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COURT OF APPEALS
DIVISION II OF THE STATE OF WASHINGTON

IN RE: ESTATE OF CECILIA BROST

LAURA DOUGLAS, DAN DOUGLAS, CINDY DOUGLAS,
DEBBIE DOUGLAS, SCOTTIE DOUGLAS, AND
KENNY DOUGLAS (“CHILDREN OF JAMES DOUGLAS”),

Appellants,

v.

JAMES BROST, MARIE OFNER, CATHERINE BIRES,
PHILLIP BROST, JEAN DEPORTER, PAUL BROST,
DAVID BROST, KRISTIN EATON, AND PETER BROST
 (“SIBLINGS OF CECILIA BROST”),

Respondents.

APPELLANTS’ OPENING BRIEF

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I. INTRODUCTION

This case is to decide who gets the assets in the Estate of Cecilia Brost. Cecilia was married to James Douglas in 1976. James had six children before he married Cecilia. Cecilia never gave birth to children of her own, but she treated James' family as her family.

In 2015, Cecilia was sick and in the hospital. James called an attorney he knew to draft Wills in the event something happened to Cecilia. According to the attorney's billing records, the attorney spent 2.9 hours to take the information from James about what he wanted, draft Wills for James and Cecilia, and go to the hospital to get Cecilia's signature. It is evident from reviewing the Wills that they were hastily prepared, and that Cecilia's Will is a copy of James' Will—for example, Section VIII of Cecilia's Will purportedly references Cecilia's "wife." At all rates, James' Will and Cecilia's Will mirrored each other and both said that when the first spouse died everything would go to the surviving spouse and then the surviving spouse would provide for James' children. Both James and Cecilia nominated Cherie Douglas to be the personal representative of the surviving spouse's estate—Cherie's mother, Laura, is one of James' children.

There is no dispute the Wills mirror each other. And it is apparent that James and Cecilia had the same intention—*i.e.*, surviving spouse gets

everything and then James' children get everything when the surviving spouse dies. However, the Wills specifically state that James' children do not get anything after the first spouse dies.

Cecilia did not die in the hospital in 2015 and James ended up dying first; he died in August 2016. Everything that belonged to James and Cecilia went to Cecilia as surviving spouse. Then Cecilia died in November 2016. James' children assumed they would inherit the assets in Cecilia's estate because they were always told that was the intent of James and Cecilia. In fact, Cecilia commented just before her death in November 2016 that she wanted her estate to pass to James' children. Cherie had been informed by James and Cecilia that she was going to be their personal representative and Cherie assumed that she would be administering the estate for the benefit of her mother and aunts and uncles.

The attorney who drafted the Wills was retained by Cherie to help her administer the estate. The attorney indicated that based on a narrow reading of one Will alone and a legal technicality, Cecilia's estate should essentially pass intestate and everything should go to Cecilia's siblings. Cherie and her family were shocked. There was no way Cecilia would have made Cherie personal representative if that was going to put Cherie at odds with her own mother and aunts and uncles about who gets the estate assets.

The Douglas children have argued during this entire case that the

Courts should do what Cecilia intended, which was obviously for assets to pass from the surviving spouse to James' children. Cecilia's siblings have argued that the Courts should blindly focus on one sentence of one mirror Will and give them the assets based on hasty Will drafting and a potential technicality. In a procedurally bizarre ruling, the Trial Court agreed with the argument of Cecilia's siblings.

The Trial Court's ruling was procedurally bizarre based on the following timeline: (1) during a summary judgment hearing on November 30, 2018, one judge stated, "the crux of this case is what was Ms. Brost's intent, and it's not 100 percent clear from the Will..."; (2) on June 4, 2019, the parties signed a Stipulated Exhibit List, which was submitted to the Clerk's Office that day with the stipulated exhibits, that stated extrinsic evidence was admitted and acceptable for review by the judge; (3) there were no motions in limine filed to exclude evidence; (4) on June 5, 2019, at the beginning of trial, the judge asked if there were preliminary matters and counsel for Cecilia's siblings said there were none; (5) the Court sustained an objection by the Douglas children's counsel that counsel for the Brost siblings was improperly making argument during opening statements; but then, (6)(a) the Court allowed opening statements to morph into an oral motion in limine and/or motion to dismiss in which the Brost siblings argued that Cecilia's Will was not ambiguous, and (6)(b) the Court granted

the Brost siblings' oral motions, including to exclude extrinsic evidence, despite the fact that the Brost siblings had stipulated to the admission of extrinsic evidence the day before—the Court commented that the Court assumed the stipulation was a contingent stipulation even though there is nothing in the stipulation about a contingency and there were no motions pending at the time the stipulation was signed and submitted to the Clerk (the Clerk then returned the stipulation without having previously filed it despite the fact it had been submitted for filing (the Stipulated Exhibit List was filed after trial), and the Clerk returned the stipulated exhibits). Technically, if the stipulated exhibits were not admitted then not even Cecilia's Will was in evidence, and, therefore, it would have been procedurally impossible for the Court to make any decision in the middle of opening statements.

