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NO 52630-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICA JEAN McLEAN (aka WRIGHT), LUKE G. SPRAGUE, and
ZECHARIAH E. SPRAGUE,

PETITIONERS,

v.

THE GORDON AND FRANCES SALES FAMILY TRUST,

RESPONDENTS

PETITIONERS' REPLY BRIEF

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I. ARGUMENT

A. The Trial Court was not “Interpreting” the Abstract but Improperly “Interpolating” Missing Terms.

Echo improperly uses “interpretation” when they really mean they have asked the Court to interpolate, or insert, the missing terms. Interpretation involves a Court deciding the meaning of words that are in front of them. *See, Prager’s, Inc. v. Bullitt Co.*, 1 Wn. App. 575, 582, 463 P.2d 217 (1969)(Talking about interpretation versus construction of a contract, but always of a full agreement). Here, Echo asks the Court to take the terms from the Abstract and insert, or interpolate, the missing Trust terms. This quantum leap is not allowed and never has been part of Washington law. *See, Setterlund v. Firestone*, 104 Wn.2d 24, 26, 700 P.2d 745 (1985)(“In short, the buyers had to prove the existence of a preliminary agreement which contained terms specific enough to be enforced without the Court drafting the final documents.”).

B. Abstract Improperly Used to Recreate Missing Trust Terms.

To use the Abstract¹ as the complete Trust is wrong. The Abstract is not intended to be the complete Trust. That’s why it is called an Abstract or Certification, and why RCW 11.98.075 expressly states you do not need to set out everything in the Trust, most importantly, the

dispositive scheme. RCW 11.98.075(4). The Abstract is meant to be used by third parties to know they are dealing with a valid Trust. RCW 11.98.075(6) – (7). The Abstract is not meant for a Court to look at it and from it alone, determine when the Trust becomes irrevocable, if ever, who is entitled to Trust Assets, or how the Grantors intended to distribute Trust Assets on the death of the first Grantor and, then, when the Survivor passes.

C. Clear, Cogent and Convincing Evidence is Applicable Standard of Proof.

Echo amazingly argues that they only have to prove the missing terms by a preponderance of the evidence. “[s]ince the Abstract of Trust and the Trust itself are fundamentally contracts, Sales had the burden at Trial to establish all facts based on a preponderance of the evidence.” Respondent’s Opening Brief at 11.

Echos’ position is contrary to statutory law. Whether you call it interpretation, construction or reconstruction, Courts look to the laws applicable to Wills. RCW 11.20.070 expressly addresses proof of lost or destroyed Wills. It provides in part: “The provisions of a lost or destroyed Will must be proved by clear, cogent, and convincing evidence, consisting at least in part of a witness to either its contents or the authenticity of a copy of the Will.” RCW 11.20.070(2). *See also, In re estate of Black,*

153 W.2d 152, 102 P.3d 796, 801 (2004) where the Washington Supreme Court reversed the Appeal Court's ruling that lost Wills need only be proven by a preponderance of the evidence. "Further, the Court of Appeals erred in stating that "[p]roof of the execution of a lost Will is by a preponderance of the evidence." 102 P.2d at 801.

The clear, cogent, and convincing standard is further supported by the proof necessary to establish an oral Trust, which by its nature is not in writing. "Except as required by a statute other than this title, a Trust need not be evidenced by a Trust instrument, but the creation of an oral Trust and its terms may be established only by clear, cogent, and convincing evidence. RCW 11.98.014.

Additionally, RCW 11.96A.125 states in part:

Mistake of fact or law in terms of will or trust—judicial and nonjudicial reform.

The terms of a will or trust, even if unambiguous, may be reformed by judicial proceedings under this chapter to conform the terms to the intention of the testator or trustor if it is proved by clear, cogent, and convincing evidence that both the intent of the testator or trustor and the terms of the will or trust were affected by a mistake of fact or law, whether in expression or inducement. . . .

Why would this situation be any different? There are missing Trust terms. Whether you reform the terms of a complete Trust, prove the terms of an oral Trust or lost terms from a written Trust, they must be proven by

clear cogent and convincing evidence. *See also, In re Estate of Meeks*, 4 Wn. App.2d 255, 421 P.3d 963 (2018).

