080(4) (the statute of limitations for fraud) should govern. But RCW 4.16.080(4) simply cannot apply when Respondents don't allege that Evelyn (or anyone else) committed fraud. Respondents cite no case that suggests application of the statute of limitations for fraud is appropriate here. In fact, the cases Respondents rely on to support their "constructive trust" argument all indicate that imposition of a constructive trust in this case was improper and the trial court should be reversed.

Goodman v. Goodman, 128 Wn.2d 366, 907 P.2d 290 (1995) dealt with an express trust, not a constructive trust. No trust instrument existed in the Goodman case, but Washington's Supreme Court held that because one party intended his property would be held in trust for the benefit of another, "the trust at issue is properly characterized as an express trust." Id. at 373. Employing the Supreme Court's analysis in this case, if Gib and Evelyn intended Evelyn to hold her own property in trust for unnamed intestate heirs, then the trust created is an express trust under Goodman, and therefore subject to the statute of limitations governing express trusts: RCW 11.96A.070(1)(c).

In Baker v. Leonard, 120 Wn.2d 538, 843 P.2d 1050 (1993), Washington's Supreme Court declined to impose a constructive trust where, as here, the party seeking to impose a constructive trust "provide[d] no evidence of wrongdoing." Id. at 548. Baker v. Leonard affirmed that constructive trusts are only imposed "when there is clear, cogent, and convincing evidence of the basis for imposing the trust." Id. at 547. In Scymanski v. Dufault, 80 Wn.2d 77, 491 P.2d 1050 (1971), the

court imposed a constructive trust as a remedy for the tort of interference with a business relationship.

Mehelich v. Mehelich, 7 Wn. App. 545, 500 P.2d 779 (1972), is the only case Respondents cite imposing a constructive trust in the absence of wrongdoing, but in *Mehelich*, a constructive trust was only imposed because of a confidential relationship between the parties. Id. at 551. Here, there was no confidential relationship between Evelyn and Respondents. As Respondents readily admit, Evelyn did not even know them (and they did not know they were potentially intestate heirs of the Trust) until years after Evelyn's death. Since Evelyn and Respondents did not even know one another, the holding in Mehelich is not instructive here.

Pitzer v. Union Bank, 141 Wn.2d 539, 9 P.3d 805 (2000) involved the claims of contingent heirs against a surviving spouse, and the analysis of the Washington Supreme Court provides clear guidance. In Pitzer, the court explained:

> Respondents were not legally entitled heirs at the time of Frank Magrini's probate and it is quite clear Frank Magrini did not intend for Respondents to take a share of his estate as pretermitted heirs. Frank Magrini specifically named Respondents in his will as contingent beneficiaries, foreclosing any equitable argument by Respondents concerning Frank Magrini's intent. Without an equitable base, we will not impose a constructive trust.

Id. at 551. Here, as in Pitzer, Respondents **were not legally entitled heirs** at the time of Gib's death. The court's analysis in Pitzer forecloses any

equitable arguments that Respondents should benefit from Evelyn's assets, rather than Evelyn's chosen and intended beneficiary.

Respondents have not proven—and cannot prove—that it was inequitable for Evelyn to retain her own half of the property after her husband's death. When Gib died, Respondents had no rights in the Trust—the only named and intended beneficiaries were Evelyn and Leah. Respondents acknowledge that they were so remote in kinship to Gib that their right to distribution of the assets in the Trust had to be determined by a judicial proceeding. And now, despite their fortuitous windfall of receiving all assets in the Trust (Gib's half of the property), Respondents have the audacity to argue that they should also receive Evelyn's half of the property, which Evelyn specifically intended to benefit the citizens of Winlock. Because there is no equitable basis for the imposition of a constructive trust, the trial court should be reversed.

C. The Best Evidence of Evelyn's Intent are Her Will and Her Actions; Everything Else is Speculation.

Evelyn's intent in the years 1998 – 2012 is extremely difficult to determine. In those years, Evelyn was 86 – 100 years old. Respondents successfully proved that none of Evelyn's advisors verified real property records, and that they prepared documents under the mistaken presumption that Evelyn's half of the property had been transferred to the Trust. But proof regarding Evelyn's advisor's opinions and beliefs cannot be substituted for proof of Evelyn's intent.

The fact that Evelyn's professional advisors failed to determine the true owner of the property is the **only** "evidence" Respondents proffer to demonstrate Evelyn's intent. But the actions or inactions of professional advisors proves very little regarding the intent of an elderly woman, who was 100 years old when some of the relevant documents were signed.

Evelyn was 86 years old when Gib died in 1998. CP 68. Respondents' speculation regarding Evelyn's intent is based on documents drafted by her professional advisors. The record contains no evidence that anyone explained to Evelyn that they thought she transferred her half of the property to the Trust, and there is certainly no affirmative statement of intent from Evelyn indicating any desire to do so. Respondents rely heavily on the tax returns prepared by CPA George Braley, who they acknowledge began preparing tax returns for Evelyn ten years after Gib died, when Evelyn was 95 years old. The fact that Evelyn signed documents prepared by her professional advisors is not evidence of her intent.