Appellant/Petitioner, Laura Douglas, requests that the Court reverse the Trial Court's Order of Dismissal, which states "Cecilia Brost's Will is not ambiguous," and do one of the following: (1) remand the case back to the Trial Court for the trial that everyone was prepared for on June 5, 2019, which would this time include extrinsic evidence based on the parties' stipulation and/or as a necessity to determine intent and resolve ambiguity in Cecilia Brost's Will; or (2) hold that the Douglas children are the beneficiaries of Cecilia Brost's estate based on documents submitted to this

Court on appeal under the theory that James' and Cecilia's Wills are mirror Wills and/or that it was Cecilia's intent for James' children to ultimately receive all assets that had been owned by James and Cecilia.

**II. ASSIGNMENTS OF ERROR TOGETHER
WITH ISSUES PRESENTED**

A. Assignments of Error

- 1. The Trial Court erred in refusing to consider extrinsic evidence, including after the parties stipulated to the admissibility of extrinsic evidence—technically, the Trial Court did not admit any evidence and made a decision absent any factual basis.**
- 2. The Trial Court erred in refusing to consider Cecilia's Will and James' Will together as mirror Wills.**
- 3. The Trial Court erred in concluding Cecilia's Will was unambiguous.**
- 4. The Trial Court erred in determining that Cecilia's estate should pass intestate—it was not Cecilia's intent for her estate to pass intestate to her siblings.**

B. Issues Presented

- 1. Cecilia's Will should have been admitted into evidence at a minimum. And James' Will should have been admitted**

into evidence with Cecilia's Will because they were mirror Wills. Other extrinsic evidence should have been admitted based on any of the following reasons: (a) the parties stipulated to the admissibility of extrinsic evidence; (b) Cecilia's Will is ambiguous and requires extrinsic evidence to determine intent; and/or (c) extrinsic evidence would have provided context relevant to ascertaining the testator's intent.

It is the duty of the Court to ascertain the intent of the parties to a contract at the time the contract was made. And in interpreting a Will, the Court must determine the testator's intent at the time the Will was made. Here, there are mirror Wills, which form a contract requiring the analysis of two separate Wills and their mutual/reciprocal intent. Extrinsic evidence is required to analyze the context for purposes of determining intent even if a writing appears unambiguous. The parties in this case stipulated prior to trial that extrinsic evidence was appropriate for review by the Trial Court, but the Trial Court made a decision based on its interpretation of Cecilia's Will in a vacuum without also considering extrinsic evidence for context and/or intent.

- 2. Mirror Wills are separate legal documents with the same contents, and that bind the parties to carry out a**

mutually agreed upon estate plan. Cecilia and James each agreed the surviving spouse would provide for James' children. The only logical interpretation of the Wills are that both James and Cecilia intended for their assets to pass first to the surviving spouse [whoever it may be] and then to James' children.

James' Will and Cecilia's Will mirror each other. One is a copy and paste of the other. The Trial Court acknowledged the sensibility of the couple having mirror Wills. James would have likely made specific provisions for his children in his Will to provide for them, and to prevent in-laws he barely knew from inheriting his assets, if he believed Cecilia was not bound by the mirror Wills to provide for his children. Cecilia was bound to provide for James' children, and the evidence indicates that she thought her Will did provide for James' children. Cecilia would not have appointed Cherie Douglas as personal representative unless Cecilia thought her estate was passing to James' children.

- 3. The Trial Court's interpretation of the Will is subject to *de novo* review in this instance. One Trial Court Judge at summary judgment determined that Cecilia's intent is "not 100 percent clear from the will," but a different Trial Court Judge at trial stated, "I just don't think that**

this is an ambiguous will.” There is a one-to-one tie at the Trial Court level that needs to be broken by the Court of Appeals.

Cecilia’s Will did not need to identify James’ children if it was Cecilia’s intent they not inherit from her estate. The fact that James’ children were specifically named in her Will was intended only to confirm that the surviving spouse inherited first, and then James’ children would inherit from the surviving spouse. This intent for the children to inherit from the surviving spouse was expressed by Cecilia stating she knew James would provide for them. Viewing Cecilia’s Will in a total vacuum, her assets pass to James and then to his children—*ergo*, the children should inherit Cecilia’s estate. But making no provision for James’ children was inconsistent with Cecilia’s apparent intent to the extent James died first and/or he did not provide for his children. The ambiguity lies in the fact that Cecilia’s intent was that James’ children would ultimately inherit the couple’s assets, but there was no provision in either Will actually providing for the children despite the mirror Wills saying the children would be provided for.

4. The Trial Court’s ruling disregards Cecilia’s intent.

It was not Cecilia’s intent for her estate to pass intestate to her siblings. Cecilia signed a Will when she thought she might be dying that

gave everything to James, and which indicates her understanding that James would then give everything to his children. Cecilia made no provision to give anything to her siblings. Further, Cecilia nominated someone on James' side of the family to be the personal representative [if not James].

