

COA No. 343154-III

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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

In Re the ESTATE OF WILLARD F. JOHNSON, Deceased.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION & RELIEF REQUESTED

The administration of estates is statutorily driven. The Trust & Estate Dispute Resolution Act (“TEDRA”) provides the substantive and procedural rules for administering estates in Washington. TEDRA’s legislative mandates direct how estates are to be administered, how disputes are to be resolved, and what evidence can be presented in Court. Washington’s dead man’s statute supplements TEDRA regarding the admission of evidence in estate cases.

In administering the Estate of Willard F. Johnson, the Stevens County Superior Court misapplied TEDRA and the dead man’s statute. Those statutory errors require Ms. Wynecoop’s petition to be dismissed without evaluating the merits of Ms. Wynecoop’s petition. Those statutory errors also led the trial court to err in analyzing the merits of Ms. Wynecoop’s petition. And those statutory errors led the trial court to admit a photocopy as though it was Mr. Johnson’s original will.

II. ARGUMENT

A. THE COURT OF APPEALS REVIEWS STATUTORY ISSUES *DE NOVO*.

Ms. Wynecoop’s response brief falsely argues that an abuse of discretion standard applies to the trial court’s interpretations of TEDRA and the dead man’s statute. The standard of review is one of the most

important aspects of this appeal, and with respect to the core statutory questions, the standard of review is *de novo*. *State v. Reeves*, 184 Wn. App. 154, 158 (2014) (citing *State v. Ervin*, 169 Wn.2d 815, 820 (2010)).

There are two core issues in this appeal. The first is whether the trial court erred by allowing Ms. Wynecoop multiple opportunities to carry her burden. The second is whether the trial court erred in allowing Ms. Wynecoop to testify regarding the purported execution and contents of Mr. Johnson's will. Each of those issues turns on the interpretation of a Washington State statute. And the Court of Appeals' review of those issues is *de novo*. See *City of Seattle v. Swanson*, 193 Wn. App. 795, 810 (2016).

B. THE TRIAL COURT DISREGARDED TEDRA'S MANDATE BY ALLOWING MS. WYNECOOP MULTIPLE OPPORTUNITIES TO CARRY HER BURDEN.

TEDRA's procedural rules provide a clear mandate to resolve cases in a single hearing unless one of the parties makes a specific request otherwise. See RCW 11.96A.100(8). It is undisputed that Ms. Wynecoop's petition did not include any request for multiple hearings, and it is undisputed that the Respondents made no such request. CP 3-8, 37-40. Thus, the sole question is whether TEDRA allowed the trial court to afford Ms. Wynecoop multiple opportunities to prove her allegations.

Ms. Wynecoop does not dispute that TEDRA governs this action. Ms. Wynecoop does not dispute that TEDRA required her to prove her allegations by clear, cogent, and convincing evidence. And Ms. Wynecoop does not dispute that TEDRA requires all issues to be resolved in a single hearing absent a party's request otherwise.

Those concessions are case determinative, yet Ms. Wynecoop argues that the trial court enjoyed discretion to disregard TEDRA's single hearing rule. Analysis of the unambiguous statutory language demonstrates Ms. Wynecoop's and the trial court's error. This case should have been dismissed following the initial hearing.

The parties point to two separate subparagraphs within TEDRA's procedural rules – RCW 11.96A.100(8) and RCW 11.96A.100(10). Those provisions read:

(8) Unless requested otherwise by a party in a petition or answer, the initial hearing must be a hearing on the merits to resolve all issues of fact and all issues of law;

* * *

(10) If the initial hearing is not a hearing on the merits or does not result in a resolution of all issues of fact and all issues of law, the court may enter any order it deems appropriate, which order may (a) resolve such issues as it deems proper, (b) determine the scope of discovery, and (c) set a

schedule for further proceedings for the prompt resolution of the matter.

