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MAY 01 2017

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. **345009**

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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In the Matter of the Estate of  
JOYCE IRENE SHORT,  
Deceased.

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

The Chelan County Superior Court dismissed Lola Taylor's ("Ms. Taylor") Trust and Estate Dispute Resolution Act ("TEDRA") Petition for the procedural reason that it was not served on necessary parties, and substantively, because the bequest Ms. Taylor sought to compel was precluded by the doctrine of ademption by fulfillment/satisfaction.

Joyce Irene Short ("Decedent") was the mother of Ms. Taylor, as well as the mother of one other child and the step-mother of four other children. In her Will, the Decedent bequeathed Ms. Taylor "my personal residence and all of the personal property in my residence that is not otherwise disposed of in this Will." The Decedent subsequently gave Ms. Taylor the Decedent's personal residence while the Decedent was still living.

The Decedent died while owning other real estate that was not her residence. Upon hearing the Personal Representative's Motion for Order Construing Will of Decedent and for Instructions, the Superior Court found that the Decedent did not intend for Ms. Taylor to receive more than one piece of real property, and concluded the Decedent's gift of "my personal residence" to Ms. Taylor was adeemed by fulfillment/satisfaction, before concluding and ordering that the Decedent's other real estate is "a part of the residue of the Decedent's

Estate and shall be sold with the net proceeds distributed according to the residuary bequest provision in Article 7(C) of Decedent's Will." In other words, the Decedent's real property was ordered to be sold and divided among seven residual beneficiaries, including Ms. Taylor, rather than being distributed in kind solely to Ms. Taylor.

Ms. Taylor is apparently not satisfied with the residence she received from the Decedent during the Decedent's lifetime, and so she appeals to request distribution of the entire balance of the Decedent's Estate at the expense of all other residuary beneficiaries. If Ms. Taylor had not appealed, she would have received eighteen and 75/100 percent (18.75%) of the residue and shared the balance with her sister, step-siblings, and grand-niece.

Respondent Thomas Overcast, as Personal Representative of the Estate of Joyce Irene Short ("Mr. Overcast"), believes the Superior Court accurately interpreted the Decedent's intent and the law surrounding ademption by fulfillment/satisfaction. Furthermore, Mr. Overcast maintains that Ms. Taylor did not adequately preserve issues for appeal because she failed to appeal the Superior Court's contemporaneous order in the Decedent's probate proceeding (Chelan County No. 15-4-00110-0) that ordered the Decedent's real property to be sold and distributed as a part of the residue to all residuary beneficiaries.

To protect the Estate from Ms. Taylor's over-reach, Mr. Overcast requests that the appellate court 1) dismiss Ms. Taylor's appeal, 2) enforce the Decedent's Will's no-contest provision by determining Ms. Taylor's should receive one dollar (\$1) of her residual share with the balance of her share passing to the American Cancer Society, and 3) order Ms. Taylor to pay the Estate's attorney's fees and costs incurred in this appeal.

## **II. STATEMENT OF THE CASE**

The Decedent's probate was opened in Chelan County Superior Court on April 27, 2015, when her Will was admitted to probate and Mr. Overcast was appointed Personal Representative with nonintervention powers. Clerk's Papers ("CP") 40-42.

The Decedent's Will bequeathed to Ms. Taylor "my personal residence and all of the personal property in my residence that is not otherwise disposed of in this Will." The Will was dated September 30, 2010, and was executed when the Decedent lived at 16487 NW Road 3, Quincy, Washington. CP 028.

On or around July 5, 2012, Decedent purchased a piece of real property located at 3345 Estes Street, Baker City, Oregon, 97814 for \$53,000.00. Decedent then moved into the residence located at 3345 Estes Street, Baker City, OR 97814, where she resided with her daughter, Ms. Taylor. CP 044, Lines 10-18; CP 054.

On October 29, 2012, Decedent conveyed her Baker City, OR residence to her daughter, Ms. Taylor. The Decedent continued to live in the residence at 3345 Estes Street, Baker City, OR 97814 after she conveyed it to Ms. Taylor, and remained there until the time of her death. CP 044, Lines 19-25; CP 060; CP 062.

The Decedent's Will directs that all residue and remainder of her estate be divided into eight shares and distributed as follows: 1.5 shares to daughter Lola Taylor, 1.5 shares to daughter Maxine Milton, 1 share to Deborah Graham, 1 shares to Teri Wisdom, 1 share to Mark Short, 1 share to Gretchen Young, 1 share to the trustee of the Emma Sasser Educational Trust. The residual shares are distributed among the Decedent's children, step-children, and other relatives. CP 045, Lines 3-9; CP 028-029.