III. STATEMENT OF THE CASE

A. Procedural Timeline

1. The lawsuit was initiated with a TEDRA Petition filed on or about May 17, 2017. CP 1-24. The parties entered a stipulated Order in Lieu of Initial Hearing on June 23, 2017. CP 25-30.
2. Laura Douglas filed a Motion for Summary Judgment on or about October 31, 2018. CP 48-57. Laura's Motion was supported by the Will of Cecilia Brost. *See*, CP 63-70. In addition to Cecilia's Will, Laura's Motion for Summary Judgment was supported by the following extrinsic evidence: (a) Laura's testimony regarding Cecilia's intent (CP 58-60); and (b) the Will of James Douglas (*see*, CP 72-75).
3. The Brost siblings filed a Response and Cross-Motion for Summary Judgment on or about November 19, 2018. CP 79-94. Similar to Laura's Motion, the Brost siblings' Cross-Motion was supported by the Will of Cecilia Brost, and by the following extrinsic evidence: (a) testimony of Peter Brost regarding

Cecilia's intent (CP 141-144); and (b) the Will of James Douglas (*see*, CP 103-106).

4. Laura filed a Reply on her Motion for Summary Judgment on or about November 26, 2018. CP 153-159. Laura's Reply added additional extrinsic evidence in the form of the Declaration of Cherie Douglas. CP 149-150.
5. The summary judgment motions were argued on November 30, 2018. No motions to strike and/or objections were made to the extrinsic evidence submitted to the Trial Court. *See*, VRP (11/30/18) 2-9. The Trial Court Judge stated that Cecilia's Will was ambiguous. VRP (11/30/18) 8:5-6. And the Trial Court Judge stated the extrinsic evidence contained issues of fact that required a trial. VRP (11/30/18) 8:15-24.
6. The only pre-trial motion filed was whether two certain witnesses could testify by declaration, as opposed to giving live testimony subject to cross-examination. Only the mechanics/format of their testimony was debated—there was never any suggestion their testimony would not be allowed. *See*, CP 176-181.
7. On June 4, 2019, the day before trial, the parties signed a Stipulation to Exhibit List. CP 205-206. The stipulated Exhibit

List and copies of all exhibits was submitted to the Clerk's Office on June 4, 2019.

8. The case was called to trial on June 5, 2019, and counsel for the Brost siblings stated there were no pre-trial issues to address. VRP (6/5/19) 2:3 – 3:10. The Trial Court eventually indicated that its view was the Stipulated Exhibit List was contingent and so the exhibits were not admitted; the Clerk did not file the list at the time and none of the exhibits were retained by the Clerk. VRP (6/5/19) 28:2-13. Unless the stipulated exhibits were before the Trial Court (as the stipulation suggested they would be—there is no indication in the pleading that the stipulation was contingent), there was absolutely no evidence before the Court (either document or testimony) when the following occurred: after sustaining an objection that counsel for the Brost siblings' opening statement was turning into argument, the Court permitted [during opening statements] an oral motion in limine to exclude extrinsic evidence. VRP (6/5/19) 9:7 – 23:22. The Trial Court indicated that the Wills of James Douglas and Cecilia Brost were mirror Wills. VRP (6/5/19) 17:14-15. However, the Court granted the motion to exclude (see, *id.*) and then dismissed the case (see, CP 203).

The following facts are taken from the declarations and exhibits submitted with the parties' summary judgment motions, which include some of the same documents on the parties' stipulated Exhibit List that was signed the day before trial. It cannot be stressed enough that unless the exhibits on the stipulated Exhibit List were admitted, then there was no evidence for the Trial Court to make a decision on—not even the Will of Cecilia Brost was in evidence unless the Trial Court selectively chose to consider one stipulated exhibit and not others, which would have been improper since the stipulation did not distinguish between exhibits. *See*, CP 205-206; and *see*, VRP (6/5/19).

B. Facts

James Douglas and Cecilia Brost were married on April 6, 1976. They remained married for over forty (40) years until James's death. James Douglas had six (6) biological children before he married Cecilia: Laura, Dan, Cindy, Debbie, Scottie, and Kenny. Cecilia Brost never had any biological children and never legally adopted any children. James' children and their children were Cecilia's family—all of James' children kept things at James' and Cecilia's house, and Cecilia was very close with her granddaughter, Cherie Douglas. Designating the Douglas children and grandchildren as "step" relatives to Cecilia might be technically accurate, but may suggest they were not real family, which was not true. *See*, CP 58-

62; and *see*, CP 149-152.

At the request of James Douglas, mirror Wills were drafted by attorney Allen Unzelman, and the mirror Wills were executed in March 2015. Both Wills contained language that community property was meant to go to the surviving spouse and the surviving spouse would “provide for” the “stepchildren/children” of Cecelia Brost/James Douglas (respectively). Both Wills nominated Cherie Douglas, the daughter of James’ daughter Laura, to serve as Personal Representative for the surviving spouse. CP 67-70; and CP 72-75.