Ms. Wynecoop argues that subparagraph 10's indulgence that the trial court **may** enter any appropriate order trumps subparagraph 8's mandate that the initial hearing **must** resolve all issues. In that manner, Ms. Wynecoop's argument renders subparagraph 8 entirely impotent.

1. Subparagraph 8 is Unambiguous and Mandatory.

The Court's objective in statutory interpretation is "to ascertain and give effect to legislative intent." *Swanson*, 193 Wn. App. at 810 (citing *Ellensburg Cement Prods., Inc. v. Kittitas Co.*, 179 Wn.2d 737, 743 (2009)). The Court's interpretation must begin with the statute's plain meaning and when the statute's meaning is plain on its face, the Court must "give effect to that plain meaning as an expression of legislative intent." *Swanson*, 193 Wn. App. at 810 (citing *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526 (2010); *City of Spokane v. Spokane County*, 158 Wn.2d 661, 673 (2006)). If a statute's plain language is subject to only one interpretation, the Court must end its inquiry. *Swanson*, 193 Wn. App. at 810.

RCW 11.96A.100(8) is an unambiguous statute that is subject to only one interpretation. The statute uses mandatory language. The Court must, therefore, conclude that the legislature meant it when it required

TEDRA proceedings to be resolved in a single hearing, absent a request for multiple hearings. Ms. Wynecoop had every opportunity to request multiple hearings. She made the strategic decision to attempt to resolve this matter in a single hearing. And the trial court erred by excusing Ms. Wynecoop from the consequences of her own strategic decision.

2. Both Subparagraph 8 and Subparagraph 10 Must Be Given Effect.

Washington Courts are obliged to interpret statutes as to give **effect to all language** and to **render no portion meaningless** or superfluous. *Swanson*, 193 Wn. App. 810; *State v. JP*, 149 Wn.2d 444, 450 (2003). When a statute uses the word “must,” the court has no discretion; it must in accord with the statute’s mandatory language. *State v. Blazina*, 182 Wn.2d 827, 838 (2015). When a statute uses the term “may,” the court has discretion with respect to how to proceed. *Id.* Finally, when the legislature uses both “may” and “must” in the same statute, the court is obliged to interpret the two words differently, with “must” or “shall” imposing an imperative duty on the court. *Id.*

RCW 11.96A.100 must, therefore, be interpreted to give both subparagraph 8 and subparagraph 10 meaning and effect. That interpretation empowers the trial court to enter whatever orders are necessary, to determine the scope of discovery, and to set a schedule for a

matter's prompt resolution, but **only** in those cases wherein one of the parties makes a request for multiple hearings. *See* RCW 11.96A.100(10). In cases where neither party makes such a request, the petitioner must present (at the initial hearing) sufficient evidence to carry his or her burden of proof, and if the petitioner fails to do so, the trial court is bound to dismiss the petition. *See* RCW 11.96A.100(8). That interpretation gives full meaning to all of the statute's provisions. That interpretation is consistent with TEDRA's goal of efficient resolution of trust and estate disputes. And that interpretation is dictated by law.

The trial court's interpretation of RCW 11.96.100 was in error. The trial court's decision to allow Ms. Wynecoop multiple opportunities to carry her burden of proof was in direct conflict with RCW 11.96A.100's clear language. The Respondents, therefore, respectfully ask the Court to reverse the trial court's judgment and to dismiss Ms. Wynecoop's petition.

C. THE TRIAL COURT'S DECISION TO ALLOW MS. WYNECOOP MULTIPLE HEARINGS WAS INEQUITABLE AND WAS CONTRARY TO TEDRA'S PURPOSE.

RCW 11.96A.100 affords a TEDRA petitioner a choice of options. Upon filing, the petitioner must opt for resolution in a single hearing or for a more traditional schedule with discovery and multiple hearings. *See* RCW 11.96A.100. The statute makes the single-hearing path the default,

allowing a multiple-hearing schedule only upon a specific request. In that manner, prompt resolution is encouraged.

