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DIVISION III
STATE OF WASHINGTON
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CONSOLIDATED UNDER No. 356787

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

HELEN KRINKE V. PAUL PICOLET, *ET AL.*

HELEN KRINKE V. KAREN PICOLET, *ET AL.*

REPLY BRIEF OF APPELLANTS

AUGUST 27, 2018

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INTRODUCTION

A fact can be inferred from evidence, but not from an inference. Inferring from inferences is speculation, which is what happened below: the trial court inferred that the Picolets knowingly intended to breach Mrs. Krinke's written life estate agreement by first inferring that they actually knew about it, and that inference sprang in turn from the antecedent inference that the real estate agents knew about the written agreement.

Mrs. Krinke confirms that there is no direct evidence that anyone actually knew about the 1969 written life estate agreement while it was still buried inside of her cedar chest. And by offering nothing but potentially plausible inferences to be cobbled together, she confirms that there is no substantial evidence, only speculation, to support the decision below.

The presumption of validity attending to Mrs. Krinke's non-notarized written life estate agreement vanished below when the Picolets presented a prima facie case that the written agreement is a fraud. The burden shifted to Mrs. Krinke to disprove fraud, but she did nothing. In fact, Mrs. Krinke never testified about the written life estate agreement at all. Her failure to deny the allegations of fraud, like her failure to authenticate the 1969 written agreement in the first place, is substantial evidence that it is, in fact, a fraud.

Finally, Mrs. Krinke's throw-away appealability argument is meritless.

RESTATED ASSIGNMENTS OF ERROR

1. In the absence of any evidence that Paul and Karen Picolet actually intended to harm or hurt Helen Krinke, did the trial court err by finding an intent to abuse for the purposes of the Abuse of Vulnerable Adults statute, RCW chapter 74.34, by finding that the Picolets' intentional acts of moving their things onto their land were acts intentionally motivated to abuse her?

2. Is there any substantial evidence to support the trial court's finding that the Picolets actually knew about the written life estate agreement when they bought the land and moved their things onto it? In fact, there is no evidence that anyone involved—the property sellers, the real estate agents, the Picolets' attorney and title insurance company, Helen Krinke and her nieces and neighbors, or Paul or Karen Picolet—actually knew about the written life estate agreement until the moment in late August 2017 when Kent Woodruff saw Helen Krinke pull it out of her cedar chest.

3. Did the trial court err by treating the non-notarized life estate agreement as valid with respect to the Picolets under *In re Deaver's Estate*, 151 Wash. 454, 456, 276 P. 296 (Wash. 1929) (non-notarized deeds valid as to buyers with actual notice “no fraud or other ulterior motive appearing”), in light of the sellers' credible, corroborated, and uncontroverted allegations of fraud?

ARGUMENT

The trial court's judgment cannot be upheld except with speculation by impermissibly inferring from inferences, and by treating as valid Mrs. Krinke's presumptively fraudulent, 1969 written life estate agreement.

I.

THERE IS NEITHER ANY DIRECT NOR SUBSTANTIAL EVIDENCE SUPPORTING THE TRIAL COURT'S ULTIMATE FINDING OF INTENT TO ABUSE.

The trial court speculated when it found that the Picolets intentionally breached Mrs. Krinke's written life estate agreement because the inference that they knowingly breached her written life estate agreement was inferred from the antecedent inference that they actually knew about it at the time. That knowledge, in turn, was surmised from contemporaneous real estate agents' references to "the life estate deal," CP 57; "the issues ... including, of course, the life estate;" CP 51, 59; a "Life Estate of Helen Krinke," CP 55, and the like, that can be ambiguously read either as referring to the written agreement or as referring to the informal, permissive life estate agreement described by the original owners of the property, the O'Neals.