The Decedent's estate consisted of two pieces of real property: the Quincy, WA property, and a property in the Dalles, OR that the Decedent specifically bequested to Sharon Parsons and Maxine Milton. The estate also included a US Bank savings account in the amount of approximately \$1,000, and two US Bank checking accounts that are co-owned with other individuals in the amounts of approximately \$5,000 each. CP 045, Lines 10-17.

The estate was highly illiquid from inception with only a \$1,000 savings account. CP045, Lines 18-19.

The piece of real property located in the Dalles, OR, is specifically bequeathed to Sharon Parsons as a life estate and then to the Decedent's daughter, Maxine Milton. The Dalles property bequest is distinguishable from the Decedent's gift of "my personal residence" to Ms. Taylor, in that the Dalles property is identified by address and legal description when the Decedent made the bequest, whereas "my personal residence" that is conveyed to Ms. Taylor is not more particularly defined. CP 045, Lines 19-26; CP 027-028

Unbeknownst to Mr. Overcast, Ms. Taylor filed a TEDRA petition on April 4, 2016 in which she requested mediation. Ms. Taylor set her TEDRA hearing to occur on the same date that Mr. Overcast had special set his Motion for Order Construing Will and for Instructions. CP 7-8.

Ms. Taylor failed to serve or provide notice of her TEDRA petition to Mr. Overcast. CP 070

At the May 2, 2016 hearing on the Motion for Order Construing Will and for Instructions, Ms. Taylor proceeded with her initial TEDRA hearing on the merits of her TEDRA petition. The Superior Court found that Ms. Taylor had not served her TEDRA Petition and Notice of Hearing on Mr. Overcast, but also found that Mr. Overcast appeared at the hearing, and proceeded to hear oral argument on Ms. Taylor's petition. CP 070

The Superior Court dismissed Ms. Taylor's TEDRA petition with prejudice on the basis that the Decedent's bequest of "my personal residence" to Ms. Taylor "was deemed by fulfillment/satisfaction when the Decedent moved to her new residence in Baker City, Oregon in 2012 and subsequently gifted the Baker City, Oregon residence to her daughter, Lola Taylor, approximately three months later." CP 070; CP 079; CP 021

### **III. SUMMARY OF ARGUMENT**

4.1 Dismissal of Ms. Taylor's TEDRA petition was appropriate in light of Ms. Taylor's failure to deliver notice of the TEDRA proceeding to the Personal Representative of the Estate.

4.2 Dismissal of Ms. Taylor's TEDRA petition with prejudice was appropriate where the Superior Court had sufficient evidence to conclude that the bequest by Decedent of "my personal residence" was deemed by fulfillment/satisfaction.

4.3 Ms. Taylor's appeal should be dismissed with prejudice on the basis that she failed to appeal the order in the Joyce Short Estate matter that construed the Will of the Decedent and ordered the sale and distribution of real property as a part of the residue of the Decedent's estate.

4.4 Ms. Taylor should have her share of the residue of the Estate reduced to one dollar with the balance paid to the American Cancer

Society pursuant to the no-contest provision of the Decedent's Will. Ms. Taylor should also be ordered to pay the Estate its attorney fees and costs incurred in this appeal.

#### IV. ARGUMENT

**Standard of Review.** Courts have recognized that probate proceedings are equitable in nature and reviewed *de novo* on the entire record. *In re Estate of Black*, 153 Wn.2d 152, P.3d 796 (2004); *In re Estate of Ney*, 183 Wash. 503, 48 P.2d 924 (1935).

**A. Dismissal of Ms. Taylor's TEDRA petition was appropriate in light of Ms. Taylor's failure to deliver notice of the TEDRA proceeding to the Personal Representative of the Estate.**

RCW 11.96A.100 and 110 provide the procedural rules by which a TEDRA proceeding must be commenced. RCW 11.96A.100(2) provides that "notice must be provided by summons only with respect to those parties who were not already parties to the existing judicial proceedings" for "action(s) incidental to an existing judicial proceeding relating to the same trust or estate or nonprobate asset." However, RCW 11.96A.110(1) requires the notice to "be personally served on or mailed to all parties or the parties' virtual representatives at least twenty days before the hearing on the petition unless a different period is provided by statute or ordered by the court." In the present case, Ms. Taylor provided no notice of her

TEDRA proceeding at all. CP 070 The Superior Court operated within the bounds of the TEDRA statute when it found that Ms. Taylor did not provide notice of her proceeding to Mr. Overcast before dismissing the TEDRA petition. *See In re Estate of Harder*, 185 Wn. App. 378, 385, 341 P.3d 342, 346 (2015) *citing In re Estate of Kordon*, 157 Wn.2d 206, 212, 137 P.3d 16, 19 (2006).