It is apparent the Wills were drafted in a hurry, and that James’ Will was prepared first with Cecilia’s Will having been a copy and paste of James’ Will. The text is essentially identical, but for appropriate substitutions of James’ name for Cecilia’s name, etc. However, a change was missed in Section VIII of Cecilia’s Will and it references her “wife,” which was obviously left over from the copy of James’ Will. *Id.*

James Douglas died on August 9, 2016, and Cecilia Brost died on November 18, 2016. The Last Will and Testament of James Douglas was never filed in any court and his estate was never probated due to a Community Property Agreement, which served to transfer all of James Douglas’s interests to Cecilia Brost—consistent, too, with his Will. The Last Will and Testament of Cecilia Brost was filed in Lewis County

Superior Court under Cause No. 16-4-0036121 on November 23, 2016. *See*, CP 4-5; and *see*, CP 63-64.

Just before Cecilia died, she told James' daughter Laura that Laura should get all of Cecilia's things together and divide them equally between the Douglas children—except a few specific items that Cecilia knew her siblings wanted because they were Brost family heirlooms. CP 59. Cecilia also told a priest who visited Cecilia at the hospital that she wanted the Douglas children taken care of. CP 59; and CP 149.

On or about November 23, 2016, Cherie Douglas was appointed by the Court to serve as the Personal Representative of the Estate of Cecilia Brost. *See*, CP 150. On June 23, 2017, the parties agreed to remove Cherie Douglas as Personal Representative and appoint Security State Bank Trust Department as Successor Personal Representative. CP 31-35; CP 58-59; and CP 150. The change was made to relieve the stress from Cherie and her mother being on different sides of a lawsuit—at least on paper. CP 58-59; and CP 150.

Laura Douglas commenced this TEDRA action on May 22, 2017, in order to establish the intent of James Douglas and Cecilia Brost: *i.e.*, that the children of James Douglas were the contingent beneficiaries while Cecilia Brost was living and that the children of James Douglas were to be the beneficiaries at her death. Both Wills state, in pertinent part, Article II:

“I make no bequest, gift or devise to my stepchildren/children except as hereinafter stated, **knowing that my [spouse] will provide for them.**” CP 67-70; and CP 72-75.

IV. SUMMARY OF ARGUMENT

The Wills of James Douglas and Cecilia Brost were mirror Wills and they must be considered together. Extrinsic evidence establishing the context of why the mirror Wills were signed demonstrates that James and Cecilia thought Cecilia might be dying and they wanted a written plan to ensure their assets went to the surviving spouse and then to James’ children. Extrinsic evidence of Cecilia’s stated intent further demonstrates that after James ended up dying first, Cecilia continued to want to provide for James’ children consistent with the mirror Wills. It is absurd to conclude that James and Cecilia signed identical Wills at the same time but intended for one Will to pass all assets to one group of people and the other Will to pass all assets to an entirely different group of people. The only group of people identified were James’ children, and both James and Cecilia intended for James’ children to be the ultimate beneficiaries. Cecilia’s Will is not clear on its own because while it references her intent to ultimately pass her assets to her husband’s children, it contradictorily provides nothing for James’ children on the basis that the children would inherit everything from James.

The testator’s intent is paramount. Even if the Wills of James

Douglas and Cecilia Brost were not “mutual Wills,” Cecilia’s Will sufficiently demonstrates that Cecilia intended for her and James’ assets to be inherited by James’ children. James’ children are the rightful beneficiaries of Cecilia’s estate, not Cecilia’s siblings. Taking the Trial Court’s determination to its logical conclusion, the Douglas children would not even have inherited from James’ estate if he were the surviving spouse because his Will expressly stated the children got nothing...that would have been an absurd result. James’ children were intended to inherit from the surviving spouse regardless of who the surviving spouse was.

V. DE NOVO STANDARD OF REVIEW

The standard of review in this case is not believed to be a contested issue. The Trial Court indicated it was excluding extrinsic evidence based on the Trial Court’s interpretation of Cecilia’s Will and opinion that her Will was unambiguous. The Trial Court’s dismissal of the TEDRA Petition was based on the view that without extrinsic evidence, and coupled with the Trial Court’s interpretation of Cecilia’s Will, then Cecilia’s estate should pass intestate to her siblings.

Interpretations of a Will are subject to *de novo* review. *See, In re Estate of Collister*, 195 Wn. App. 371, 382 P.3d 37 (Div. 2 2016). The Trial Court in this case did not hear testimony and/or consider other evidence that could have been characterized as issues of fact—either in the form of

evaluating extrinsic evidence to determine intent or evaluating extrinsic evidence to determine whether James and Cecilia agreed to make mutual wills.

VI. ARGUMENT

A. Context Rule: The Court’s duty to ascertain Cecilia’s intent at the time she signed her Will can only be fulfilled by admitting extrinsic evidence to consider the context in which her Will was executed. The need to consider context is independent of whether the Will is ambiguous. Moreover, the parties in this case stipulated to the admissibility of extrinsic evidence—the mirror Will of James Douglas included.

