

FILED

JUL 18 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Case No. 296741

Court of Appeals, Division III
of the State of Washington

Yakima County Superior Court
Eliseo Figueroa, Respondent,
v.
Hector Chavez, Personal Representative
of
The Estate of Linda C. Davila, deceased, Appellant.

Brief of Appellant

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FORM 6. BRIEF OF APPELLANT
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I. INTRODUCTION

This appeal concerns the validity (or lack thereof) of a Prenuptial Agreement entered into by the decedent in the above Estate proceeding, and her husband, Eliseo Figueroa. It further involves the manner in which the Order Appealed from herein was entered.

II. ASSIGNMENTS OF ERROR

ASSIGNMENTS OF ERROR

1. The Court invalidated a Prenuptial Agreement
2. A dispositive Order was entered without proper notice

ISSUES

1. Was the Trial Judge correct in initially upholding the validity of the Prenuptial Agreement, or was he correct in nullifying his previous Order entered pursuant to his initial ruling, and reversing his position 180 degrees, and holding on Respondents Motion for Reconsideration, that the Prenuptial Agreement should not be enforced.

2. Is the Judge's Order signed by him on his last day of Office without notice to the parties a valid order, or is it a nullity.

III. STATEMENT OF THE CASE

Linda Davila died on the 5th day of November, 2008 being at the time of her death a resident of the County of Yakima, City of Sunnyside. Linda Davila died leaving two adult children, two young grandchildren (whom she adopted as her own) and a nephew whom she treated as a

step-child, RP 12/3/10 Pg. 12. She was also survived by the Respondent herein, Eliseo Figueroa, to whom she was married on the 29th day of September 2007, RP 4/8/10 Pg. 52.

Eliseo Figueroa, the Respondent, did never at any time assume a parenting role with respect to said Children or Grandchildren and never at any time, so far as known, contribute anything toward their support, RP 4/8/10 Pg. 47. Moreover, at all times pertinent herein he was an undocumented illegal alien and was under the supervision and custody of the Immigration and Customs Enforcement Agency, RP 12/17/10 Pg 14. He was scheduled for removal to Mexico on December 31, 2008, but his deportation was stayed by the posting of Five Thousand dollar cash bond by the deceased, RP 4/8/10 Pg. 46 (out of her separate funds), RP 12/17/20 Pg. 29. So far as in known he continues in that status to the present time. He admittedly married the deceased at a time when his only assets were, the clothes on his back, a picking bag, and an old car. No other assets, RP 4/8/10 Pg. 44.

The Decedent and the Respondent herein executed a Prenuptial Agreement the day before their marriage (Exhibit 1), CP SE1. However, they had lived together prior to marriage for a number of months, RP 4/8/10 Pg. 41. A copy of said document is hereunto attached in the appendix, CP SE1.

As will be noted from an examination of the document, the same was a preprinted form available at any stationary store where legal forms are available.

The issues on this appeal are a small portion of a number of other issues that have rendered the probate of the above estate an extremely complex and costly process and at the time this brief is prepared the Attorney fees on the each side, when totaled, probably exceed the value of the entire Estate. There is no evidence of the existence of any community property, RP 12/147/ Pg. 29.

The Respondent herein is claiming a statutory share of his wife's separate property by virtue of the fact that he was married to her at the time of her death and his further assertion that the Prenuptial Agreement he signed is a nullity.

Briefly, stated the Decedent did execute a perfectly valid Last Will and Testament which excluded not only her husband but left her entire Estate to her Grandchildren whom she had previously ad-adopted as her children, and to the nephew who was a stepchild, RP 12/17/10 Pg. 19.

The will was initially offered for Probate in good faith even though it was noted that the Attorney who prepared the same did not specifically name the Decedents two older children who therefore become heirs under the Pretermitted Heir Statute, RCW 11.12.091, RP 4/8/10 Pg. 3, RP 12/17/10 Pg. 19.