**B. Dismissal of Ms. Taylor's TEDRA petition with prejudice was appropriate where the Superior Court had sufficient evidence to conclude that the bequest by Decedent of "my personal residence" was adeemed by fulfillment/satisfaction.**

When called upon to construe a will, the paramount duty of the court is to give effect to the testator's intent. *In re Estate of Riemcke*, 80 Wn.2d 722, 728, 497 P.2d 1319 (1972). RCW 11.12.230 provides, " All courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them." Such intention must, if possible, be ascertained from the language of the will itself and the will must be considered in its entirety and effect must be given every part thereof. *In re Estate of Douglas*, 65 Wn.2d 495, 499, 398 P.2d 7 (1965); *Elder v. Seattle First Nat'l Bank*, 33 Wn.2d 275, 278, 204 P.2d 1068 (1949).

Courts may need to admit extrinsic evidence to identify beneficiaries or property disposed of by the will, where there are certain types of ambiguity in the will. *In re Estate of Johnson*, 46 Wn.2d 308, 313, 280 P.2d 1034 (1955). 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. *Carney v. Johnson*, 70 Wn.2d 193, 422 P.2d 486 (1967); *Vadman v. American Cancer Soc'y*, 26 Wn. App. 697, 615 P.2d 500 (1980). An equivocation is an ambiguity which involves an accurate description that equally applies to two or more persons of the same name or things of the same description. 4 W. Bowe & D. Parker, *Page on Wills* § 32.9, at 271 (1961). Extrinsic evidence is admissible upon finding of either of the above types of ambiguities. *In re Estate of Seaton*, 4 Wn. App. 380, 481 P.2d 567 (1971).

In the present case, intrinsic evidence establishes the Decedent's intent to provide a residue to bequeath to a larger group of family members than just Ms. Taylor. The Decedent left a residuary bequest to seven different people, and the complexity of the residuary bequest suggests that the Decedent fully intended for the residuary bequest to be funded. The Decedent created a trust for a grand-niece for one share of the residue, and then created six other shares of disproportionate sizes for

the benefit of her children (with larger shares) and her step-children (with smaller shares). CP 028-031

Likewise, intrinsic evidence supports that the Decedent contemplated that she would be providing Ms. Taylor the real property in which the Decedent was residing, rather than a specific piece of real property, based on the fact that the Decedent bequeathed Ms. Taylor a piece of real property that was not legally described nor was ascertainable through any distinguishing feature other than the fact that it was the Decedent's residence. The "my personal residence" bequest contrasts starkly from the Decedent's bequest of the Dalles, OR, property to Sharon Parsons (life estate) and then to Maxine Milton (remainder), where the Decedent was very specific with the address, legal description, and parcel number. CP 027-028 The distinct differences between the descriptions of the bequests shows that the "personal residence" was an evolving item and would attach to wherever the Decedent was living at her time of death, consistent with RCW 11.12.190's after-acquired property provision:

Any estate, right or interest in property acquired by the testator after the making of his or her will may pass thereby and in like manner as if title thereto was vested in him or her at the time of making the will, unless the contrary manifestly appears by the will to have been the intention of the testator.

Admissible extrinsic establishes that the Decedent deemed her specific bequest to Ms. Taylor. The Decedent purchased the property in

Baker City, Oregon with her own money on July 5, 2012, and moved into the property. CP 044, Lines 10-23; CP 054. On October 29, 2012, Decedent conveyed her Baker City, OR residence to Ms. Taylor, after living there full time for almost four months. CP 062 The Decedent continued to live in the residence at 3345 Estes Street, Baker City, OR 97814 after she conveyed it to Ms. Taylor, and remained there until the time of her death. CP 060

“Ademption” occurs when a testator parts with the specific subject of a legacy during his lifetime, rendering the legacy inoperative. *In re Estate of Frank*, 146 Wn. App. 309, 189 P.3d 834 (2008); *In re Estate of York*, 133 Ohio App. 3d 234, 239, 727 N.E.2d 607 (1999). Ademption by satisfaction occurs when a testator, during his lifetime, makes a gift or provides a substitute for a bequeathed item, evidencing an intention to revoke or cancel the bequest. *Frank*, 146 Wn. App. at 319; *York*, 133 Ohio App. 3d at 239.

Appellant may argue that under the common law a devise of land cannot be adeemed except by conveyance of the same land<sup>1</sup>, however, the nature of the bequest (with no specific property bequested while still clearly specifying it would be the Decedent’s residence) is particular enough to invoke ademption when considering the court’s paramount duty

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<sup>1</sup> *Frank*, 146 Wn. App. at 320; 6 William J. Bowe & Douglas H. Parker, Page on The Law of Wills § 54.1, at 265 (rev. treatise 2005).

to give effect to the testator's intent<sup>2</sup> and the after-acquired property provisions of RCW 11.12.190.

