

**FILED**  
**Court of Appeals**  
**Division II**  
**State of Washington**  
**11/8/2019 12:46 PM**  
No. 53701-0-II

COURT OF APPEALS  
DIVISION II OF THE STATE OF WASHINGTON

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IN RE: ESTATE OF CECILIA BROST

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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.

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**REPLY ON APPELLANTS’ OPENING BRIEF**

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“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). Cecilia Brost signed her Will in the hospital and it seemed likely in the moment that her husband, James Douglas, would outlive her. Cecilia wanted to give her earthly possessions to her husband, and she knew he would then give it to his children. Cecilia and James were married for forty years and Cecilia had no biological children—she treated James’ children as her children.

There was no provision in Cecilia’s Will for what might happen if James did not outlive Cecilia. The only mention of survival contained in Cecilia’s Will is in reference to the contingent personal representative—if James did not survive Cecilia, then Cecilia wanted a Douglas family member to serve as personal representative of her estate and to distribute assets. Cecilia nominated a Douglas family member to serve as personal representative, as opposed to a Brost family member. Cecilia’s choice of personal representative reflects her benevolence to her [step]children and intention for them to ultimately inherit her and James’ assets.

As it turned out, Cecilia outlived James by a few months. Cecilia made it known to those around her after her husband died that she wanted her [step]children taken care of. Cecilia did not attempt to change the contingent personal representative after James died, and/or make any

changes whatsoever to her estate plan that would indicate her intentions were different after her husband died compared to what her intentions were when she signed the Will.

Cecilia's brothers and sisters argue they should inherit Cecilia's estate based on a self-serving and narrow interpretation of Cecilia's Will. They know that almost all extrinsic evidence, including the context surrounding the Will, supports James' children's position that the children should inherit Cecilia's estate. Cecilia's brothers and sisters want money and do not want to give effect to Cecilia's intent.

Cecilia's Will is poorly drafted. It contains typos and fails to contain customary provisions of a well-reasoned estate plan. It was obviously drafted in a hurry. Nevertheless, it would be an error of law, and contrary to Cecilia's intent, to render her Will meaningless—and to pass her estate to her siblings as if she had died intestate. Cecilia's Will should be given meaning. And when Cecilia's Will is read critically and viewed in the proper context, it provides for her [step]children to inherit.

## **I. ARGUMENT**

### **A. Procedure**

A stipulation to admit exhibits is a self-executing document that obviates the need for any formal judicial action—*e.g.*, to admit offered

exhibits. *See U.S. v. Lancellotti*, 761 F.2d 1363, 1368 (9<sup>th</sup> Cir. 1985). In the present matter, the Trial Court made a decision based on the interpretation of Cecilia Brost's Will. However, the Will was not offered into evidence during any party's case or submitted with any filed motion because the Trial Court made its decision at a procedurally peculiar time—during an opening statement after both parties confirmed there were no preliminary matters to address. The only way the Will could have been before the Trial Court was if the Trial Court accepted it as part of the parties' stipulated exhibit list, which was submitted to the clerk prior to trial. CP 205-206.

The Douglas children contend that all of the evidence set forth in the stipulated exhibit list—Cecilia's Will and other evidence, which included extrinsic evidence—should have been admitted by virtue of the stipulation. The Brost siblings argue the stipulation was a “procedural courtesy to the clerk” and not a stipulation that waived objections to extrinsic evidence. Missing from the Brost siblings' argument/analysis of the situation is any explanation for how Cecilia Brost's Will was admitted into evidence and properly before the Trial Court to be interpreted, but the other exhibits on the stipulated list were not simultaneously admitted.

Nothing contained in the stipulated exhibit list distinguishes the admissibility of Cecilia's Will from the admissibility of the other exhibits

on the stipulated list. The stipulated exhibit list agreed to by the parties had three boxes to check for each exhibit: (1) Admissibility Stipulated; (2) Authenticity stipulated, admissibility disputed; and (3) Authenticity and admissibility disputed. CP 205-206. The Brost siblings could have checked boxes two or three if they objected to admissibility of the exhibits. The Brost siblings agreed to check box number one instead, which signified their agreement to the admissibility of extrinsic evidence.

