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No. 53701-0-II

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

Appellants,

v.

JAMES BROST, MARIE OFNER, CATHERINE BIRES, PHILIP
BROST, JEAN DEPORTER, PAUL BROST, DAVID BROST, KRISTIN
EATON, AND PETER BROST

RESPONDENT'S BRIEF

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I. Introduction

This case involves the administration of a basic will. The Decedent, whose will is being probated, is Cecilia Brost (hereinafter after referred to as “Cecilia”).

The Appellants are the children of Cecilia’s previously deceased husband (James Douglas) from a prior relationship. They are Cecilia’s stepchildren (hereinafter referred to as the “Douglas Stepchildren”).

The Appellees are Cecilia’s siblings, who inherited Cecilia’s estate in equal shares via the laws of intestacy (hereinafter referred to as the “Brost Siblings”).

II. Counterstatement of the Facts

The Douglas Stepchildren’s Statement of Facts includes facts that are contested and not supported by the record. The Brost Siblings assert the following is a summary of the facts that are relevant to this Court’s decision.

Cecilia’s Will was executed on March 25, 2015 while she was experiencing a medical emergency. On March 27, 2015, James Douglas (her husband at the time, hereinafter referred to as “James”) executed a will with reciprocal terms.

Cecilia survived the medical emergency. On May 8, 2015, Cecilia and James executed a subsequent Community Property Agreement. They did not amend the terms of their then existing Wills.

James died on August 9, 2016. Per the terms of the Community Property Agreement, which was consistent with James' Will, the entirety of his estate passed to Cecilia.

Cecilia then died on November 18, 2016. Allen Unzelman, Esq., who was the drafting attorney of both Cecilia and James' wills, admitted her will into probate.

Cecilia's Will clearly and unambiguously states the entirety of her estate is to pass to James (who had predeceased Cecilia). Further, Cecilia's Will clearly and unambiguously disinherits the Douglas Stepchildren. Cecilia's Will states in relevant part:

Section V: Distribution of Estate: I give, devise and bequeath all of my property of every nature and wheresoever situated to my husband, JAMES DOUGLAS, **making no provision in such event for any child/stepchildren of mine now living or hereafter born to or adopted by me** [emphasis added]. CP 67 – 70.

Further, there is a second provision in Cecilia's Will that again acknowledges Cecilia's intent to disinherit the Douglas Stepchildren. Specifically, "Section II: Declaration" states:

Section II: Declaration: I am married to JAMES DOUGLAS. I have no children. My husband, JAMES DOUGLAS, has six (6) children through prior marriage, namely, Dan Douglas, Laurie Douglas, Cindy Douglas, Debbie Douglas, Scottie Douglas, and Kenny Douglas. **I make no bequest, gift or devise to my stepchildren/children except as hereinafter stated, knowing that my husband will provide for them** [emphasis added]. CP 67 – 70.

Therefore, Cecilia's Will disinherited the Douglas stepchildren in two separate provisions. Because James had predeceased Cecilia, her will

contained no living beneficiaries. Accordingly, her estate was to pass to her next closest relatives via the laws of intestacy. After admitting Cecilia's will into probate, Mr. Unzelman contacted the Brost Siblings to notify them of their impending distribution.

The Douglas Stepchildren, apparently being dissatisfied with the manner in which their father provided for them prior to his death, brought a TEDRA Petition claiming that they were in fact the intended beneficiaries of Cecilia's Will.

The theory presented to justify this position was that Cecilia's Will was ambiguous, and that extrinsic evidence would show they were the true intended beneficiaries of Cecilia's Will. However, upon questioning at the outset of trial, the Douglas Stepchildren's attorney could not articulate any actual ambiguities within the four corners of Cecilia's Will.

Accordingly, the Hon. Judge James W. Lawler ruled: 1) Cecilia's Will was not ambiguous; 2) further evidence was not necessary to determine Cecilia's intent; and 3) Cecilia's estate would pass to the Brost Siblings via the laws of intestacy.

III. Standard of Review

Interpretations of a will are subject to de novo review. See *In re Estate of Westall*, 4 Wn.App 2d 877 (Div. II 2018).

IV. Argument

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A. Cecilia’s Will is Clear and Unambiguous

A general maxim of contract interpretation in Washington is that Courts will “[g]ive words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. We do not interpret what was intended to be written but what was written. *Hearst Commc'ns, Inc. v. Seattle Times*, 154 Wash. 2d 493, 503 – 504 (2005) (emphasis added).

