

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 94128-9

(Court of Appeals No. 74320-1-I)

GARY PETER WAY and KRISTIN KIRCHNER,

Petitioners,

v.

MARJORY E. WAY, TRUSTEE OF THE PETER J. & MARJORY E. WAY LIVING TRUST,

Respondent.

Appeal from the Superior Court of Washington for Snohomish County
(Cause No. 15-2-04284-8)

REPLY OF PETITIONERS

Mark J. Wilson, WSBA #16675
2331 46th Avenue SW
Seattle, WA 98116
(206) 567-9826
mjwilson@mjwilsonlawyer.com
Attorney for Petitioners

TABLE OF CONTENTS

I.	IDENTITY OF PETITIONERS	1.
II.	NEW ISSUES RAISED IN RESPONDENT’S ANSWER	1.
III.	ARGUMENT	1.
	1. The petition argues the Opinion is in conflict with decisions of the Supreme Court and published decisions of the Court of Appeals.	1.
	2. The Court of Appeals’ interpretation of the Way trust involves a significant public interest because it is the same form of trust that has been available and sold over the Internet to attorneys and the general public for at least three and one-half years from February 2012 to October 2015.	4.
VI.	CONCLUSION	6.

TABLE OF AUTHORITIES

Cases

Carney v. Johnson, 70 Wn.2d 193, 197, 422 P.2d 486 (1967) 3
In re Estate of Bernard, 182 Wn. App. 692, 332 P.3d 480, 483 (2014)..... 3
In re Estate of Douglas, 65 Wn.2d 495, 499, 398 P.2d 7 (1965) 3
In re Estate of Magee, 75 Wn.2d 826, 829, 454 P.2d 402 (1969)..... 4
In re Estate of Riemcke, 80 Wn.2d 722, 728, 497 P.2d 1319, 1323 (1972) 3

Statutes

RCW 11.12.23 3

Rules

RAP 13.4(b) 1, 2, 4

I. IDENTITY OF PETITIONERS

Gary Peter Way (Gary) and Kristin Kirchner (Kristin) are petitioners herein and appellants in the Court of Appeals and respondents in the trial court. Gary and Kristin reply to the Answer to the Petition for Review of respondent Marjory Way (Marjory) pursuant to RAP 13.4(d), because it appears Marjory has raised new issues in her answer.

II. NEW ISSUES RAISED IN RESPONDENT'S ANSWER

1. Is the only issue argued in the petition as a basis for review of the Opinion that it involves an issue of substantial public interest under RAP 13.4(b)(4), but the petition does not argue that the Opinion conflicts with decisions of the Supreme Court and with published decisions of the Court of Appeals? (Answer, p. 8; RAP 13.4(b)(1), (2) and (4)).

2. Is the interpretation of the Way Trust by the Court of Appeals of no substantial public interest because the “disputed issue” arose “solely out of modifications” to “a boilerplate trust form available on the Internet” and from “the individualized drafting decisions” of the attorney hired by Peter and Marjory Way and will not be repeated by other attorneys or lay persons? (Answer, pp. 8-9).

III. ARGUMENT

1. **The petition argues the Opinion is in conflict with decisions of the Supreme Court and published decisions of the Court of Appeals.**

Marjory argues in her answer that the only basis asserted by Gary and Kristin for acceptance of review of the Opinion is that the Opinion involves an issue of substantial public interest. (Answer, p., 8; RAP 13.4(b)(4)).

Marjory is incorrect. Gary and Kristin clearly argue in the petition that the Opinion is in conflict with a decision of the Supreme Court, conflicts with a published decision of the Court of

Appeals and involves an issue of substantial public interest that should be reviewed by the Supreme Court. (Petition, pp. 1, 2, 8-10 and 19; RAP 13.4(b)(1), (2) and (4)).

The petition argues that the Opinion disregards Paragraph 6, Remainder of Trust Estate and the second sentence of Paragraph 7, Contents of Trust A of the Way trust, which expressly limit the contents of Trust A. (Petition, pp. 1, 5-10; and Opinion, pp. 5-6 and 8). The petition argues that these provisions are critically important to a correct interpretation of the trust because they provide in clear, unambiguous terms that any portion of the deceased spouse's estate distributed to specific beneficiaries pursuant to Paragraph 6 are not to be included in Trust A. (Petition, pp. 5-10).

Below are portions of Paragraphs 6 and 7 of the trust that *were* considered and quoted in the Opinion, together with those portions of Paragraph 6 and 7, emphasized below in bold and italics, which the petition argues were *not* considered and were omitted from the Opinion:

Paragraph 6:

...

Husband's Beneficiaries. Upon the death of PETER J. WAY, his portion of the Trust Estate, to include his share of the property listed in Schedule A, as well as any separate property listed in Schedule C, shall be distributed in accordance with the terms and to the Beneficiaries named in Schedule E, attached.

Remainder of Trust Estate. Upon the death of one spouse, any remaining property of the deceased spouse, including one half of the shared property in Schedule A and any separate property in the appropriate Schedule B or C, in the Trust Estate, which was not distributed to the aforementioned Beneficiaries, including remaining property which was not distributed as above due to the prior death of the Beneficiary, shall be transferred and administered as part of Trust A, as herein provided.