The Probate proceeded normally for a short period of time when it was then discovered that the Decedent did not in fact physically sign the will, RP 12/17/10 Pg. 19, even though the signature thereon is identical to known valid signature specimens of decedents hand writing. The reason that the Purported Will was withdrawn was uncontroverted evidence that the witnesses misunderstood the process of witnessing a Last Will and Testament and that the Deceased was at best semi-conscious, but in any event strapped to a hospital bed at the time of the purported execution and therefore physically incapable of signing anything, RP 4/8/10 Pg. 3.

The original Personal Representative being not knowledgeable of the defects in the Testamentary document, immediately resigned (he was a brother of the deceased) and another brother, Hector Chavez, was substituted and has proceeded as the Personal Representative of an Intestate Estate.

There next followed a motion filed on the part of Eliseo Figueroa to Intervene and to have the court determine that he had a vested interest in the property of the Estate by virtue of RCW 11.04.015 and RCW 110.04.250. Furthermore that the Prenuptial Property Settlement was a nullity for lack of advice of counsel.

In due course the matter came on for hearing before the Honorable F. James Gavin, one of the Judges of the above entitled court on Mr. Figueroa's Motion for Summary Judgment.

Judge Gavin ruled that the statutes above cited were not applicable. That ruling was not appealed and is now the law of the case. However, Judge Gavin felt that there were enough issues of fact presented on the question of the validity of the Prenuptial Agreement that the same should be set for trial.

In due course the matter came on for trial before the Honorable Michael J. Schwab a different Judge of the Superior Court in Yakima County on April 8, 2010. Following a lengthy argument Judge Schwab ruled that the prenuptial property agreement was perfectly valid largely due to the applicability of RCW 5.60.030 (commonly referred to as The Dead Man's Statute) and that the contestant having the burden of proof of showing it to be invalid, did not do so, RP 4/8/10 Pg. 66.

In due course Judge Schwab signed Findings of Fact and Conclusions of Law which are a part of the record herein, on September 29, 2010, CP 80. There followed a Motion for reconsideration filed by the Respondent which in due course came on for a further lengthy argument on December 17, 2010, Judge Schwab, to the amazement of all concerned, reversed himself totally, ruling that the recent case of Marriage of Bernard, 137 Wash. Ap. 827, controlled the issue and there being no showing that the Respondent was represented by Counsel, that the document was fatally defective, RP 12//17/10 Pg. 31.

The next sequences of events are somewhat bizarre. The Honorable Appellate Court will please note the following:

Judge Michael J. Schwab was scheduled to retire on December 31, 2010, and did so, RP 12/17/10 Pg. 30. His ruling reversing himself and canceling his previously signed decision and order was heard on December 17, 2010. Notice of Presentation of the Oder of Reversal was set for argument on December 30, 2010 at 1:30 pm. (Counsel obtained an Order Shortening time from a Yakima County Court Commissioner), CP 88.

When appellants Counsel, the Personal Representative, and the interested parties appeared at 1:30 pm in Judge Schwab's Court room as scheduled as per the Order shortening time (obtained without notice to appellant) the Court room was dark; the clerks were absent, Mr. Alexander could not be found, and Judge Schwab could not be found.

Inquiry to the Clerk's Office then disclosed that Attorney Alexander had gone Ex Parte before Judge Schwab on the day before the hearing, without any notice to counsel or the parties and obtained the Judges signature on the Order reversing himself, and then caused the same to be filed in with the Court Clerk. At this point, the Yakima County Superior Court Clerk noting the state of the record searched for Judge Schwab, and also noted that the Order shortening time had been altered to the day previous, again without notice to anyone, CP 88. In order to ascertain what was transpiring, as the clerk of the Court was very confused herself, because the Order that she filed plainly showed on

its face; that it had been altered. That it was signed without any notice whatsoever to the affected parties.

Although the hearing was scheduled for 1:30 pm the appellant and counsel were requested to stand by. At 4:15 that afternoon Judge Schwab was located, on a speaker phone, as was Attorney Alexander, and after a brief argument Judge Schwab indicated that the matter as far as he was concerned, was concluded. RP 12/30/10 Pg. 51.

This appeal followed.