Bresemann v. Hiteshue, 151 Wash. 187, 275 P. 543 (1929) does not support Echo's position. That case involved a dispute regarding whether a contract was ever formed for Bresemann to design and build an apartment house. The Court made the general statement that "The burden, of course, rests upon Appellant to prove his case by a preponderance of the evidence . . ." *Id* at 189 – 190. Here, Echo is attempting to specifically enforce a Trust contract, with missing terms, her burden is by clear, cogent and specific evidence. *Cuzdey vv. Landes*, No. 75632-0-I, at 6 (Wn. App. April 3, 2017)("[b]ecause Cuzdey seeks specific performance of a contract, he had the burden to prove "by evidence that is clear and unequivocal and which leaves no doubt as to the terms, character, and existence of the contract,")ⁱⁱ

Trust "contracts" like Wills, are different and distinguishable from a standard building contract. This case involves an express written Trust which is governed by statute, RCW 11.98, and the laws used to interpret and construe Wills. These laws require proof of the terms, and the Grantor's intent, that meet the clear, cogent and convincing standard. Echo cites no case dealing with Trusts or Wills that only requires proof based upon the preponderance of evidence standard.

D. The Trial Court Improperly Created Missing Trust Terms.

The Trial Court did not have any authority to create the missing Trust terms. First, the Trial Court admits the Abstract is not complete or clear. RP 26, lines 17 – 19 (“I will say that is the abstract that has been filed an example of absolutely clarity? Absolutely not.”). *See also*, RP 27, lines 1– 21, where the Court talks about “Ellipses” that appears through out the Abstract, to represent missing terms that you do not need to know. It also found reasonable people can disagree with its ruling. *See also*, RP 28, lines 6 – 21 where the Trial Court discusses inconsistencies with paragraph 3 and 4 and admits sub-paragraph 3.3 is completely missing. For the Trial Court to then conclude that the abstract clearly provides enough proof for it to determine the Grantors’ intentions defies common sense and is not supported by the evidence.

Further, the two cases Echo cites in support of their argument for such authority, are in fact contrary to their position. Both cases involve actions for specific performance of alleged agreements. In *Setterlund v. Firestone*, 104 Wn.2d 24, 700 P.2d 745 (1985), Setterland entered into an earnest money agreement to purchase Firestone’s commercial real estate. The earnest money agreement referenced, but did not include, a

promissory note and deed of trust that were to be part of the transaction. The forms were not available to Firestone when the earnest money agreement was signed. Three days later, a real estate agent sent blank forms to Firestone (and presumably Setterland), which Setterland signed three months later. However, Firestone never performed.

In the ensuing Bench Trial, the Court granted Firestone's motion to dismiss, brought at the close of Setterland's case. Citing Echo's second case, *Hubbell v. Ward*, 40 Wn.2d 779, 246 P.2d 468 (1952), the Court of Appeals laid down the basic rule "The legal principle with which we are concerned is that preliminary agreements must be definite enough on material terms to allow enforcement *without the Court supplying those terms.*" *Setterlund v. Firestone*, 104 Wn.2d at 25 (emphasis added). This general principle, begs the question, what are "material terms." There is no clean definition of "material terms." However, they appear to be governed by the nature and context of the transaction.

Our Supreme Court has outlined material terms for real estate contracts. *Sea-Van Investments Associates v. Hamilton*, 125 Wn.2d 120, 128, 881 P.2d 1035 (1994)(citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)(which cited *Hubbell v. Ward*, 40 Wn.2d 779, 246 P.2d 468 (1952)).

It appears “material terms” are those that substantially effects a party’s rights and obligations. In *Hubbell v. Ward*, 40 Wn.2d 779, 246 P.2d 468 (1952) the Court outlines material terms that must be addressed in sufficient detail, in a signed agreement, to specifically enforce a real estate contract. *Id* at 782 – 783. The Trust Abstract used by Echo does not meet this test.

