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No. 362388

WASHINGTON STATE COURT OF APPEALS
DIVISION III

IN THE MATTER OF THE ESTATE OF:

ANNE LORRAINE TROYER, DECEASED

TIMOTHY M. TROYER,
Petitioner - Appellant,

v.

LORI A. TROYER,
Respondent - Appellee.

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. Introduction

In their response respondents make two points. First, they assert the appellant cannot raise the issue of RCW 11.36.010 because it was not raised at the time of the hearing below. Second, they assert that the case is determined by the case of *Langill's Estate*. As we shall see, each assertion is wrong.

II. First Time on Appeal: Waiver

Respondent tells the court that the Appellant cannot raise the argument concerning RCW 11.36.010 because Appellant failed to raise the argument before. Reference is made to RAP 2.5(a) which provides in pertinent part:

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. [Emphasis added.]

A. Matter of Discretion

The court has discretion under RAP 2.5(a). *Roberson v. Perez*, 156 Wn. 2d 33, 39, 123 P. 3d 844 (2005) (“an appellate court may refuse to review any claim of error which was not raised in the trial court. However, by using the term "may," RAP

2.5(a) is written in discretionary, rather than mandatory, terms. See *State v. Ford*, 137 Wn.2d 472, 477, 484-85, 973 P.2d 452 (1999).”)

Obert v. Environmental Research, 112 Wn. 2d 323, 333, 771 P. 2d 340 (1989) (“Furthermore, the rule precluding consideration of issues not previously raised operates only at the discretion of this court. ‘The appellate court may refuse to review any claim of error which was not raised in the trial court.’ RAP 2.5(a).”)

B. Of Necessity RCW 11.36.010 Was Considered.

RCW 11.28.010 provides (“[a]fter the entry of an order admitting a will to probate and appointing a personal representative, or personal representatives, letters testamentary shall be granted to the persons therein appointed executors. If a part of the persons thus appointed refuse to act, or be disqualified, the letters shall be granted to the other persons appointed therein. If all such persons refuse to act, letters of administration with the will annexed shall be granted to the person to whom administration would have been granted if there had been no will.”)

RCW 11.28.020 provides (“[a]ny person interested in a will may file objections in writing to the granting of letters testamentary to the

persons named as executors, or any of them, and the objection shall be heard and determined by the court.”

The “objection” cannot be that Appellant “be disqualified” because Appellant was not disqualified. RCW 11.36.010 says “(1) Except as provided in subsections (2), (3), and (4) of this section, the following persons are not qualified to act as personal representatives . . . minors, persons of unsound mind, or persons who have been convicted of (a) any felony or (b) any crime involving moral turpitude.” None of these attributes exist regarding Appellant.

Thus, RCW 11.36.010 was implicitly in play below because its terms were, of necessity, part of RCW 11.28.010 and RCW 11.28.020.

C. Trial Court Jurisdiction

The trial court did not have jurisdiction under RCW 11.28.020 because Appellant was named as the executor under the will of the deceased. *State ex rel. Lauridsen v. Superior Court for King County*, 179 Wash. 198, 37 P.2d 209 (1934)¹ (“Upon the first and fundamental question, therefore, we hold that, in the absence of fraud connected with the will or the estate, and in the absence of any statutory disqualification, the right of the testator to appoint an executor of

¹ Hereinafter sometimes referred to as “*Lauridsen v. Superior Court.*”

his will may not be superseded by the court by appointing an administrator in his place.”)

Under such circumstances a person so named can only be prevented from serving as personal representative if he is not qualified under RCW 11.36.010.

Further, as will be established below, RCW 11.28.020 cannot be applied except in circumstances of intestate succession. See part III.

D. Manifest Error of Constitutional Right

As Appellant's opening brief is shown Appellant was named as the personal representative of his mother's estate. The Court has recognized that this right is one of liberty under the Constitution and must be enforced. It cannot be taken away by the court simply acting to ignore the right. *See* Opening Brief of Appellant, C. Fundamental Rights and Strict Scrutiny starting at page 17.

Thus the matter must be considered under RAP 2.5 (a) because a constitutional right is at stake.

III. Lauridsen v. Superior Court Controls

Respondent tells us “*In re Langill’s Estate*, 117 Wash. 268 (1921) is on all fours. *Langill’s Estate* is the death knell for Tim’s

argument.” Response 14-15.

To the contrary, this case is controlled by *State ex rel. Lauridsen v. Superior Court for King County*, 179 Wash. 198, 37 P.2d 209 (1934). The details of why *Lauridsen v. Superior Court* controls are discussed at length in Appellant’s Opening Brief 12-15.

The *Lauridsen v. Superior Court* rule was confirmed and held applicable in *In re Odman's Estate*, 51 Wn. 2d 840, 841-42 (Wash. 1958) (“In the case of *State ex rel. Lauridsen v. Superior Court*, 179 Wn. 198, 37 P.2d 209, 95 A.L.R. 819 (1934), this court adopted the following rule, which is controlling in this case:

‘We hold that, in the absence of fraud connected with the will or the estate, and in the absence of any statutory disqualification, the right of the testator to appoint an executor of his will may not be superseded by the court by appointing an administrator in his place.’”)

III. CONCLUSION

The court should reverse the trial and remand the case to the trial court for action in light of the foregoing.

February 16, 2019

Respectfully submitted,
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Certificate of Service

I certify that the foregoing Opening Brief of Appellant will be filed by the Washington Court of Appeals under its JIS Link procedure and that the Respondent attorney will be notified of the filing under the JIS Link protocol.

Additionally, however, I have this day emailed copies to the lawyer for the Respondent and to the administrator of the estate at the following email addresses:

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February 16, 2019.

Signed, Stephen Kerr Eugster

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Transmittal Information

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