IV. ARGUMENT

Assignment of Error #1

The basic legal issues in the above proceedings are centered about the enforceability of the Prenuptial Agreement taking into account the severe limitation on admissible testimony in light the of RCW 5.60.030 (the dead mans statute) and a correct reading or analysis of the recent case of the Estate of Bernard, 137 Wash. Ap. Pg. 827. Both parties concede that the current state of the law in Washington is enunciated in State vs Bernard Supra, but the problem in this case is how do the holdings and rule of law enunciated in that particular case affect the instant case which has a vastly different set of facts.

It is argued that a reading of the case of Marriage of Foran, 67 Wash. Ap. 242, (1992) in concert with the decision in the Marriage of

Bernard supra, sets up some interesting guidelines for the Court to consider in whether or not the Prenuptial Agreement is valid.

Paraphrasing Bernard supra, does the agreement allow the decedent to enrich herself or her property at the expense of the community? Does it make a provision for the disadvantaged party from the advantaged party's separate property regardless of how long the marriage lasts? Does it provide for reimbursement of the disadvantage parties contribution of personal services to the advantage parties separate property? Does it or does it not allow for maintenance regardless for the length of the marriage? Answering these, the court in its original oral opinion basically found as follows:

We do not know whether or not the agreement was drafted without the benefit of independent counsel because we do not know who drafted the instrument. Anything beyond that is pure speculation and the testimony of the parties' monetary advantage by having the same validated cannot so testify because of the dead man's statute.

Again, are the bargaining positions of the parties grossly imbalanced? We do not know this. The parties lived together according to one witness for four years. Other evidence indicates that they lived together for a number of months. Whichever may be the case in fact we have no knowledge of the depth, if any, of discussions between the parties. Any comment on that is complete and total speculation. We do know from the contestant (Figueroa's) own testimony that was admitted

that at the time of his marriage to the decedent, even though they had lived together for indefinite period of time (as above noted) both parties were fluent in Spanish. It is total speculation, as to whether or not the document that he signed was explained to him. It is also known that he contributed little if anything to the separate property of his wife. The only evidence at hand scanty though it may be, and contained in his declaration, and testimony was that he arrived on the scene with the clothes on his back, a picking bag, and a beat up Oldsmobile for which he had paid \$1500 at an indefinite previous point in time. Both the Will (which was declared a nullity for invalid execution) and the Property Agreement (Exhibit 1) does not deprive him of any community property. On the contrary he received it if his appropriation of the uninstalled light fixtures is considered as such. The point is there was little or no community property. The Decedent had a nice home worth \$60-\$70 thousand dollars largely paid for. At the time of decedent's death there was approximately a \$2,700.00 dollar balance on a first mortgage on Linda Davila's home. This sum was paid by one of her brothers to the mortgage company in order to provide a shelter for the children, and for which he filed a claim against the Estate.

Contestant Figueroa locked the gate and fence around the property immediately after his wife's death and continued to reside there in until forced to vacate by an Unlawful Detainer Action brought by the Estate. Never at any time did Mr. Figueroa pay one dime in rent, to the

estate, make any payments on the mortgage, or do any maintenance. He also stripped the property of all of the moveable furniture including the new uninstalled light fixtures. This was basically first degree theft unless it could be argued by virtue of the law he owned 50% thereof. He has never at anytime made an accounting for the property that he took, nor has he made any claim that he contributed any funds in any amount toward the acquisition thereof.

It was further argued by Mr. Figueroa's counsel that his client did not have full knowledge of his legal rights. This is absolute and total speculation.

It was these lines of arguments that caused the heated debate in the hearing of April 8, 2010 before Judge Schwab. Judge Schwab disposed of these issues in his oral opinion rendered that date. Said oral opinion and conclusion of the court can be found at RP pg. 66 line 6, held April 8, 2010.

Appellant herein argues (and hopefully successfully) that the heated debate before the court which starts at RP pg. 50 line 23, of April 8, 2010 is sufficiently lucid that no additional argument of real substance can be made on this issue except to agree with the Trial Court that the facts here involve simple people, with simple and very limited assets and in the instant case (of respondent Figueroa) no assets, it is also a totally silent record as to the extent to which he had knowledge of what he was signing.