Echo refers to RCW 11.98.011(1) for what material terms must be addressed, and if present you have an enforceable Trust. Repondent’s Opening Brief at 15. They then argue “The Petitioners do not describe why a “distribution scheme” is relevant to any issue before this Court or how the purported lack of a dispositive scheme makes any Trust unenforceable in any other respect.” Respondent’s Opening Brief at 17. However, the dispositive scheme is the most material provision of any Trust. Beneficiaries want, and need, to know when assets, whether income or principal, will be distributed. Here, the Abstract lacks any dispositive scheme so there is no basis for the Court to say Frances had no right to take assets out for her benefit.

E. The Abstract Contains Insufficient Terms

To say the Abstract sets forth the terms of the Trust ignores the fact significant terms are missing. There is no dispositive scheme, no provision saying exactly when, if ever, the Trust becomes irrevocable, no

provision barring Frances from taking property out of Trust for herself. There are no specific provisions that expressly states the Trust becomes wholly irrevocable upon the first Grantor's death, that Frances was not a beneficiary or that she could not take assets out for her benefit. What the Trial Court did was to violate the rules forbidding a Court from making up and inserting missing material terms.

F. Frances was a Trust Beneficiary.

To argue that Frances was not a Trust Beneficiary is offensive to Grantor(s) and Trustor(s) creating a Trust Agreement and defies all common sense and sensibilities. This was a Family Trust, and Frances was a Grantor. She contributed her community property interest into the Trust. The only logical conclusion to Echo's argument is that upon Gordon's death, Frances became penniless and homeless because she no longer had any right to her Trust Assets. *See Respondents' Opening Brief* at 21, paragraph c. "Distributions were Limited to Beneficiaries Only." What sane Grantor would ever sign such an agreement?

Further, if the Trust became irrevocable upon Gordon's death, why did Echo sit back, for Seventeen (17) years after Gordon's death, and allowed Frances to use Trust Assets as her own? Clearly, Echo have no trouble suing relatives, so why not their mother if she was not a Beneficiary and could not revoke the Trust? Why did Echo not demand

for Trust Assets be distributed to them as Beneficiaries, outright and free of Trust, as soon as Gordon died? Why did she knowingly allow her mother, Frances to de-fund the Trust?

Clearly, Frances had authority to use Trust Assets for her benefit. She did so with Echos' knowledge and presumably consent.

G. Trust Revocation or Termination Is an Irrelevant Issue

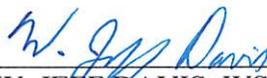
Echo's Opening Brief spends a lot of pages discussing whether Frances "properly" revoked or terminated the trust. Repondent's Opening Brief, pages 21 – 25. This issue is moot. Assuming Frances did not formally revoke the Trust, the fact she completely de-funded the Trust meant there were no assets to administer. The Trust was effectively revoked.

II. CONCLUSION

The Abstract contains insufficient terms to support the Trial Court's ruling. The Trial Court created reversible error by creating missing Trust Terms. There is no basis for the judicially created terms. The Trial Court's ruling should be reversed and the matter dismissed.

Respectfully submitted this 3rd day of August, 2019.

BELL & DAVIS PLLC

By  _____
W. JEFF DAVIS, WSBA No. 12246
Attorneys for Appellant

ⁱ The terms “Abstract” and “Certification” have been used interchangeably throughout this proceeding. They are one and the same.

ⁱⁱ GR 14.1 states in part that unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

CERTIFICATE OF SERVICE

I, Mindy Davis, hereby declare and state as follows:

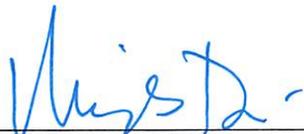
1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of BELL & DAVIS PLLC, 526 N. 5th Ave., PO Box 510 Sequim, WA 98382.

3. In the appellate matter of Mica Jean McLean (aka Wright), et.al. v The Gordon and Frances Sales Family Trust, I did on the date listed below, (1) cause to be filed with this Court a Petitioner’s Reply Brief and served a copy of the Reply Brief via email agreement to Patrick M. Irwin, pmirwin@patrickirwin.com and sheri@patrickirwin.com who are counsel of record of The Gordon and Frances Sales Family Trust.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: August 3, 2019.



MINDY DAVIS

BELL & DAVIS PLLC

August 03, 2019 - 11:14 AM

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