In this case, the distributive provision of Cecilia’s Will is abundantly clear:

Section V: Distribution of Estate: I give, devise and bequeath all of my property of every nature and wheresoever situated to my husband, JAMES DOUGLAS, **making no provision in such event for any child/stepchildren of mine now living or hereafter born to or adopted by me** [emphasis added]. CP 67 – 70.

This is the only provision in Cecilia’s Will that makes distributive instructions. This distributive provision states, without equivocation, that the only beneficiary to her estate is James Douglas. It further states, without equivocation, that she is expressly not providing for the Douglas Stepchildren.

On appeal, the Douglas Stepchildren assert there are both patent and latent ambiguities within Cecilia’s Will, and that they are the Will’s true intended beneficiaries. No such ambiguities exist.

A.1. There is no Patent Ambiguity

An ambiguous document is something “capable of being understood in more senses than one.” *In re Seaton’s Estate*, 4 Wn. App. 380, 383 (Div.

III 1971). A patent ambiguity is an ambiguity that appears on the face of the document. *In re Estate of Bergau*, 103 Wn. 2d. 431, 436 – 437 (1985).

The Douglas Stepchildren assert a patent ambiguity arises when reading Sections II and V of Cecilia’s will. As noted above, Section II states:

Section II: Declaration: I am married to JAMES DOUGLAS. I have no children. My husband, JAMES DOUGLAS, has six (6) children through prior marriage, namely, Dan Douglas, Laurie Douglas, Cindy Douglas, Debbie Douglas, Scottie Douglas, and Kenny Douglas. I make no bequest, gift or devise to my stepchildren/children except as hereinafter stated, knowing that my husband will provide for them. CP 67 – 70.

Section V states:

Section V: Distribution of Estate: I give, devise and bequeath all of my property of every nature and wheresoever situated to my husband, JAMES DOUGLAS, making no provision in such event for any child/stepchildren of mine now living or hereafter born to or adopted by me. CP 67 – 70.

These provisions do not conflict with one another. Nor do they suggest that Cecilia had two separate beneficiaries. Section II merely serves as a declaratory statement acknowledging Cecilia’s awareness of the Douglas Stepchildren and further acknowledging that she did not intend to provide for them. Nevertheless, the Douglas Stepchildren allege a patent ambiguity exists because Section II does not “[describe] how she knows James will provide for the [Douglas Stepchildren].” Appellant’s Brief p. 27.

This is a non-sequitur. The manner in which Cecilia expected James to provide for the Douglas Stepchildren in the future does not have any bearing on how *she* intended to provide for them in her will. Her expectation that James would provide for his children in the future does not suggest that

she separately intended to provide for the Douglas Stepchildren in her Will. This is especially so when considering Sections II and V both contain clear and direct language disinheriting the Douglas Stepchildren.

Section II is not a distributive instruction. Rather, it is a provision that acknowledges and disinherits the Douglas Stepchildren. As opposed to being in contradiction with Section V, Section II is in complete harmony with Section V (both provisions specifically identify and disinherit the Douglas Stepchildren). Therefore, Section II does not create a patent ambiguity with Section V because it does not give rise to multiple plausible interpretations of Cecilia's will.

A.2. There is no Latent Ambiguity

“A latent ambiguity is one that is not apparent upon the face of the instrument alone but which becomes apparent when applying the instrument to the facts as they exist.” *Bergau* at 436. The Douglas Stepchildren assert a latent ambiguity exists because James predeceased Cecilia. However, it is entirely unclear why this would give rise to an interpretation suggesting the Douglas Stepchildren should be awarded Cecilia's estate. This is especially so when that interpretation would contradict the Will's two separate disinheritance clauses. Instead of creating an ambiguity, James' predeceasing of Cecilia simply triggers Washington's gift lapse and intestacy laws.

There is no latent ambiguity created by James' death. Regardless of James' death, the language of Cecilia's Will remains the same. It still states

that James was the only intended beneficiary, and it still states that the Douglas Stepchildren are specifically disinherited.

Cecilia's intention was simply to provide for James, and only James. This is made clear in her Will's disinheritance clauses. Because James predeceased Cecilia, her Will contains no beneficiaries, requiring her estate to pass via the laws of intestacy.

In substance, the Douglas Stepchildren are arguing that Cecilia's Will can reasonably be interpreted to name them as the contingent beneficiaries of her estate. However, this is not logically supported by the plain language of Cecilia's Will. Cecilia's Will names no contingent beneficiaries. Further, and more importantly, Cecilia's Will specifically disinherits the Douglas Stepchildren in two separate provisions.