The same rules of construction apply to the interpretation of a Will as to the interpretation of a contract. *In re Estate of Bernard*, 182 Wn. App. 692, 704-5, 332 P.3d 480 (Div. 1 2014). And the goal in each type of case is to give effect to the intent of the person(s) signing the document. *Id.*

Washington courts apply the “context rule” to assist in determining the meaning of contract language. *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 713, 334 P.3d 116 (Div. 2 2014) (citing *Berg v. Hudesman*, 115 Wn.2d 657, 666-69, 801 P.2d 222 (1990)). The context rule provides for the admissibility of extrinsic evidence to help understand the intent of a document by examining the context surrounding the

document's execution. *Viking Bank*, 183 Wn. App. at 706 (citing *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 502, 115 P.3d 262 (2005)). The context rule is not meant to change the written word of a document, but to shed light on the meaning of the words written. *Id.*

Berg, supra, is a 1990 case that is generally cited as the seminal case in Washington related to the context rule. However, there is authority going back seventy years for using the context rule to interpret a Will. *See, In re Lidston's Estate*, 32 Wn.2d 408, 418, 202 P.2d 259 (1949).

Not only does the context rule support the admissibility of extrinsic evidence to determine intent, but also in this case there was a stipulation that extrinsic evidence was "acceptable for review by the judge." The stipulation signed by the parties the day before trial was not an ER 904 submission where relevance objections were reserved. The stipulation listed fourteen exhibits and stated that each exhibit noted as admitted should be reviewed. The parties noted each exhibit as admissible and no party objected to admissibility based on authenticity or any other ground.

There is no suggestion in the parties' stipulation that the admissibility of extrinsic evidence was contingent on some future event and/or finding by the Trial Court. Further, the parties had submitted extrinsic evidence at summary judgment without any objections, and the only pre-trial motion in this case dealt with the format for presenting

extrinsic evidence by testimony from two witnesses the parties each expected to call at trial (one witness to present extrinsic evidence to be called by the Douglas children and the other witness to be called by the Brost siblings). The parties' actions leading up to trial indicate extrinsic evidence was necessary to determine the intent of Cecilia's Will. And the context rule supports the admissibility of extrinsic evidence to determine intent.

Cecilia's Will states that her property is to go entirely to her husband, James. There is a survival section stating that a person who dies within ninety days of Cecilia is not deemed to survive her, but the only part of the Will where the survival section is relevant is with regards to the appointment of a personal representative. There is no statement in Cecilia's Will that says James has to survive Cecilia in order for James [or his heirs] to inherit Cecilia's estate.

If James were a blood relative of Cecilia, then James' children would have inherited under Cecilia's Will [through James] despite James dying first. RCW 11.12.110. And if James' children had been legally adopted by Cecilia then they would have inherited from Cecilia's estate either through James or Cecilia. RCW 11.04.015; RCW 11.04.085. Reading Cecilia's Will as a whole and based on the context surrounding the making of Cecilia's Will, it is reasonable, and consistent with the law in

other situations, to find that Cecilia's intent was for James' children to inherit even if James did not survive her.

Cecilia's Will gives to James [with no survival requirement] and does not provide for James' children. However, statements in Cecilia's Will pertaining to James' children are qualified by Cecilia's statement that she knows James will provide for them. If Cecilia did not intend that James' children ultimately inherit from James' and Cecilia's estates, and if Cecilia wanted her assets to pass intestate to her siblings, then Cecilia's Will would not have needed any reference to James' children.

Extrinsic evidence must be examined under the context rule to explain why there is no survival requirement in Cecilia's Will and why Cecilia mentioned that she knew James would provide for his children. When Cecilia's Will is viewed as a whole, and in the proper context, it is evident that Cecilia's intent at the time she signed her Will was for James' children to inherit the couples' assets after the surviving spouse died.

The extrinsic evidence in this case reflects that James and Cecilia had mirror Wills drafted at the same time, which was a time Cecilia was in the hospital. James' Will had the same language as Cecilia's as far as giving nothing to his children knowing that Cecilia would provide for them. It would be absurd to hold that James intended to disinherit his children. The obvious meaning of the statement in James' Will was to make sure his

children only inherited his [and Cecilia's] assets after both James and Cecilia died. In other words, the surviving spouse would inherit and then James' kids would inherit. This exact same language should have the exact same result in both Wills—for James' children to inherit from the surviving spouse.

The evidence further shows that Cecilia treated James' children as her own. Cecilia was very close to Laura Douglas' daughter, Cherie, and Cherie was named in Cecilia's Will as personal representative. Naming Cherie as personal representative is a further indication of Cecilia's benevolence toward the Douglas children. *Matter of Estate of Bergau*, 103 Wn.2d 431, 439, 693 P.2d 703 (1985).

In the context of Cecilia signing her Will in March 2015 while in the hospital, and with James alive after nearly forty years of marriage, during which time Cecilia was devoted to James and James' children, there is little doubt that Cecilia intended for James' children to inherit from the surviving spouse. There is absolutely no evidence to support the argument that Cecilia intended for her assets to pass intestate upon her death to her siblings.

B. Mirror Wills: The Trial Court acknowledged Cecilia's and James' Wills were mirror wills, but failed to assess one in conjunction with the other. This makes no sense, as it would be

absurd to conclude that identical mirror Wills were intended to have different outcomes/results/beneficiaries. Providing for James' children like both Cecilia and James intended is what makes sense.