A. INFERRING FACTS FROM INFERENCES IS SPECULATION.

However vague the dividing line may be between logical inference and impermissible speculation, it has long been clear that substantial evidence is something more than inferences derived from other inferences: "It is frequently laid down as a general proposition or rule that an inference

cannot be founded on an inference or drawn from another inference. ...
Until the chances of error are eliminated in one inference, it forms an
unsound foundation for a second inference.” *Peterson v. Seattle Automobile Co.*,
149 Wash. 648, 658, 271 P. 1001 (Wash. 1928) (quoting Jones on Evidence
(J. Henderson Commentaries on the Law of Evidence in Civil Cases (based
on the work of Burr W. Jones)) (2d Ed. 1926) vol. 1, § 11); accord, *Prentice
Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 163-64, 106 P.2d
314 (Wash. 1940)(“It is a case of indulging in a presumption in order to
support a conjecture. Presumptions may not be pyramided upon
presumptions, nor inference upon inference.”); *Martin v. Ins. Co. of N. Am.*, 1
Wn.App. 218, 221, 460 P.2d 682 (Wash. App. Div. 2 1969) (“A jury will not
be permitted to extrapolate conjecturally beyond a legal conclusion which is
itself arrived at circumstantially by inference from a proven fact.”)

The trial court’s ultimate finding of intent to abuse was doubly
inferred by inferring that the Picolets knew about the written life estate
agreement and inferring abusive intent based on that knowledge. This is
speculation by itself. See Martin, 1 Wn.App. at 221 (agreeing in principle that
“because of the two-fold nature of the ultimate fact- -both of which are
dependent upon circumstantial evidence- -the jury was first asked to infer
death from the proven facts and thereafter to infer the manner of death”
which is “piling of inferences upon inferences”). Here there was more

speculation as the trial court also inferred that the Picolets knew about the written agreement by inferring that the real estate agents were talking about it at the time.

B. IT CANNOT LOGICALLY BE INFERRED THAT ANYONE KNEW ABOUT THE WRITTEN AGREEMENT WHEN THE SELLERS, AN ATTORNEY HIRED TO SEARCH FOR IT, AND THE TITLE INSURANCE COMPANY KNEW NOTHING ABOUT IT.

It is undisputed that when the Picolets bought their land everyone involved knew that Mrs. Krinke had a life estate of some kind or another on one of the three parcels of land that the Picolets bought from Cecil and Adele O'Neal. The owners believed that they had permissively allowed Mrs. Krinke to live in the house until the property was sold, and that the written life estate agreement from 1969 was a fraud. CP 69 (“We never saw this paper when we bought the property and out of good grace only allowed Helen Krinke to use the house until we decided to sell.”).

This is what the seller's—the O'Neals'—real estate agent understood at the time, too. The listing agent, Delene Monetta, confirmed in a March 2016 e-mail to the O'Neals' daughter that “Given her age, I want to be very clear with her that Cecil and Adel don't intend to have her move out of the house while she is living there.” CP 63.¹ In other words, Ms. Monetta was

¹ Of course, as part of the sale the O'Neals and the Picolets formally granted Mrs. Krinke a life estate to remain on the property. Tr. 80 (parties “continued the same kind of agreement that I was informed by Cecil to allow

reassuring Mrs. Krinke that although the owners had only allowed her to live there until the property was sold, the owners were now making her life estate permanent to survive the sale. This, of course, is what the owners, CP 66-71, and the Picolets understood as well, Tr. 77-80.

Not even Mrs. Krinke testified that there was anything more to her life estate than the good grace of the owners agreeing that she could live there. This is her entire testimony about her life estate: “I sold the Property and the surrounding 25 acres or more in 1969, but received a life estate agreement for the Property from the buyers, Thomas Devins and Marjorie Adele Devins. That agreement was never changed.” CP 127.