A TEDRA petitioner, therefore, faces a strategic fork in the road. She must decide if her evidence is sufficient to carry her burden of proof (clear, cogent, and convincing) or whether she will subject herself to discovery and multiple hearings. *See id.* The respondent faces the same strategic decision: Is his response sufficient to defeat the petition or should he request discovery and delay? *See id.* Each decision has benefits and burdens, and each decision has risks.

In this case, Ms. Wynecoop made the decision to pursue early resolution in a single hearing. See CP 3-6. She presented her allegations, she presented her evidence, and she made no request for multiple hearings. *Id.* The Respondents also made the decision to pursue early resolution; they presented their response, confident that Ms. Wynecoop's submission could not satisfy her burden of proof. See CP 37-40. The trial court correctly held that Ms. Wynecoop had not met her burden of proof. See CP 121-23.

Rather than dismissing Ms. Wynecoop's petition, the trial court gave Ms. Wynecoop a second bite at the apple. See CP 151. In addition to being a misapplication of TEDRA's clear single-hearing rule, RCW 11.96A.100(8), the trial court's decision was inequitable. Ms. Wynecoop

made a strategic decision, yet the trial court saved Ms. Wynecoop from the consequences of her decision.

The trial court's decision is legally indistinguishable from the following scenario: (i) the petitioner proceeds in a single hearing; (ii) the petitioner presents overwhelming evidence in support of her claim; (iii) the respondent files a responsive argument, choosing not to request discovery or multiple hearings; and (iv) the trial court grants the petition. In that scenario, the disappointed respondent would never be heard to argue that he should have been given another opportunity to disprove the petitioner's claim. So too should Ms. Wynecoop's arguments have been rejected.

D. THE TRIAL COURT ERRED IN ALLOWING MS. WYNECOOP TO TESTIFY IN THIS LOST WILL CASE.

Ms. Wynecoop parses her testimony, statement by statement, trying in vain to make it compliant with Washington's dead man's statute. *See generally* Ms. Wynecoop's Response Brief. Regardless of whether it is viewed on a granular or a global level, Ms. Wynecoop's testimony was admitted in violation of the dead man's statute. RCW 5.60.030.

The dead man's statute's purpose is to prevent interested parties from giving self-serving testimony regarding conversations or transactions with a decedent "because the dead cannot respond to unfavorable

testimony.” *Kellar v. Estate of Kellar*, 172 Wn. App. 562, 574 (2012). It is undisputed that the dead man’s statute applies in this probate matter. *In re Shaughnessy’s Estate*, 97 Wn.2d 652, 655-56 (1982); *In re Estate of Wind*, 27 Wn.2d 421 (1927); *In re Estate of Eickoff*, 188 Wn. App. 1051, *5 (2015, unreported).

The dead man’s statute bars **any potential beneficiary** from testifying with respect to the disputed will’s **contents** or regarding **any transaction involving the disputed will**. *Shaughnessy’s Estate*, 97 Wn.2d at 656. The trial court erred by allowing Ms. Wynecoop to testify in support of her petition. That error was compounded by the fact that Ms. Wynecoop’s testimony was the sole evidence to establish that Mr. Johnson executed a will.

As noted above, the Court of Appeals reviews questions of statutory interpretation *de novo*. *Reeves*, 184 Wn. App. at 158. Reviewing the matter *de novo*, the Court of Appeals should hold that Ms. Wynecoop should not have been permitted to testify regarding Mr. Johnson’s will, its purported execution, or its contents.

Ms. Wynecoop testified that an attorney and two witnesses arrived at her home, met with Mr. Johnson, reviewed documents, and signed those documents. *See* Ms. Wynecoop’s Response Brief, p. 18. Ms. Wynecoop also testified that all of that was done so Ms. Johnson could execute a will.