B. The Intent of Cecilia's Will can be Derived from the Actual Words Used and Without the Need for Extrinsic Evidence

Separately, the Douglas Stepchildren posit they are entitled to introduce extrinsic evidence regardless of whether any ambiguity exists within the four corners of Cecilia's Will. This is an inaccurate statement of Washington law. Although extrinsic evidence may be introduced without ambiguities for limited purposes, courts nonetheless must first conduct an analysis to determine whether a will can be understood within its four corners.

As stated in *In re Estate of Hayes*:

When requested to construe a will, the paramount duty of the court is to give effect to the testatrix's intent. **The intent must, if possible, be derived from the four corners of the**

will, and the will must be considered in its entirety, unaided by extrinsic evidence.”

185 Wn. App. 567, 609 (Div. III 2015) (emphasis added and internal citations omitted).

Further, as stated by the Supreme Court of Washington:

[W]e attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties. We impute an intention corresponding to the reasonable meaning of the words used. Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant **if the intent can be determined from the actual words used.**

Hearst Commc'ns, Inc. v. Seattle Times, 154 Wn.2d 493, 503 – 504 (2005) (emphasis added and internal citations omitted).

As noted above, Cecilia's Will is clear. It states that James Douglas is the only beneficiary, and it twice states that the Douglas Stepchildren are specifically disinherited. Thus, the intent of Cecilia's Will can be determined simply “from the actual words used” and “unaided by extrinsic evidence.”

C. Extrinsic Evidence may not be Used to “Vary, Contradict or Modify the Written Word.”

The Douglas Stepchildren argue that Washington's adoption of the “context rule” permits the unfettered introduction of extrinsic evidence. To support this proposition, the Douglas Stepchildren cite *Berg v. Hudesman*, 115 Wn.2d 657 (1990). However, as subsequently stated by the Supreme Court of Washington, “Unfortunately, there has been much confusion over the implications of *Berg*.” *Hearst* at 503. This is due to the fact that,

“Initially, *Berg* was viewed by some as authorizing the unrestricted use of extrinsic evidence in contract analysis.” *Hollis v. Garwell, Inc.*, 137 Wn.2d 683, 693 (1999).

The Washington State Supreme Court has since clarified that extrinsic evidence may only be used “to determine the meaning of specific words and terms used and **not to show an intention independent of the instrument or to vary, contradict or modify the written word.**” *Hearst* at 503 (emphasis added). Thus, extrinsic evidence may only be used to clarify the meaning of specific terms within a will, and it is expressly prohibited from being used to “vary, contradict or modify the written word.”

“Section V: Distribution of Estate” of Decedent’s Will plainly states, “I make no bequest, gift devise to my stepchildren/children.” Therefore, even if extrinsic evidence were admitted, any extrinsic evidence would need to remain in harmony with this above provision, and certainly could not instead be used to directly contradict it.

The Douglas Stepchildren are not seeking to introduce extrinsic evidence to clarify the meaning of any “specific terms within [Cecilia’s] will.” As stated in both their trial and appellate materials, they are seeking to introduce extrinsic evidence only to generally show that Cecilia intended for her estate to pass to them. This is in effect an attempt to directly “vary, contradict or modify” Cecilia’s Will’s two separate disinheritance clauses. Accordingly, this runs afoul of the rules permitting the use of extrinsic evidence.

Given the Douglas Stepchildren’s position, it seems all but impossible for extrinsic evidence to exist that would make them the contingent beneficiaries of Decedent’s estate, while at the same not contradicting Section V’s plain instruction that the Will “[makes] no provision in such event for any child/stepchildren of mine now living or hereafter born to or adopted by me.”

D. Cecilia and James Did Not Enter into Contractually Binding Mutual Wills

There is an important distinction between contractually binding “mutual” wills and mere “reciprocal” or “mirror” wills. A “mutual” will is the result of two parties’ separate and independent agreement as to how all of their property is to be distributed after they are both deceased. With a “mutual will,” the surviving spouse is not permitted to change his/her will after the first spouse has died.

For mutual wills to exist, there needs to be a distinct agreement between the parties indicating their intent to enter into irrevocable mutual wills. As stated in *Newell v. Ayers*, 23 Wn. App. 767, 769 (1979):

[A] mutual will is a will that is executed pursuant to an agreement between two individuals as to the manner of the ultimate disposition of their property after both are deceased (emphasis added).