Somewhat incongruently the Marriage License and Marriage Certificate which has important legal ramifications was entirely in English, as was the marriage ceremony.

He seeks to enforce them apparently, to be the widow as to impeach them would cause him not to be a widower. The companion document he is now asserting he did not understand because it's very much to his advantage to disavow any knowledge of what hurts him financially as distinguished from the marriage certificate which helps him financially.

All subsequent proceedings to those of April 8, 2010 are procedural in nature and do not add anything of substance to the legal issues or the resolution thereof.

Assignments of Error #2

The dates of all events in this case here are important. The record based upon the clerks papers filed with this appeal show the following:

A. November 10, 2008, Eliseo Figueroa's motion for summary judgment heard. Portion of motion regarding statutory inheritance i.e., RCW 11.04.015 and RCW 110.04.250 held inapplicable and motion for Summary Judgment orally denied. Case remanded for trial on the remaining issue of Property Agreement.

B. April 8, 2010 trial regarding the validity of Property Agreement. Oral ruling in favor of Estate upholding the same.

C. November 19, 2010 written decision pursuant to oral decision signed by Judge Schwab upholding validity of Property Agreement (after extensive re-argument of same issues of April 8, 2010).

D. November 22, 2010 Mr. Figueroa through his Attorney files Motion for Reconsideration. However, this motion was not received by opposing counsel until December 2, 2010.

E. December 17, 2010 the matter was again thoroughly argued for the third time at some length. At the end of the argument Judge Schwab announced he had re-read the case of in re Marriage of Bernard, *supra*, and had changed his mind and that the language of the Bernard case required that he nullify the prenuptial agreement.

F. Counsel for Mr. Figueroa then prepared an Order which was received by the Personal Representative on December 22, 2010 knowing full well that it had been previously indicated the Judge Schwab was leaving the bench on December 31, 2010.

G. December 28, 2010, Order shortening time signed by Commissioner Harthcock without notice. It appears from the file stamps on the documents that Court Commissioner Gayle Harthcock had signed

the Order shortening time even before Counsel for Personal Representative was made aware that he was going to ask for it. The time was fixed by Commissioner Harthcock at 1:30 pm in Judge Schwab's Court room on December 30, 2010.

As directed by the Court in the order shortening time, the Personal Representative of the Estate, his Counsel, the other parties,(except the Children Represented by Guardian *Ad Litem* Ted Lowry) appeared as scheduled.

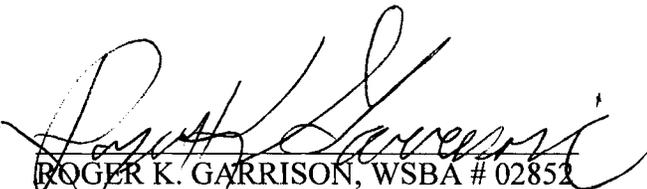
To the surprise of those concerned, Judge Schwab's Courtroom was dark, and locked; the Clerks were not anywhere to be found; Mr. Alexander did not appear; and Judge Schwab had departed Yakima County for his Seattle residence. After waiting for Court Personnel and opposing Counsel to arrive, Counsel for the Estate inquired of the Yakima County Clerk's Office and found to his amazement that Mr. Alexander on behalf of his Client Eliseo Figueroa had appeared before Judge Schwab Ex-Parte and without notice and caused Judge Schwab to sign the Order nullifying his previous ruling. It also appeared that someone had altered the date of appearance from December 30, 2010 to December 29, 2010.

The RP Pg. 33 and 34 had on December 29 and the misrepresentations made to the Court. Nothing further need be said.

V. CONCLUSION

In light of brevity of this Brief conclusionary remarks would appear to be redundant.

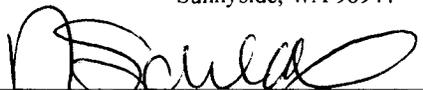
Respectfully submitted this 15TH day of July, 2011


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CERTIFICATE OF SERVICE

I hereby certify that on July 15th, 2011.

I via ~~hand~~ email, a copy of the foregoing to:
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