Mirror wills can be: “mutual Wills” and/or “reciprocal Wills.” Mutual Wills require the existence of an agreement as to the manner of the disposition of the couples’ property after both are deceased, and which agreement cannot be changed by the surviving spouse. Reciprocal Wills can be Wills that have a common plan, but reciprocal Wills are not mutual Wills if there is no agreement that the common plan is binding on a surviving spouse—*i.e.*, if the surviving spouse is free to change his or her Will, then it is not a mutual Will. *Portmann v. Herard*, 2 Wn. App. 452, 466, 409 P.3d 1199 (Div. 2 2018).

An example of a mutual Will is the Will of Homer Duncanson in the case of *Newell v. Ayers*, 23 Wn. App. 767, 598 P.2d 3 (Div. 3 1979). Homer Duncanson and his wife Bessie had been married for sixteen years when Bessie went to the hospital for surgery. Homer and Bessie each had children from prior marriages, and when Bessie went in for surgery the couple had identical Wills drafted that provided for the surviving spouse and then for all of the couples’ children/stepchildren equally. The Wills stated the identical Wills were mutual Wills by agreement.

Express language in a Will that it is a mutual Will is obviously helpful in determining the binding effect of the agreement. *Newell, supra*. However, a Will can be a mutual Will with binding effect even if it does not expressly so state. *See, Auger v. Shideler, 23 Wn.2d 505, 161 P.2d 200 (1945)*. In *Auger, 23 Wn.2d 505*, a husband and wife signed identical Wills prepared by the same attorney, at the same time, and with the same distribution plan. The Wills did not expressly state they were mutual Wills, but extrinsic evidence proved that at the time the Wills were signed the couple had agreed they did not want the distribution plan to change after the first spouse died. In *Auger*, the Court determined the mirror Wills were mutual Wills.

A case where a reciprocal Will was held not to be a mutual Will was *Portmann v. Herard, supra*. In that case, domestic partners who had been together for several decades made wills in 1992 providing for the survivor and a similar distribution to various family members [on both sides] upon the passing of the surviving partner. The couple had new reciprocal Wills drawn up in 1995. Then in January 1998, one partner signed a new Will that changed the distribution. The other partner signed a new Will with a slightly different distribution in September 1998. The first partner died in 2000 and the surviving partner changed his Will multiple times before his death in 2015. The Court in *Portmann* reasoned that it may have been the

intent of the couple in 1998 to leave assets of the surviving couple to family members of each partner, but under the facts it could not be held that the surviving partner was prohibited from changing the distribution after the first partner's death.

It is notable in *Portmann* that the Court observed it may have been the intent of the parties in 1998 for the survivor to distribute assets in the manner agreed to by the couple at that time. 2 Wn. App. at 468. This suggests that if no new Will was created by the surviving partner, then the property would have been distributed pursuant to the couple's agreement in 1998 regardless of whether the Wills were mutual Wills. That point is relevant to Cecilia's estate because Cecilia did not create a new Will after James died, and she stood behind the Will that said she wanted everything to go to James knowing that he would provide for his children. Further, Cecilia made comments after James died that indicated she intended both at the time she signed her Will and after James died that James' children should inherit the couples' assets.

Ultimately, though, *Portmann* is distinguishable for a number of reasons. Mainly, the couple in *Portmann* changed their Wills multiple times while they were both alive and they did not have identical Wills when the first partner died. The present matter is more like *Newell* and *Auger*, in which cases identical Wills were in effect at the time the first spouse died

that prevented the surviving spouse from disinherit the deceased spouse's progeny. And like in *Auger*, 23 Wn.2d at 510-11, where the Court explained the husband and wife had no knowledge of the difference between mutual Wills and merely reciprocal Wills, James and Cecilia were not educated in the law and simply made it known at the time their Wills were signed that they wanted an identical estate plan—the surviving spouse to inherit and then provide for James' children.

It is indisputable that Cecilia's Will was identical to James' Will down to the statement that each spouse said they knew the other spouse was providing for James' children. At a minimum, this statement shows identical intentions in March 2015 when the Wills were signed—for the surviving spouse to take and then for James' children to inherit from the surviving spouse—regardless of whether the Wills were mutually binding. And since Cecilia never changed her Will, it is essentially a moot point whether she had a right to make a new Will; but the issue of whether the Wills were mutual Wills is not entirely moot because of the implication regarding intent that a determination the Wills were mutual Wills would signify. It all circles back to intent and the rationale for why the Trial Court should have examined extrinsic evidence to determine intent.

Certainly, the Douglas children believe the Wills were mutual Wills, which belief is supported by extrinsic evidence, including looking at both

Wills together, the context of when and why the Wills were signed, and testimony about the family ties between Cecilia and James' children. Further, mutual Wills make sense in blended families where spouses want to make sure their children are provided for and that the surviving spouse cannot give everything to a new spouse and/or the entirety to the surviving spouse's side of the family. Specifically in this case, it is inconceivable that James intended to allow his in-laws to inherit over his children. And given the identical Wills, it makes no sense that two identical Wills would lead to completely opposite results.