From the evidence before the Superior Court, it is clear that the Decedent intended to provide her residence to Ms. Taylor, which she did, and her other investments that were not specifically bequeathed were to go to the residuary beneficiaries. Ms. Taylor undermines the Decedent's intent and enriches herself at the expense of her family if she is allowed to receive the Decedent's residence in addition to what had become the Decedent's rental property by the time that the Decedent died.

**C. Ms. Taylor's appeal should be dismissed with prejudice on the basis that she failed to appeal the order in the Joyce Short Estate matter that construed the Will of the Decedent and ordered the sale and distribution of real property as a part of the residue of the Decedent's estate.**

It is settled law in this state that orders and decrees of distribution made by superior courts in probate proceedings upon due notice provided by statute are final adjudications having the effect of judgments in rem and are conclusive and binding upon all persons having any interest in the estate and upon all the world as well. *Ryan v. Plath*, 18 Wn.2d 839, 140 P. 2d 968 (1943). Mr. Overcast provided timely notice of the Motion for Order Construing Will of Decedent and for Instructions. CP 066-069 Ms. Taylor appeared and argued through counsel. CP 070 Mr. Overcast then

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<sup>2</sup> *In re Estate of Riemcke*, 80 Wn.2d 722, 728, 497 P.2d 1319 (1972)

provided timely notice of the presentation of the order on the Motion for Order Construing Will of Decedent and for Instructions. CP 071-075 The Order on the Motion was signed and filed by the Superior Court, and Ms. Taylor did not appeal. Ms. Taylor's failure to appeal the probate Order means that the Estate has a valid and final order regarding sale and distribution of the Decedent's rental real property in Quincy, Washington, and this court should not allow Ms. Taylor to reopen the probate order through the alternate means of this TEDRA appeal.

**D. Ms. Taylor should have her share of the residue of the Estate reduced to one dollar with the balance paid to the American Cancer Society pursuant to the no-contest provision of the Decedent's Will. Ms. Taylor should also be ordered to pay the Estate its attorney fees and costs incurred in this appeal.**

Per Article X of Decedent's Will titled "No Contest Provision," this court should reduce Ms. Taylor's share of the residue of the Estate to one dollar, with the balance of what would otherwise be her share paid to the American Cancer Society. While this is not a true Will Contest in the sense of RCW 11.24, Ms. Taylor did elect to file a lawsuit against the Estate that contradicts the intent of the Will and the findings of the Superior Court regarding the Will. The Decedent's Will was drafted with consequences in mind for those who seek to circumvent the Decedent's intent.

Mr. Overcast also requests attorney fees on appeal on behalf of the Estate. A party may recover attorney fees and costs on appeal when granted by applicable law. RAP 18.1(a). TEDRA permits an award of attorney fees on appeal under RCW 11.96A.150:

Either the superior court or any court on appeal may, in its discretion, order costs including reasonable attorneys' fees, to be awarded to any party ... 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, which factors may but need not include whether the litigation benefits the estate or trust involved.

Ms. Taylor cannot in good faith claim that this litigation is benefitting the estate. While estate disputes over the interpretation of a Will are reviewed de novo, that does not mean that all de novo reviews are reasonable or beneficial to an Estate. This court should award attorney fees to the Estate for the precedential effect of deterring expensive appeals from beneficiaries who pose unreasonable questions about a decedent's intent so as to advance their personal fortunes.

## **V. CONCLUSION**

For the foregoing reasons, Petitioner respectfully requests this Court grant the following relief:

1. Dismiss Ms. Taylor's appeal;
2. Enforce the Decedent's Will's no-contest provision by determining Ms. Taylor's should receive one dollar

(\$1) of her residual share with the balance of her share  
passing to the American Cancer Society; and

3. Order Ms. Taylor to pay the Estate's attorney's fees  
and costs incurred in this appeal.

Respectfully submitted this 27<sup>th</sup> day of April, 2017.

OVERCAST LAW OFFICES, PS

David Visser  
David Visser, WSBA #41546  
Attorneys for Thomas D. Overcast as  
Personal Representative of the Estate of  
Joyce Irene Short

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COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

In the Matter of the Estate of  
  
JOYCE IRENE SHORT,  
Deceased  

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Lola Lanelle Taylor,  
Appellant,  
  
Thomas D. Overcast,  
Respondent.

NO. 345009  
  
DECLARATION OF SERVICE

I, Linda Rich, declare that on the 27th day of April, 2017, I caused to have served a true and correct copy of the **Brief of Respondent** and this **Declaration of Service** on the following via the method(s) indicated:

VIA:

Mona J. Geidl  
Minnick-Hayner  
PO Box 1757  
Walla Walla, WA 99362

- Via Facsimile
- Via First Class US Mail, Postage Prepaid
- Via Messenger
- Via Electronic Service

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT

4/27/17 Wenatchee  
DATE AND PLACE

Linda Rich  
Linda Rich