Note that despite its central importance to her case, Mrs. Krinke neither mentioned, sponsored, nor authenticated the 1969 written agreement; also note that she never denied Adele O’Neal’s allegations of fraud. Thus, as this record stands, the only testimony of a knowledgeable person regarding the 1969 written agreement is that it is a fraud. As will be shown below, Mrs. Krinke’s failure to explicitly acknowledge even the existence of the written agreement under oath, like her failure to address its obvious discrepancies (not tied to sale of property, not notarized, not recorded for a decade), and her failure to deny signatory Adele O’Neal’s allegations of fraud are substantial evidence that the document is fraudulent.

her to live in the house”); Br. Resp. 6 (the Picolets and the O’Neals “retained Robert Flock to draw up a life estate agreement for Mrs. Krinke”).

Although Mrs. Krinke proffers all of the real estate agents' references to Mrs. Krinke's life estate as circumstantial evidence of contemporaneous knowledge the written life estate document, Br. Resp. 1, 4-6, 18-20, she never explained how it is possible to logically infer that the sellers' real estate agent knew about the written life estate agreement when the sellers who hired her knew nothing about it.

It cannot logically be inferred that any of the real estate agents involved found out about the written agreement on their own when neither the Picolets' attorney who was hired to search for it, nor their title insurance company, was able to find it.

C. THE EVIDENCE MUST ENGENDER OR SUGGEST AN INFERENCE; A LOGICAL INFERENCE IS NOT MERELY CONSISTENT WITH FACTS.

Because all of the real estate agents' references to Mrs. Krinke's life estate can be read equally as referring to either the permissive agreement described by Adele O'Neal or to the 1969 written agreement, it is speculation to read those references one way or the other without evidence pointing to or suggesting that interpretation:

As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be two or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only. On the other hand, if there is evidence which points to any one theory of causation, indicating a

logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence.

Prentice Packing & Storage, 5 Wn.2d at 163 (quoting *Georgia Power Co. v.*

Edmunds, 233 Ala. 273, 171 So. 256, 258 (Ala. 1936)); *Grobe v. Valley Garage*

Serv., Inc., 87 Wn.2d 217, 225-26, 551 P.2d 748 (Wash. 1976):

The facts relied upon to establish a theory by circumstantial evidence must be of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them. . . . If there is nothing more tangible to proceed upon than two or more equally reasonable inferences from a set of facts, and under only one of the inferences would the defendant be liable, a jury will not be allowed to resort to conjecture to determine the facts.

Moreover, even if it could be logically inferred that the real estate agents were talking about the written life estate agreement when the principals who hired them knew nothing about it, this only lengthens the speculatively concatenated chain of interdependent inferences to get from the record evidence to the trial court's ultimate finding of abuse.

The principle that the evidence must suggest or give rise to an inference (as opposed to merely being consistent with the inferred fact) applies against inferring that the Picolets intended to undermine Mrs. Krinke's rights under the 1969 document when they asked the real estate agents about temporarily removing Mrs. Krinke's life estate from the title to secure bank financing. See Br. Resp. 5-6, 19 (omitting references to placing

life estate back on title to property after financing). It simply cannot logically be inferred that the Picolets intended to invalidate Mrs. Krinke's rights by taking her life estate off of the title and putting it back on.

Mrs. Krinke misrepresents the evidence by asserting that Paul Picolet had asked only about "removing" or "eliminating" the life estate, Br. Resp. 5, 6, without mentioning that he also wanted to put it back on.²

D. THERE WAS NO CONTRARY EVIDENCE FOR THE TRIAL COURT TO ASSESS SHOWING THAT ANYONE KNEW ABOUT THE WRITTEN AGREEMENT AT THE TIME.

It is undisputed that there is no direct evidence of the written 1969 agreement until Kent Woodruff saw Mrs. Krinke pull it out of her cedar chest weeks after the Picolets moved their thing onto their own land.³ Mrs.

² Mr. Picolet's questions about temporarily removing the life estate from the title to obtain financing make sense in the context no one knowing about the written document and everyone only knowing about the owners' undocumented permissive arrangement. In any event, the wisdom of barring real estate agents from practicing law is demonstrated in Susannah Gardner's response to Mr. Picolet's question. CP 51 ("unethical;" "no way to force ... the life estate back"). As a lawyer would know, a proper set of escrow instructions with the executed documents, or a subordination agreement, would have kept the life estate on the title even if temporarily removed while the lending bank's security in the real estate was recorded.