C. Ambiguity: The parties in this case have two different interpretations of Cecilia's intent as reflected in her Will. Extrinsic evidence is required to determine Cecilia's intent.

“[A]mbiguous’ simply means capable of being understood in more senses than one.” *In re Seaton's Estate*, 4 Wn. App. 380, 383, 481 P.2d 567 (Div. 3 1971) (citing *In re Torando's Estate*, 38 Wn.2d 642, 645, 228 P.2d 142 (1951)). There are generally three types of ambiguities—latent, patent, and equivocation—and extrinsic evidence to resolve the ambiguity is admissible upon the finding of any one of the types of ambiguities. *Matter of Estate of Bergau*, 103 Wn.2d 431, 436-37, 693 P.2d 703 (1985). A patent ambiguity is one apparent on the face of the document at issue. *Id.* (citing *Carney v. Johnson*, 70 Wn.2d 193, 422 P.2d 486 (1967)). A latent ambiguity

is one that becomes apparent when applying the instrument to the facts as they exist. *Id.* When any uncertainty arises as to a testator's true intention, extrinsic evidence should be admitted to explain the language in the Will. *Estate of Bergau*, 103 Wn.2d at 436 (citations omitted).

There are both patent and latent ambiguities in the present matter. A patent ambiguity exists based on Cecilia's qualification that the reason she does not provide for James' children is because she knows James is providing for them, but no explanation within the four corners of Cecilia's Will itself describes how she knows James will provide for the children. A latent ambiguity exists because Cecilia's Will only expressly provides for James [with James providing for his children], but James had already died when it became time to probate Cecilia's Will and so the assets could not go to James.

Given James died first, the person who Cecilia expressly stated should inherit her assets cannot inherit them; although, arguably his estate could since Cecilia's Will does not specifically state James must survive her; the only time in Cecilia's Will that James' survival is mentioned is in the section appointing a personal representative. The question, then, is: should James' children inherit based on Cecilia's statement that James' children will be provided for [by James]; or, should Cecilia's assets pass intestate [to her siblings]? Either result is arguably plausible. And by the

very definition of the term “ambiguous,” Cecilia’s Will is ambiguous because it is capable of being understood to mean more than one thing.

Extrinsic evidence is required to resolve the ambiguity and determine Cecilia’s intent. The extrinsic evidence includes James’ mirror Will, which indicates Cecilia would provide for James’ children. Extrinsic evidence also includes statements that Cecilia made indicating it was her intention that James’ children be taken care of. The Trial Court reached the wrong conclusion [on June 5, 2019] about Cecilia’s intent, and part of the reason the wrong conclusion was reached is that the Trial Court refused to take extrinsic evidence into account.

D. Intent: The Court’s primary duty in a case like this is determining the intent of the testator—rules of construction are subordinate to this primary duty. It was Cecilia’s intent that James’ children inherit all of her and James’ assets after the last one of Cecilia and James died. Cecilia did not intend for her assets to pass intestate to her siblings.

“The paramount duty of the Court is to give effect to the testator’s intent when the will was executed.” *In re Estate of Sherry*, 158 Wn. App. 69, 76, 240 P.3d 1182 (Div. 3 2010) (citations omitted). There is a presumption in favor of testacy. *In re Riemcke’s Estate*, 80 Wn.2d 722, 729, 497 P.2d 1319 (1972) (citations omitted). The Court will gather the

testator's intent from the Will as a whole, if possible, to distribute assets of the estate consistent with the testator's intent even if the Will does not explicitly cover a contingency that happens to exist at the time of the testator's death. *Id.* Rules that courts apply to interpret documents are subordinate to the Court's primary duty of determining the intent of the testator and giving it effect. *Riemcke's Estate*, 80 Wn.2d at 727 (citing *Kjosness v. Lende*, 63 Wn.2d 803, 807, 389 P.2d 280 (1964); *In re Estate of Lidston*, 32 Wn.2d 408, 418, 202 P.2d 259 (1949)). It has been black letter law for decades that:

The one rule of testamentary construction to which all others are servient and assistant, it has been said, is that the meaning intended by the testator is to be ascertained and given effect in so far as legally possible. The testatorial intention will control any arbitrary rule, however ancient may be its origin, and the various accepted canons of construction serve not so much to restrict or constrain the judicial mind as merely to aid or guide it in the discovery of the intention of the testator.

Estate of Lidston, 32 Wn.2d at 415 (quoting 57 Am. Jur. 731, Wills §1135).

In some cases, Courts have determined that arguably unambiguous language is ambiguous when extrinsic evidence helped to give effect to the testator's intent. *See, e.g., Seaton's Estate, supra.* In other cases, Courts have reasoned through ambiguous language and determined it is not ambiguous as to the testator's intent. *See, e.g., Riemcke's Estate, supra.*

The present matter does not have any perfectly analogous case, but *Riemcke's Estate* has several similarities.

In *Riemcke's Estate*, 80 Wn.2d 722, part of a Will expressly provided for the testator's parents. The Will indicated that the portion of the estate designated to the testator's parents would go to the testator's sister if the testator's parents pre-deceased the testator. The testator died and her parents did not pre-decease her. However, the testator's parents renounced their right to take pursuant to the Will.