It is common practice, if not a required rule, for parties to submit a combined list of exhibits to the Court prior to trial. But there is no requirement for parties to stipulate to the admissibility of each and every exhibit that one party or the other plans to potentially offer for admission into evidence during trial. The “procedural courtesy to the clerk,” as the Brost siblings put it, would have been accomplished by submitting the same set of exhibits even if the Brost siblings had chosen to object to the admissibility of any exhibit(s). The decision to stipulate was a waiver of the Brost siblings’ objections to the admissibility of extrinsic evidence. The stipulation was more than just a procedural courtesy.

This issue has nothing to do with the Trial Court’s discretion to admit or exclude evidence. The Brost siblings cite *State v. Demary*, 144 Wn.2d 753, 30 P.3d 1278 (2001), for the proposition that courts have broad discretion related to admissibility of evidence. It merits pointing out that

the Brost siblings' only citation as to this issue is a case where a trial court allowed evidence the defense objected to, and the Supreme Court affirmed the decision to allow the evidence. The Brost siblings do not cite a case where the decision to exclude evidence was affirmed. But as previously stated, the Trial Court's discretion to admit or exclude evidence is not the issue in this case. The issue is whether a court can selectively admit one stipulated exhibit into evidence out of a batch of fourteen exhibits and exclude the other thirteen stipulated exhibits in the same batch. It appears from *Lancellotti, supra*, that the Court must accept into evidence all stipulated exhibits and not just a select one or few.

#### **B. Context Rule**

There is overlap in the Douglas children's arguments related to admissibility of extrinsic evidence under the context rule, and arguments related to Cecilia's intent. The obvious reason for the overlap is that examining extrinsic evidence illuminates Cecilia's intent, which was for the Douglas children to ultimately inherit once both James and Cecilia were gone.

As for the context rule, both parties cite *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990), and *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262 (2005). *Berg, supra*, held that extrinsic evidence was admissible to determine intent of a lease. In *Hearst*,

*supra*, the Court deemed the extrinsic evidence was irrelevant to analyzing a joint operating agreement. Several of the cases cited in the Douglas children's Opening Brief related to the context rule were not addressed in the Brost siblings' Response. However, the Brost siblings cited two new cases on this issue: (1) *Hollis v. Garwell, Inc.*, 137 Wn.2d 683, 974 P.2d 836 (1999); and (2) *In re Estate of Hayes*, 185 Wn. App. 567, 342 P.3d 1161 (Div. 3 2015).

In *Hollis, supra*, the Supreme Court held that the context rule allowed the introduction of extrinsic evidence to interpret restrictive covenants applicable to a subdivision plat. But the specific testimony sought to be admitted under the context rule in *Hollis* was excluded. 137 Wn.2d at 697. Meanwhile, the Court of Appeals in *In re Estate of Hayes, supra.*, went through the exercise of interpreting a will both while considering extrinsic evidence and not considering extrinsic evidence—the Court in that case concluded its decision would be the same either way. The cases cited by the Brost siblings generally support the Douglas children's position that the context rule allows extrinsic evidence in a wide variety of document interpretation cases, and when analyzing a will the Court should attempt to reconcile any differences between conclusions that might be reached in interpreting a will in the context of extrinsic evidence versus ignoring extrinsic evidence.

Justice requires that the context rule be liberally applied to allow extrinsic evidence in cases of interpreting a will to determine intent. This principal is the logical extension of the long-held rule in Washington that a Court's paramount duty is to determine intent and that "rules and presumptions relating to the construction of wills are subordinate to the intention of the testator..." *In re Lidston's Estate*, 32 Wn.2d 408, 202 P.2d 259 (1949).

The circumstances surrounding Cecilia signing her Will should not be ignored. Cecilia's Will was identical to James' Will and they should be given the same meaning—obviously, James did not intend to pass his estate to his in-laws. Cecilia nominated a Douglas family member to serve as personal representative. Cecilia loved her husband's children as her own and told people she wanted to make sure they were taken care of. Last, but not least, Cecilia's Will stated that she knew her [step]children would be provided for. How did she know—because she believed her Will and her husband's identical Will provided for the Douglas children. This is the only logical conclusion of Cecilia's intent when viewing all of the evidence. If Cecilia had intended to provide for her siblings at the time she signed her Will, she would have needed to expressly provide for them. But there is no mention of Cecilia's siblings in her Will. Cecilia only mentions her husband and her step[children]. The surviving spouse was intended to inherit and

then the Douglas children were intended to inherit from the surviving spouse.

### **C. Mirror Wills**

The Douglas children's Opening Brief cited and discussed *Portman v. Herard*, 2 Wn. App. 452, 466, 409 P.3d 1199 (Div. 2 2018), as one of the cases explaining mirror wills. The Brost children cite this case for the definition of reciprocal will, but do not discuss the case.