³ Mrs. Krinke half-heartedly points to three pages of an incoherently interrupted cross-examination of Karen Picolet, Br. Resp. 8 (citing Tr. 114-16), purportedly showing Karen Picolet's knowledge of the 1969 document while it was still inside Mrs. Krinke's cedar chest. She does not direct this Court's attention to anything specific in that mangled mass of testimony, in contrast to which the clarity of Karen Picolet's denial of prior knowledge of the written agreement stands out, Tr. 115 ("Q. ... you told me that you were aware of the life estate of Helen Krinke; isn't that correct? A. No.").

Krinke is correct that this Court cannot second-guess the trial court's assessment of contrary evidence, e.g., Br. Resp. 21, 24, but the trial court made no such assessment.

There is simply no direct evidence of anyone's knowledge of the written life estate agreement while it was still buried inside of Mrs. Krinke's cedar chest that could have been assessed against Mrs. Krinke's counsel's frank admission below that "it was only until - - it was only when Mr. Woodruff got involved and located the life estate agreement that it became clear that Mrs. Krinke did have rights and that they were actionable." Tr. 163.

II.

THE TRIAL COURT ERRED BY TREATING THE 1969 AGREEMENT AS VALID

The trial court erred by treating Mrs. Krinke's 1969 written life estate agreement as valid; it is presumptively fraudulent.

The most momentous omission in Mrs. Krinke's case is her failure to testify at all about the written life estate agreement. Although it was central to her case she neither introduced it, authenticated it, or mentioned it in her testimony. CP 126-31.

She never testified under oath that it is what it purports to be. She never explained why her life estate was not part of the sale of her property to Adele O'Neal and Adele's former husband; she never explained why the

written agreement is dated one day after that sale, why it was not notarized, or why it was not recorded until more than a decade later.

Mrs. Krinke is correct that because the document is presumptively valid, fraud cannot merely be alleged. Br. Resp. 22 (“a mere allegation of fraud is insufficient”). It is because “honesty is presumed,” *Columbia Int’l Corp. v. Perry*, 54 Wn.2d 876, 880, 344 P.2d 509 (Wash. 1959), that “it is not enough that the evidence may cause a suspicious as to its good faith. The evidence must be clear and satisfactory, and such as convinces the mind that the conveyance is in reality fraudulent.” *Id.* 54 Wn.2d at 881 (quoting *Rohrer v. Snyder*, 29 Wash. 199, 206, 69 P. 748 (Wash. 1902)).

The presumption that Mrs. Krinke’s written life estate agreement is valid vanished when Adele O’Neal swore it was a fraud, CP 69-70. Mrs. O’Neal is the only person other than Mrs. Krinke with first-hand knowledge about the particulars of Mrs. Krinke’s life estate, and when her testimony was admitted into evidence⁴ the burden fell upon Mrs. Krinke to prove its

⁴ Although Mrs. Krinke belatedly repeats her objections to the O’Neals’ affidavit, *compare* Tr. 59, 161 *with* Br. Resp. 10 (“unusual submission”), 23 (“purportedly on behalf of himself and his incapacitated wife”), she acknowledges that the trial court received the affidavit into evidence, Br. Resp. 17 (“The evidence submitted to the trial court included ... a notarized statement submitted by Mr. O’Neal”). Mrs. Krinke continues to misrepresent the evidence by inaccurately portraying the affidavit as Mr. O’Neal’s, Br. Resp. 17, 23, even though Adele O’Neal signed it, CP 70, and her signature was notarized by the same Notary Public who notarized her signature on the O’Neals’ Statutory Warranty Deed to the Picolets, *compare* CP 71 *with* CP 92.

validity. See *City Nat. Bank of Lafayette v. Mason*, 58 Wash. 492, 493, 108 P. 1071 (Wash. 1910) (“If, however, there was any evidence to show ... fraud, then the burden shifted to the plaintiff to show it was a holder in due course”); *Henry v. Yost*, 88 Wash. 93, 96, 152 P. 714 (Wash. 1915) (“Henry ... would have established a prima facie case of fraud, and the burden then would have been on the grantor and grantee to prove the validity of the conveyance.”).