Id. Ms. Wynecoop argues that her testimony was nothing more than testimony regarding her own observations, rendering the dead man's statute inapplicable. *See id.* at 18-19. However, Ms. Wynecoop's arguments improperly divorces her testimony from the case's context. Ms. Wynecoop was permitted to testify that Mr. Johnson executed a will, that said will was duly witnessed, and that the document that she presented to the trial court was an authentic duplicate of that will. The trial court erred in allowing Ms. Wynecoop to offer that testimony.

Ms. Wynecoop argues that the Court of Appeals' decision in *Kellar v. Estate of Kellar*, 172 Wn. App. 562 (2012), justifies the trial court's admission of her testimony in this matter. Ms. Wynecoop's Response, pp. 18-19. However, the Court of Appeals' analysis in *Kellar* illustrates the trial court's error.

Ken Kellar died in December 2009; Donna Kellar filed a claim against the Estate of Ken Kellar, arguing that a prior prenuptial agreement was substantively and procedurally unfair. *Id.* at 572. Donna Kellar asked the Court of Appeals to hold that the trial court erred in striking portions of her summary judgment declaration pursuant to Washington's dead man's statute. *Id.* at 573.

Like Ms. Wynecoop, Donna Kellar argued that she was entitled to testify regarding her own actions. *See id.* at 574. Specifically, Donna

Kellar argued that she was entitled to testify regarding her own acts surrounding the prenuptial agreement's execution and the reasons for her actions. *Id.* The Court of Appeals held that, under the facts and circumstances of the case, Donna Kellar's testimony was an impermissible description of Ken Kellar's statements. *Id.* Ms. Wynecoop's testimony is legally identical; Ms. Wynecoop purported to testify that: (i) she contacted two witnesses to come to her home to witness Mr. Johnson's will; (ii) she met Mr. Johnson's attorney at her home at the same time; and (iii) she observed the witnesses and lawyer reviewing legal documents with Mr. Johnson. Ms. Wynecoop's Response, p. 18. Under the facts and circumstances of this case, Ms. Wynecoop's testimony is tantamount to testifying that Mr. Johnson, in fact, executed the disputed will – that is exactly the kind of self-serving testimony that the dead man's statute prohibits.

Also like Ms. Wynecoop, Donna Kellar testified that she was entitled to testify regarding her own mental impressions. *Id.* at 577. However, the Court of Appeals observed that “an interested party may testify as to her own feelings or impressions, **so long as they do not concern a specific transaction or reveal a statement by the decedent.**” *Id.* at 575 (emphasis added). The Court of Appeals held that Donna Kellar's testimony was property excluded pursuant to the dead man's

statute. *Id.* at 577. The Court of Appeals should hold that Ms. Wynecoop's testimony should have been excluded. Everything that Ms. Wynecoop testified to was aimed at demonstrating that Mr. Johnson executed a valid will and that the disputed document was an authentic duplicate of that disputed will. The dead man's statute prohibits such self-serving testimony in lost will cases. *See* RCW 5.60.030.

Lastly, Ms. Wynecoop's attempt to distinguish the State Supreme Court's decision in *In re Shaughnessy's Estate*, 97 Wn.2d 652 (1982), also highlights the impropriety of Ms. Wynecoop's testimony. Ms. Wynecoop asserts that *Shaughnessy* is inapplicable because she did not see the purported will prior to its execution, because she did not witness the will's execution, and because she did not have any discussions with Mr. Johnson regarding the will's contents. Ms. Wynecoop's Response, p. 19. *Shaughnessy*, however, holds that a witness to a will's execution, who is also a beneficiary under that will, is incompetent to testify. 97 Wn.2d at 655-57, *see also Callighan v. Luster*, 305 W.2d 530 (Ky. Ct. App. 1957). The fact that Ms. Wynecoop's "knowledge" is more speculative than the witness in *Shaughnessy* does not render Ms. Wynecoop competent as a witness. In fact, Ms. Wynecoop's testimony was even more odious than the testimony prohibited in *Shaughnessy*.