The Douglas children's Opening Brief cited and discussed *Newell v. Ayers*, 23 Wn. App. 767, 598 P.2d 3 (Div. 3 1979), as another case explaining mirror wills. The Brost children cite this case for the definition of mutual will, but do not discuss the case.

The Douglas children's Opening Brief additionally cited and discussed *Auger v. Shideler*, 23 Wn.2d 505, 161 P.2d 200 (1945), as another case explaining mirror wills. It is the Douglas children's position that the Wills of James Douglas and Cecilia Brost, and the context surrounding the signing of their Wills, is analogous to *Newell, supra*, and *Auger, supra*. The Brost children's Response Brief fails to mention *Auger, supra*, let alone discuss the case.

The Response Brief makes three arguments in support of the Brost children's position that Cecilia's and James' Wills were not mirror wills.

First, the Brost children argue, without citing to any case or statute to support their position, that the mirror will issue would have only been relevant if Cecilia attempted to change her Will. This is an absurd argument. The fact that a person does not attempt to change their will is evidence the person agreed not to change their will—it is not evidence that a person believed they were free to make changes.

Second, the Response Brief makes a conclusory argument that the Douglas children must prove there was an oral contract between James and Cecilia to create mirror wills. This is contradictory to the arguments made by the proponents of mirror wills in other cases, such as *Newell, supra*, and *Auger, supra*, and not in line with the Courts' decisions in those cases.

At all rates, the Brost children cite to *Arnold v. Beckman*, 74 Wn.2d 836, 447 P.2d 184 (1968), in an attempt to support their argument. The *Arnold* decision expressly describes how that case was different than *Auger*. And the later *Newell* case is also distinguishable from *Arnold*. For some of the same reasons that *Arnold* is distinguishable from *Newell* and *Auger*, it is distinguishable from the present matter.

In *Arnold*, the husband and wife both had children from prior marriages before they married. Whereas in the present matter, only one spouse had biological children. In *Arnold*, the wife had substantial separate property well exceeding the value of community property shared by the

couple. Whereas in the present matter, Cecilia married at a young age before she had any separate property and the couple lived together for so long as a family they decided everything would be community anyhow. In *Arnold*, the wife changed her will while the husband was still alive. Whereas in the present matter, the Will Cecilia signed in the hospital at the same time James signed his Will was the same Will Cecilia kept until she died—she never attempted to change her Will. In *Arnold*, there was no indication in the wife’s will [she ultimately changed] that she knew how her husband would provide for the children. Whereas in the present matter, Cecilia’s Will stated she knew James would provide for the children.

There are many distinguishing factors between *Arnold* and the present case, but one major point, which arguably does not have anything to do with whether there were mirror wills in *Arnold*, is that the wife’s final intent in *Arnold* was a natural and expected bequest—she split community property between her children and her husband’s children, but she kept her separate property on her side of the family. Whereas in the present matter, it would be unnatural and unexpected for Cecilia to disinherit the children she treated as her own.

This leads into the third argument in the Response Brief on mirror wills, which is the Brost siblings’ argument that not even James’ Will would have resulted in the Douglas children inheriting. This is another absurd

position and highlights precisely why the Wills of James Douglas and Cecilia Brost were mirror wills, which must be read in tandem. James' Will states the he wants to provide for Cecilia if she is the surviving spouse and he knows she will provide for his children. Cecilia's Will states that she wants to provide for James if he is the surviving spouse and she knows he will provide for his children. Taken together, both James and Cecilia wanted the surviving spouse to get everything and then for the Douglas children to get everything from the surviving spouse. This is the natural and expected way for a family like James, Cecilia, and the Douglas children to distribute the estate(s) of the family patriarch and matriarch. Both James and Cecilia naming a Douglas family member as contingent personal representative reinforces their intent.

It might be a moot point whether James' Will and Cecilia's Will were mirror wills as the issue relates to the surviving spouse's ability or inability to change their Will. But the mirror will issue is relevant in that a hallmark of mirror wills is they are intended to result in the same—*i.e.*, mirror—distributions of estate assets to heirs. In other words, it may not matter if the Wills could or could not have been changed, the intent at the time the Wills were signed is what should control. A determination the Wills were mirror wills would give the Court another reason [in addition to the

parties' stipulation and in addition to the context rule] to review James' Will for purposes of determining Cecilia's intent. When these mirror wills are read together, there is no question the Douglas children should inherit Cecilia's estate. James did not intend for his assets to pass to the Brost siblings, and, therefore, Cecilia's identical Will signed at the same time should not lead to that result.