Technically, based on a narrow view of the language in the Will, the testator's sister was not in line to take under the Will because her parents were not deceased. The trial court ruled the parents' share went back into the estate and passed intestate since there was no contingency in the Will for the parents still being alive, but declining to take their share. The trial court found this result to be the correct interpretation of what all parties considered an unambiguous Will. *Riemcke's Estate*, 80 Wn.2d 722.

On appeal by the sister in *Riemcke's Estate*, 80 Wn.2d 722, the Court of Appeals also found the Will unambiguous, but reached a different result than the trial court. The Court of Appeals acknowledged that the Will at issue did not consider every contingency, but reasoned enough contingencies were contemplated to evidence an intent to pass the property to the wife's side of the family. The Court of Appeals reversed the trial

court and decided the testator's sister should take the property that her parents renounced because that was the general plan.

No contingencies were considered in the present matter for simultaneous deaths of James and Cecilia, and there was no consideration for different beneficiaries depending on who died first. Both Wills stated the surviving spouse was to inherit and then James' children would be provided for by the surviving spouse. A technical reading of both Wills, which each expressly state that James' children receive nothing knowing that they will eventually be provided for by the surviving spouse, would result in Cecilia's estate passing intestate and James having no heirs—absurd results and not the presumed intentions of the testators.

The general plan is apparent in Cecilia's Will that James inherit if he is alive and that James' children ultimately inherit. To pass Cecilia's estate intestate and not to James' children frustrates Cecilia's intent that James' children ultimately inherit. Cecilia's Will states in no uncertain terms that she wanted everything to go to James and she knew that he would provide for his children—this is an expression of intent that can only be reasonably interpreted as meaning James' children should inherit. This interpretation is consistent with how Cecilia treated James' children as her own family and is consistent with Cecilia's stated intentions to uninterested third parties.

Respondents may rely upon *In re Searl's Estate*, 29 Wn.2d 230, 186 P.2d 913 (1947). However, the case is distinguishable. In *Searl's Estate*, a husband and wife each signed Wills that provided for the surviving spouse and then for the wife's sister if the husband and wife died simultaneously [or their deaths were approximately close to each other]. There was no contingency if one spouse outlived the other for more than a month. And more importantly for comparison purposes, there was no provision in either spouse's Will that indicated any knowledge and/or reliance that the other spouse would provide for the wife's sister upon the surviving spouse's death.

In *Searl's Estate*, 29 Wn.2d 230, the wife died first and the husband died forty-seven days later. The Court held that the wife's estate passed to the husband pursuant to her Will and that the husband's estate passed intestate to his siblings. The Court determined the provision in the husband's Will potentially providing for his wife's sister was null and void because her sister only inherited if the couple died at approximately the same time, which the Court determined meant less than forty-seven days apart.

There was no mutual intent in *Searl's Estate*. The wife's Will contemplated by its terms that if her husband outlived her then he could make the beneficiaries of his estate whomever he wanted. The wife's sister

was only the contingent beneficiary in the event the couple died at approximately the same time. But the terms of Cecilia's Will state that the only reason she did not provide for James' children is that she was giving everything to James and she knew James would provide for his children. James and Cecilia were not free to make new Wills providing for beneficiaries other than James' children—and even if they were, they signed mirror Wills promising to provide for James' children and Cecilia's mirror Will was never revoked.

In *Searl's Estate*, the testators thought at the time they signed their Wills: if we die at the same time then wife's sister gets everything, but other than that the surviving spouse gets everything and can do what he or she wants. In *Riemcke's Estate*, the testator thought at the time she signed her Will: I want my property to go to my side of the family. In the present matter, James and Cecilia thought at the time they signed their Wills: I want the surviving spouse to get everything and then James' children to eventually get everything. The Court must give effect to the testator's intent, and in this case the evidence supports Petitioner/Appellant's position that Cecilia intended for the Douglas children to inherit from her estate.

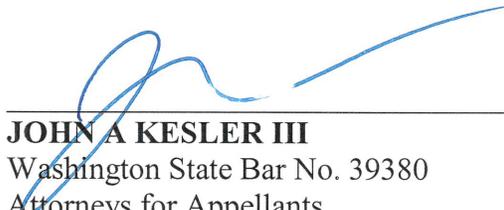
VII. CONCLUSION

For the foregoing reasons, Appellant/Petitioner, Laura Douglas, requests that the Court of Appeals reverse the ruling of the Trial Court. The

Court of Appeals has the right to its own interpretation of Cecilia Brost's Will and decision about her intent, which the Douglas children believe is clear from all of the evidence—*i.e.*, the children were intended to inherit from James and Cecilia regardless of whether the couple died simultaneously or who outlived who. At the very least, the Court of Appeals should determine that extrinsic evidence is required to analyze intent and a trial should be conducted that includes the admission of stipulated exhibits and the testimony of witnesses on issues of the testator's intent in the context of her mirror Will, and/or whether the Wills were mutual Wills.

RESPECTFULLY SUBMITTED this 12th day of September 2019.

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