Ms. Wynecoop's improper testimony was the primary basis for the trial court's decision to admit the disputed will to probate. CP 1870-185. Thus, the trial court's statutory error infected every aspect of this case. The Respondents respectfully ask the Court of Appeals to correct the trial court's error and to dismiss Ms. Wynecoop's petition.

E. THE TRIAL COURT'S ANALYSIS OF THE MERITS WAS CIRCULAR.

The Respondents do not wish to restate the merits arguments made in their opening brief. However, the circuitry of the trial court's analysis warrants brief comment.

RCW 11.20.070 governs admission of lost wills to probate. The statute requires the purported will's proponent to prove the disputed will's execution and contents by clear, cogent, and convincing evidence. *Id.*, see also *In re Estate of Black*, 153 Wn.2d 152, 163 (2004).

Ms. Wynecoop's petition was supported by her testimony, testimony from a retired Spokane attorney (George Diana), and a document that she purported to be an authentic photocopy of Mr. Johnson's will. *See generally*, the Respondent's Opening Brief. Ms. Wynecoop offered no testimony from a person who actually witnessed the will's execution. *Id.* No testimony was offered from anyone who had any knowledge regarding the will's contents. *Id.* Instead, Ms. Wynecoop

relied upon the purported photocopy to establish both the will's execution and the will's contents. *Id.*

The trial court determined that the purported document was an authentic photocopy of a validly executed will because it was consistent with Ms. Wynecoop's testimony regarding the will's execution. See CP 186-87. And the trial court determined that a will was validly executed because the disputed document was facially valid. *Id.* The trial court's analysis was, thus, hopelessly circular – we know that a will was validly executed because we have a document that says so, and we know that the document is authentic because it bears all the necessary signatures.

In that manner, the trial court rendered Washington's requirements for original wills and original signatures irrelevant. Unless reversed, the trial court's decision would render photocopies admissible to probate in the same manner as original wills. Washington law has long required original documents and original signatures in probate, and the Court of Appeals should maintain fidelity to those traditional requirements.

III. ATTORNEYS' FEES ON APPEAL

RAP 18.1 allows for the recovery of attorneys' fees on appeal where the applicable law allows for an award of attorneys' fees. Washington's probate statute (Title 11 RCW) gives the Court broad discretion in awarding costs and attorneys' fees to parties in probate

proceedings. RCW 11.96A.150. The court may, in its discretion, order the costs and fees “be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate ...” RCW 11.96A.150(1).

Ms. Wynecoop subjected the Appellants to significant expense by initiating a petition to admit a lost will, which she simply could not prove. The Respondents respectfully ask the Court of Appeals to award the Respondents all costs and attorneys’ fees incurred in defense of Ms. Wynecoop’s petition.

IV. CONCLUSION

The trial court made two statutory errors that require reversal. First, the trial court disregarded TEDRA’s mandatory single-hearing rule. Second, the trial court misapplied the dead man’s statute, allowing Ms. Wynecoop to offer self-serving testimony in this lost will case.

The trial court also erred on the merits. The trial court improperly applied a circular analysis. Properly reviewed and interpreted, Ms. Wynecoop did not meet her burden to prove her lost will allegations by clear, cogent, and convincing evidence.

The Respondents, therefore, respectfully ask the Court of Appeals to reverse the trial court's determinations. The Respondents respectfully ask the Court of Appeals to dismiss Ms. Wynecoop's petition.

RESPECTFULLY SUBMITTED, this 7th day of March, 2017.

WITHERSPOON · KELLEY

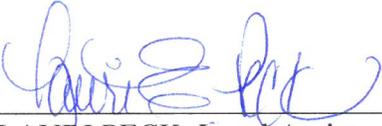


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CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 7th day of March, 2017, the foregoing was delivered to the following persons in the manner indicated:

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