#### **D. Ambiguity**

The parties cite the same cases to define ambiguity and the different types of ambiguities; *e.g.*, patent and latent. The cases relied upon are *In re Seaton's Estate*, 4 Wn. App. 380, 481 P.2d 567 (Div. 3 1971), and *Matter of Estate of Bergau*, 103 Wn.2d 431, 693 P.2d 703 (1985). In *Seaton's Estate, supra*, the Court of Appeals determined part of a will was ambiguous, the Court of Appeals determined extrinsic evidence should be admitted to analyze the testator's intent, the Trial Court's decision was reversed, and the case was remanded back to the Trial Court. In *Estate of Bergau, supra*, the Supreme Court agreed with the Trial Court's decision that a will was ambiguous and extrinsic evidence was required to determine intent. Thus, both cases cited in the Brost siblings' Response Brief that deal with wills and ambiguities are cases where ambiguities existed and extrinsic evidence was allowed.

The Brost siblings do not cite any analogous case to support their argument that Cecilia's Will is unambiguous. They simply insist it is so. But their argument is based on a narrow reading of specific parts of Cecilia's Will, and without context. Further, the Brost siblings fail to explain why Cecilia's Will mentions the Douglas children at all if it were truly her intent to pass her estate intestate to the Brost siblings. Additionally, the Brost siblings' argument purports to give no meaning to the statement in Cecilia's Will that she knows her husband is going to provide for the Douglas children.

Cecilia's Will standing alone could be interpreted to provide for the Douglas children—her Will states she knew they would be provided for, and the only way they are provided for under the circumstances is if they inherit from Cecilia's estate. But the Brost siblings have a different interpretation. The Will being subject to multiple interpretations is the very definition of ambiguity. *Seaton's Estate, supra*. At a minimum, the language in the Will is ambiguous enough to warrant the review of extrinsic evidence to determine intent.

#### **E. Intent**

Intent is what really matters. *In re Estate of Sherry*, 158 Wn. App. at 76. Given the importance of determining intent in a will interpretation case, it is shocking the Brost siblings' Response Brief glosses over the

subject. The Response Brief cites eleven cases: one on the standard of review; one on discretion to admit evidence; three on mirror wills; two on ambiguity; and four on matters of statutory construction and the context rule. The Brost siblings do not discuss intent except to implore the Court to ignore extrinsic evidence and construe intent based on a narrow reading of a few passages in the Will. This is simply not how Courts are meant to decide will interpretation cases—Washington Courts have a history of refusing to interpret wills in a narrow and technical sense when it is overall clear what the testator intended. *See, e.g., In re Riemcke's Estate*, 80 Wn.2d 722, 497 P.2d 1319 (1972).

Cecilia stated in her Will that she knew the Douglas children would be provided for. Cecilia named a Douglas family member to be the personal representative of her estate. These statements in Cecilia's Will reflect her intention that the Douglas children inherit her estate. When viewing Cecilia's Will in tandem with James' Will, it becomes even clearer that both Cecilia and James intended for the Douglas children to inherit from the surviving spouse. Extrinsic evidence, including Cecilia's statements before she died that she wanted the Douglas children taken care of, further solidify Cecilia's intent that the Douglas children inherit her estate.

Cecilia was the matriarch of the Douglas family for forty years. She treated the Douglas children as her own. Cecilia was the grandmother to the Douglas children's children. Further, Cecilia and James were devoted to each other and they wanted their assets to pass in an identical way—to the surviving spouse and then the Douglas children. In order to give effect to Cecilia's intent when she signed her Will, the Douglas children must be declared the rightful beneficiaries of Cecilia's estate.

#### **F. Attorneys' Fees**

The Trial Court denied the Brost siblings' request for an award of attorneys' fees in this case. VRP (6/5/19) 27:9-12; CP 199. The Douglas children did not request an award of fees although it technically would have been allowed under RCW 11.96A.150 because the Court has discretion to award fees to any party, and not just to a prevailing party. It was tempting for counsel for the Douglas children to request fees based on the argument that peculiar tactics by the Brost siblings caused the parties to incur unnecessary expenses—*i.e.*, if the Brost siblings would have brought a timely motion in limine instead of making a motion in limine/motion for summary judgment during opening statements, then trial attendance and some part of trial preparation could have been avoided. But ultimately, counsel for the Douglas children did not believe this was an appropriate

case for fees to be awarded. As such, the Douglas children have not made a request for fees at trial or on appeal.