Mrs. Krinke’s failure to refute Mrs. O’Neal’s allegations of fraud when it was incumbent upon her to do so is by itself substantial evidence that the 1969 life estate document is, in fact, fake; coupled with her failure to acknowledge the existence of the written document under oath, it is clear and convincing evidence that the 1969 document is fraudulent. See *Wiard v. Marketing Operating Corp.*, 178 Wash. 265, 271, 34 P.2d 875 (Wash. 1934) (quoting Jones on Evidence (2d Ed.) vol. 1 §§ 92, 93):

Where evidence has been introduced affording legitimate inferences going to establish the ultimate fact that the evidence is designed to prove, and the party to be affected by the proof, with an opportunity to do so, fails to deny or explain such facts, they may well be taken as admitted with all the effect afforded by the inferences.
... The general rule as to the presumption from the failure of a party to testify applies with equal force against a party who testifies in his own behalf but does not deny material evidence against him which it is in his power to contradict.

The trial court’s judgment cannot be upheld because even if it can be inferred that the Picolets actually knew about the 1969 agreement when they

moved their things onto their land near Mrs. Krinke's house, the written agreement is a sham, a fraud, void and without legal effect.

As the trial court recognized, there could be no abuse under RCW 74.34.130 if the Picolets were acting within their rights when they moved their things onto their own land. It became abuse only because the trial court mistakenly treated the written life estate document as valid.

III. THIS APPEAL IS PROPER

Mrs. Krinke asserts that this appeal is frivolous because the trial court's protective order cannot be appealed.

But the Commissioner's Office found no appealability issues here. This appeal would be frivolous only if no reasonable attorney could believe that the Picolets' protective orders could be appealed. But because this appeal has passed this Court's institutional threshold review mechanism to identify and weed out frivolous appeals, this appeal is not and cannot be frivolous as a matter of law.

A. THE PROTECTIVE ORDERS ARE FINAL JUDGMENTS BECAUSE ALL OF MRS. KRINKE'S SUBSTANTIVE RIGHTS WERE ADJUDICATED.

Mrs. Krinke asserts that the trial court's protective order cannot be appealed because it is not a final judgment, mistakenly arguing that there is a claim for damages pending below. She is mistaken; there is no such claim pending.

The trial court has fully and finally adjudicated all of Mrs. Krinke's substantive rights under RCW 74.34.110 and her statutory cause of action for a protective order. Those substantive, statutory rights do not include a right to assert a claim for monetary damages in a protective order action. Because the trial court has disposed of all of her statutory, substantive claims, the protective orders are final, appealable judgments. CR 54(a)(1) ("A judgment is the final determination of the rights of the parties in the action").

Mrs. Krinke's cause of action for a protective order under RCW chapter 74.34 is entirely a creation of the Washington State Legislature. Mrs. Krinke has no common law rights to this cause of action, which is defined and circumscribed by RCW 74.34.110 ("An action known as a petition for an order of protective for a vulnerable adult ... is created"), RCW 74.34.115 (instead of pleadings under the Rules of Civil Procedure, "standard petition, temporary order for protection, and permanent order for protection forms" are used), RCW 74.34.120 (right to hearing within 14 days), and RCW 74.34.130 (court empowered to order "relief as it deems necessary for the protection of the vulnerable adult").

Mrs. Krinke has no right to assert a claim for monetary damages in a Chapter 74.34 protective order proceeding because nothing in any provision of RCW 74.34.110 through 74.34.130 giving her that right. The state legislature created a cause of action that traditionally sounds in equity; Mrs.

Kinke has no statutory right to assert a common-law damages claim in that statutory equity action that traditionally sounds in law.