Other than the documents drafted by Braley and other advisors, which Respondents acknowledge are "suggestive" but not dispositive, the record contains ample evidence that Evelyn **did not** intend to transfer her own half of the property to the Trust.

It is undisputed that Evelyn owned one-half of the property since 1953. CP 157. It is undisputed that Evelyn never transferred her half of the property, and that at her death she was still the titleholder of record to her half of the property. A contemporaneous letter from Evelyn's

attorney, Ralph Olson, confirmed that only Gib's half of the property was transferred to the Trust and Evelyn's half was not transferred. CP 70. Olson stated "we may be able to squeak out a little bit more," but never suggested transferring Evelyn's half of the property to the Trust. There are no contemporaneous records from any person indicating that Evelyn agreed or intended to transfer her half of the property to fund the Trust. The fact that her advisors mistakenly believed she had transferred her interest does not constitute clear, cogent, and convincing evidence regarding Evelyn's intent.

Even Respondents admit that their purported evidence of Evelyn's intent only "points towards the suggestion" of her intent or "suggests that" Evelyn understood something (see Respondent's Brief, p. 22). The reality is that Evelyn never transferred her one-half interest in the property to the Trust and never had any obligation to do so.

Importantly, when her daughter Leah predeceased her in 2011, Evelyn executed a new Will to name the City of Winlock as her intended beneficiary. CP 174-178. This action is strong evidence of Evelyn's intent **not to benefit her remote descendants**. Equity prevents giving Respondents, who are remote intestate heirs, Evelyn's one-half interest in the property, when Evelyn clearly demonstrated her intent to hold the property in trust for the City of Winlock. Even attorney Ralph Olson confirmed that neither Gib nor Evelyn intended to benefit their remote heirs, and that the Trust was in fact recommended by Olson solely as a

tax-savings vehicle, not as an instrument to control later disposition of assets. CP 67.

D. Evelyn Was Not Required to Transfer Her Own Property to the Trust.

Respondents' argument fails to make a connection between an obligation to fund the Trust and their allegation that Evelyn was obliged to transfer *her own asset* to the Trust. There is no evidence that Evelyn was required to use her own property to fund the Trust. Gib's one-half of the community assets could and should have been used to fully fund the Trust. Respondents provide no rational basis for why they should be entitled to *Evelyn's* property. The fact that non pro rata funding of trusts is common does not impose an obligation to do so.

There was no need or requirement that Evelyn's assets be transferred to the Trust to fully fund it. In fact, if Evelyn's half of the property had been transferred to the Trust, the Trust would have been *over funded* – the value of the entire property at the time of Gib's death exceeded Gib's estate tax exemption.

Respondents' core theory is based on the false assumption that the duty to fund the Trust generally created a duty for Evelyn to fund the Trust using her own property. No such duty existed. Respondents simply cannot prove that they have a valid claim to Evelyn's property.

E. *Rathbone* Precludes Challenge to Evelyn's Decisions Regarding Funding the Trust.

To the extent this Court needs another reason to reverse the trial court's holding on summary judgment, In re Estate of Rathbone, 190 Wn.2d 332, 412 P.3d 1283 (2018) instructed that trial courts simply do not have the authority to intervene in the administration of nonintervention estates.

The trial court here based its ruling in large part on its understanding that TEDRA grants courts broad authority (see RP 10:18-25; 11:1-2). But Rathbone held that the authority granted to superior courts under TEDRA is limited if the personal representative has nonintervention powers.

Rathbone directs that Evelyn's decisions as personal representative remain undisturbed, and that the trial court should not substitute its interpretation of Evelyn's intent in contravention of the actions that Evelyn actually took when she administered Gib's estate. It is undisputed that Evelyn only transferred Gib's half of the property to the Trust. That decision should stand, and the trial court should be reversed.

III. CONCLUSION

Decades ago a mistake was made (probably by the estate attorney) in funding the Trust. No beneficiary of the Trust was harmed by the mistake and no one improperly benefited. Respondents have presented no viable equitable claim to property that has always belonged to Evelyn and which Evelyn clearly intended to benefit the City of Winlock.

For the reasons stated above, the trial court incorrectly ruled that Evelyn's half of the property, which was never transferred to the Trust, should be distributed to the Respondents. This Court should reverse and remand for consideration of an award of attorney's fees and should award the Estate's fees on appeal.

RESPECTFULLY SUBMITTED this 21st day of December, 2018.

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CERTIFICATE OF SERVICE

I, Nicola Derbyshire, hereby certify that on December 21, 2018, I served a copy of the preceding Reply in Support of Appellant's Opening Brief on the parties listed below in the manner shown:

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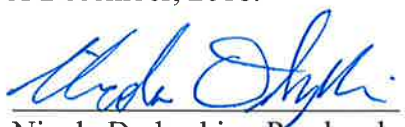
I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21st day of December, 2018.



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