RCW 11.96A.150 states the Court's discretion to award fees is based on equity. The Court is permitted to "consider any and all factors it deems to be relevant..." RCW 11.96A.150(1). In the Brost siblings' request for fees on appeal, they do not provide any analysis of what equitable factors would support an award. They simply want an award if they prevail without regard to fairness and/or the nature of the dispute. But the law is not a prevailing party fee shifting statute and prevailing alone does not entitle the Brost siblings to an award of fees.

In *Matter of Estate of Westall*, 4 Wn. App.2d 877, 894-95, 423 P.3d 930 (Div. 2 2018), the Court of Appeals refused to impose an award of fees on any party because the case involved a *bona fide* dispute that required the Superior Court's guidance to resolve. The present matter similarly involves a *bona fide* dispute. It would be inequitable to award fees in this case to whatever side obtains rights to Cecilia's estate, while making the side that gets nothing pay double attorneys' fees. The Trial Court Judge was correct not to award fees during the lawsuit leading up to "trial." And the Court of Appeals should not award fees related to the appeal.

## II. CONCLUSION

A statement can be misinterpreted when taken out of context. In the movie “My Cousin Vinny,” one of the defendants was being interrogated and repeated the Sheriff’s accusatory statement, “I shot the clerk.” The statement when made in the movie was obviously not a confession. But the prosecutor used the statement out of context at trial in an attempt to convict an innocent man. Taken out of context, the statement was construed as a confession.

In this case, the Brost siblings are focusing on just a part of Cecilia’s Will, which taken out of context could be interpreted the wrong way. Whether under the context rule, due to an ambiguity, because James and Cecilia had mirror wills, and/or because the Brost siblings stipulated to the admissibility of extrinsic evidence—the Court should consider Cecilia’s Will in the proper context, as opposed to stopping with the limited and misleading interpretation argued by the Brost siblings.

Wills are binding legal documents and rules of contract interpretation generally apply. However, Washington Courts more readily consider extrinsic evidence when interpreting a will. This is because a will is not a document negotiated between multiple parties with potentially divergent interests and potentially competing views. And wills do not require the beneficiaries to provide consideration—or to even know about

the will when it is made. A will is the expression of the testator's final wishes. And the Courts want to make sure a person's final wishes are respected. Therefore, a more complete investigation of intent is appropriate, which takes into account extrinsic evidence. It is vitally important in this case to at least consider James' Will along with Cecilia's Will to determine testator intent given the Wills were signed at the same time and are identical.

Cecilia was married to James for forty years. Cecilia treated James' children as her own. Cecilia had a very close relationship with her [step]granddaughter, Cherie. Both Cecilia and James named Cherie as their contingent personal representative. What is more likely—that Cecilia and James intended for Cherie to handle Cecilia's estate for the benefit of the Brost siblings, who Cherie does not even know, or that Cherie was intended to handle the estate for the benefit of her family, the Douglas children? James' and Cecilia's Wills are identical and do not mention the Brost siblings. There is no question the Brost siblings would not have inherited anything if Cecilia died first. It makes no sense that Cecilia's Will would lead to a different result as far as intended beneficiaries when the Wills were identical and signed at the same time.

When Cecilia signed her Will, she wanted her husband to get everything and then she knew it would go to his children. The point is that Cecilia knew when she signed her Will that the Douglas children were to ultimately inherit everything. The Douglas children are Cecilia's intended beneficiaries. The Court's paramount duty is to give effect to the testator's intent, and so the Douglas children should inherit from Cecilia's estate.

RESPECTFULLY SUBMITTED this 8<sup>th</sup> day of November, 2019.

BEAN, GENTRY, WHEELER & PETERNELL, PLLC



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DATED this 8<sup>th</sup> day of November, 2019, at Olympia, Washington.

  
Pamela R. Armagost

**BEAN GENTRY WHEELER & PETERNELL**

**November 08, 2019 - 12:46 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53701-0  
**Appellate Court Case Title:** Estate of Cecilia Brost; Laura Douglas, et al., Appellants v. James Brost, et al., Respondents  
**Superior Court Case Number:** 17-4-00166-5

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