Moreover, a trial court has no statutory authority to take action on damages in a Vulnerable Adult protective order action because the statutory options for judicial relief specifically exclude the authority to award damages or other non-time-limited relief except for costs. RCW 74.34.130 (“Any relief granted by an order for protection, other than a judgment for costs, shall be for a fixed period not to exceed five years.”)⁵.

Apparently, Mrs. Krinke believes a claim for monetary damages was pleaded and is pending because in box 10 of the standard-form Petition for Vulnerable Adult Order of Protection for “Other,” Mrs. Krinke asked that the Picolets also pay monetary damages for emotional distress and

⁵ The statute also provides “The court may order relief as it deems necessary for the protection of the vulnerable adult, including, but not limited to the following:

- (1) Restraining respondent from committing acts of abandonment, abuse, neglect, or financial exploitation against the vulnerable adult;
- (2) Excluding the respondent from the vulnerable adult’s residence for a specified period or until further order of the court;
- (3) Prohibiting contact with the vulnerable adult by respondent for a specified period or until further order of the court;
- (4) Prohibiting the respondent from knowingly coming within, or knowingly remaining within, a specified distance from a specified location;
- (5) Requiring an accounting by respondent of the disposition of the vulnerable adult’s income or other resources;
- (6) Restraining the transfer of the respondent’s and/or vulnerable adult’s property for a specified period not exceeding ninety days; and
- (7) Requiring the respondent to pay a filing fee and court costs, including service fees, and to reimburse the petitioner for costs incurred in bringing the action, including a reasonable attorney’s fee.”

destruction of property. But because Mrs. Krinke has no statutory right to assert a legal claim for damages in this equitable action, her “claim” for damages is simply a nullity—it is without any legal effect whatsoever.

The legislature did create an entirely separate cause of action for vulnerable adults giving them the right to assert claims for monetary damages against their care providers in RCW 74.34.200 (“In addition to other remedies available under the law, a vulnerable adult who has been subjected to abandonment, abuse, financial exploitation, or neglect . . . shall have a cause of action for damages”), RCW 74.43.205, and RCW 74.34.210. The statutory cause of action for damages is not part of a protective order cause of action because the first two sentences of RCW 74.34.210 explicitly distinguish between “A petition for an order for protection” on the one hand, and “An action for damages under this chapter” on the other.

In reality, Mrs. Krinke does not even have a statutory claim for damages because the Picolets are not care providers who preyed on their ward’s vulnerabilities, which are the only defendants who can be liable for damages by statute.⁶

⁶ RCW 74.34.200 (“This action shall be available where the defendant is or was a corporation, trust, unincorporated association, partnership, administrator, employee, agent, officer, partner, or director of a facility, or of a home health, hospice, or home care agency licensed or required to be licensed under chapter 70.127 RCW, as now or subsequently designated, or an individual provider.”).

B. IN ANY EVENT, THE PICOLETS' PROTECTIVE ORDERS ARE APPEALABLE UNDER RAP 2.3(B)(2).

There is an automatic right to appeal injunctions and protective orders under RAP 2.3(b)(2) where there is probable error. See *State v. Howland*, 180 Wn.App. 196, 206-07, 321 P.3d 303 (Wash. App. Div. 1 2014) (quoting Geoffrey Crooks, "Discretionary Review of Trial Court Decisions under the Washington Rules of Appellate Procedure," 61 Wash. L. Rev. 1541, 1545-46 (1986)) ("Subsection (b)(2) was intended to apply 'primarily to orders pertaining to injunctions, attachments, receivers, and arbitration, which have formerly been appealable as a matter of right.'").

CONCLUSION

There is neither any substantial evidence in this record to uphold the trial court's ultimate finding that the Picolets abused Helen Krinke by knowingly violating her written life estate agreement, nor any basis upon which to treat the 1969 written agreement as valid or enforceable. The protective orders should be vacated and the case remanded for dismissal.

Respectfully submitted August 27, 2018,



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