Conversely, “reciprocal” or “mirror” wills are similar wills whose parallelism has no legal significance. As stated in *Portmann v. Herard*, 2 Wn.App 2d 452, 462 (2018):

Reciprocal wills are two wills that are similar or identical but are executed with no intention that the wills shall be mutual

in the sense that neither will can be revoked. Reciprocal wills, although executed simultaneously, do not in themselves constitute evidence of a contract to execute mutual wills and keep them in effect (Internal citations omitted).

The mere fact that two wills are similar or identical does not constitute evidence of an agreement to enter into contractually binding “mutual” wills. Rather, there must be proof, either in a separate document or incorporated into the wills themselves, that the parties intended to execute “mutual” wills. This distinction was outlined plainly in *Portmann*:

[A]lthough similar wills could be mutual wills, they also could be nonbinding reciprocal wills. The difference between the two kinds of wills is that mutual wills require the existence of an agreement as to the manner of the disposition of their property after both are deceased (emphasis added and internal citations omitted).

At the outset, it should be noted that the Trial Court did not find James and Cecilia had executed contractually binding “mutual wills.” When discussing the concept, the Trial Court briefly referred to the wills as “mutual wills,” but then immediately corrected itself to clarify they were merely “mirror wills.” VRP (6/5/19) 17:14-15. This is because Cecilia and James did not actually enter into contractually binding mutual wills.

There is no evidence of a written contract proffered by the Douglas Stepchildren to support the assertion that Cecilia and James entered into contractually binding mutual wills. Likewise, neither will contains language stating such an agreement exists. Therefore, to prove the existence of contractually binding mutual wills, the Douglas Stepchildren would need to prove the parties entered into such an agreement via oral contract.

The standard to prove the existence of an oral contract to execute contractually binding mutual wills is exceptionally robust. As stated in in *Arnold v. Beckman*, 74 wn.2d 836, 841 (1968):

We have consistently demanded a high degree of proof in support of alleged oral contracts to will, and, if anything, this requirement has become more rigid than before... We believe... that the burden of proof must be met by evidence which is conclusive, definite, certain and beyond all legitimate controversy.

The Douglas Stepchildren proffered no evidence suggesting they could meet the *Arnold* burden. Regardless, even if they had proved the existence of contractually binding mutual wills, this would have been irrelevant to the Trial Court's decision for the reasons outlined in the following section.

D.1. It is Irrelevant whether the Parties Executed Contractually Binding Mutual Wills because Cecilia did not Change her Will after James' Death

Whether Cecilia and James executed contractually binding mutual wills is irrelevant. The effect of a contractually binding "mutual" will is to prohibit the surviving spouse from changing his/her will after the passing of the first spouse. However, in this case, Cecilia never changed her Will. Therefore, even if the parties did enter into contractually binding mutual wills, Cecilia's Will is the exact Will James would have expected to be probated upon her death.

Cases involving litigation over contractually binding mutual wills inexorably involve a surviving spouse's decision to change his/her will after the first spouse's death. It is under these circumstances where the mutual

versus mirror will distinction becomes relevant because a contractually binding mutual will prohibits any amendments to the surviving spouse's will. However, Cecilia never amended her Will. Therefore, there is no allegation that she somehow violated the terms of an agreement to execute irrevocable mutual wills.

Therefore, regardless of whether the parties entered into contractually binding mutual wills, or mere mirror wills, Cecilia's Will as currently being probated is the same will that existed prior to James' death. This Will is unambiguous and can be interpreted on its face by giving its words their plain, ordinary and usual meanings. Accordingly, extrinsic evidence (in the form of James' Will) is not necessary for the interpretation and administration of Cecilia's Will.

D.2. James' Will also does not Provide for the Douglas Stepchildren

There is an implication throughout the Douglas Stepchildren's materials that they are provided for in James' will. However, this is untrue. The distribution provision of James' will likewise disinherits the Douglas Stepchildren. Specifically, Section V reads:

Section V: Distribution: I give, devise and bequeath all of my property of every nature and wheresoever situated to my wife, CECILIA BROST, **making no provision in such event for any child/stepchildren of mine now living or hereafter born to or adopted by me** [emphasis added]. CP 72 – 75.

Therefore, not only are the Douglas Stepchildren not provided for in either will, but they are also specifically disinherited in both wills. Thus, there is no testamentary instrument prepared by either Cecilia or James

naming the Douglas Stepchildren as beneficiaries. Despite being disinherited by both James and Cecilia, the Douglas Stepchildren continue to audaciously assert they are the intended beneficiaries of Cecilia's estate.

E. The Parties' Stipulated Exhibit List was not a Waiver of Arguments Asserted in the Brost Siblings' Trial Memorandum

The Douglas Stepchildren assert that the Joint Stipulated Exhibits List waived the Brost's Siblings' arguments regarding the inadmissibility of extrinsic evidence as outlined in their trial memorandum. This is a hyper-technical argument that should not be entertained.

Throughout the pendency of this case (as early as the Summary Judgement hearing on November 30, 2018), the Brost Siblings have made consistent arguments regarding the lack of necessity for, and inadmissibility of, extrinsic evidence. These arguments were reiterated as late as June 3, 2019, when they submitted their Trial Memorandum.

The Joint Stipulated Exhibits List was prepared at the behest of the Trial Court clerk to facilitate an orderly trial. In preparing the list, the parties' attorneys each identified exhibits they intended to produce at trial and pre-submitted them to the clerk on June 4. It is implausible that the Douglas Stepchildren interpreted this procedural courtesy to the clerk as a waiver of the Brost Siblings' persistent arguments regarding the use of extrinsic evidence.

Further, the Trial Court was not bound to admit or entertain evidence it felt was not necessary to its decision. Ultimately, it was the Trial Court that indicated its ruling did not require the entry of the Douglas

Stepchildren’s proffered exhibits. The Trial Court has broad discretion whether to admit or deny evidence, and the Trial Court’s decision to not admit the Stipulated Joint Exhibit List was properly within its discretion. See, Generally *State v. Demary*, 144 Wn.2d 753 (2001).

F. The Trial Court’s Ruling at the November 30, 2018 Summary Judgment Hearing does not Create a “One-to-One Tie”

On November 30, 2018, the Trial Court denied both parties’ Motions for Summary Judgment. The Douglas Stepchildren now assert on appeal that the Trial Court’s final ruling conflicts with its ruling at the Summary Judgment level. They further assert this “one-to-one” conflict at the trial court level must be resolved by the appellate court.

The Trial Court’s *final ruling* issued on June 5, 2019 is completely untethered from its prior *summary judgment ruling* on November 30, 2018. These two rulings would were based on different standards. The Douglas Stepchildren cite to no authority indicating that a ruling on summary judgment must bind a Court to make certain rulings at the final trial.

Therefore, the fact that the Trial Court’s final ruling was different from its summary judgment rulings does not create a “one-to-one” tie at the trial court level with respect the trial court’s *final ruling*. There is only one *final ruling* in this case, and it is that ruling that is being reviewed on appeal.

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G. Attorney's Fees

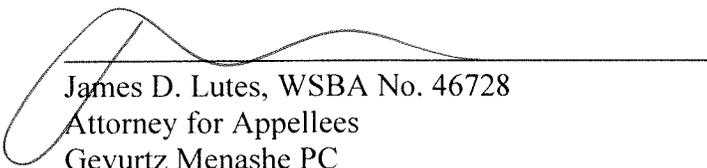
In the event they prevail, the Brost Siblings request an award of attorney's fees incurred on appeal pursuant to RAP 18.1 and RCW 11.96A.150.

VI. Conclusion

Cecilia's Will is plain and unambiguous in that she only intended to provide for James. This intent can be clearly ascertained from the four corners of the document. Further, Cecilia's Will is plain and unambiguous in that she intended to disinherit the Douglas Stepchildren. The Douglas Stepchildren are not the beneficiaries of Cecilia's Will, nor are they even the beneficiaries of James' Will.

The Douglas Stepchildren's TEDRA Petition, as reflected by the conciseness of the Trial Court's ruling, was without merit. Their continued pursuit of these claims in the Appellate Court is likewise without merit. Accordingly, the Trial Court's ruling should be affirmed and the Brost Siblings should be awarded attorney's fees on appeal.

Respectfully Submitted this 14th day of October, 2019



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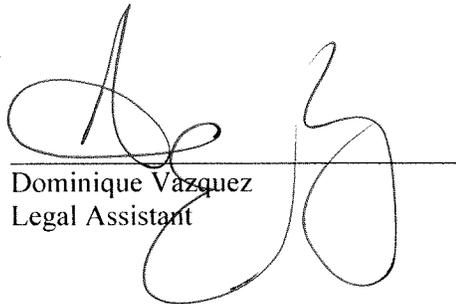
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