Paragraph 7:

Creation of Trust A and Trust B. Upon the death of the first spouse [Peter], the surviving spouse [Marjory], as Trustee, shall divide the entirety of the Trust Estate . . . into two separate trusts,

Trust A and Trust B, and shall continue to serve as Trustee for both Trusts.

...

Contents of Trust A. All of the property of The Peter J. & Marjory E. Way Living Trust owned by the deceased spouse [Peter], to include one half of the value of shared Property in Schedule A, as well as any separate property described in Schedule B or C, as applicable, shall be transferred to Trust A. *This includes any earned and accumulated income or appreciation in value attributable to his/her ownership interest in the aforementioned property, but does not include any portion of the Trust Estate given to a specific Beneficiary under the terms of Paragraph 6 of this Declaration of Trust.*

(Opinion, pp. 4-6; Petition, p. 9).

The petition then argues that because the Court of Appeals disregarded Paragraph 6, Remainder of Trust Estate and the second sentence of Paragraph 7, Contents of Trust A (in bold and italics, above), it erroneously concluded that *all* of Peter's trust estate was to be transferred to Trust A upon Peter's death. (Opinion, pp. 5-6 and 8; Petition, pp. 9-10).

The petition then cites decisions of this Court and the Court of Appeals that have consistently held a court's paramount duty in construing a testamentary instrument is to give effect to the maker's intent. (Petition, p. 9, referencing the Opinion, p. 3, citing In re Estate of Bernard, 182 Wn. App. 692, 332 P.3d 480, 483 (2014); Carney v. Johnson, 70 Wn.2d 193, 197, 422 P.2d 486 (1967); In re Estate of Douglas, 65 Wn.2d 495, 499, 398 P.2d 7 (1965); and In re Estate of Riemcke, 80 Wn.2d 722, 728, 497 P.2d 1319, 1323 (1972).

The petition cites RCW 11.12.23, which requires all courts to have due regard to the direction of the will and true intent and meaning of the testator in all matters brought before them. (Petition, p. 9).

The petition argues in the petition that decisions of this Court have consistently held that the intent of the maker is determined from the instrument as a whole, and its specific provisions

must be construed in light of the entire document. (Petition, p. 9; referencing the Opinion at p. 3, citing In re Estate of Magee, 75 Wn.2d 826, 829, 454 P.2d 402 (1969); In re Estate of Shaw, 69 Wn.2d 238, 241, 417 P.2d 942 (1966); In re Estate of Johnson, 46 Wn.2d 308, 312, 280 P.2d 1034 (1955); and In re Estate of Riemcke, 80 Wn.2d at 728.

Finally, the petition argues that by disregarding the trust as a whole and not giving effect to all its provisions, the Opinion conflicts with this Court's precedent and for that reason this Court should accept review. (Petition, p. 10; RAP 13.4(b)(1), (2) and (4)).

Instead of addressing the merits of Gary and Kristin's argument that the Opinion conflicts with decisions of the Supreme Court and with published decisions of the Court of Appeals because it fails to consider the entirety of the trust, including Paragraph 6, Remainder of Trust Estate and the second sentence of Paragraph 7, Contents of Trust A, Marjory dismissively argues that the only consideration for acceptance of review identified by Gary and Kristin is that the Opinion involves a substantial public interest. (Answer, p. 3). The reason Marjory does not do so is she knows that if the Court of Appeals had given due regard to the trust in its entirety it would have concluded that all of Peter's trust estate should have been distributed to Marjory, Gary and Kristin upon Peter's death pursuant to Paragraph 6 and Schedule E. (Petition, pp. 1, 8-9).

2. The Court of Appeals' interpretation of the Way trust involves a significant public interest because it is the same form of trust that has been available and sold over the Internet to attorneys and the general public for at least three and one-half years from February 2012 to October 2015.

Marjory argues that the interpretation of the Way Trust by the Court of Appeals is of no substantial public interest because the "disputed issue" arose "solely out of modifications" to "a boilerplate trust form available on the Internet" and from "the individualized drafting decisions"

of William Zingarelli, the attorney hired by Peter and Marjory Way so will not be repeated by other attorneys or lay persons. (Answer, pp. 8-9). However, Gary and Kristin contend the Opinion's interpretation of the Way trust does involve a significant public interest.

The disputed issue in this case is whether the first deceased spouse has the right under the terms of the trust to bequeath any portion of his trust estate to specific beneficiaries pursuant to Paragraph 6, to be distributed to them upon his death, or whether his entire estate must be transferred to Trust A to serve as a life estate for his surviving spouse.

Gary and Kristin contend the Opinion is in error because it interprets the trust as requiring the first deceased spouse's entire share of the trust to be transferred to Trust A upon his death. (Petition, pp. 9-10).

The Opinion's interpretation of the Way trust involves a significant public interest because a form of trust that is essentially the same as the Way trust has been available for purchase and download by attorneys and the general public from at least February 29, 2012 to October 9, 2015. (CP 467-500).

The Way trust was drafted by William Zingarelli. (CP 260). He used a "plug-in" form of trust he purchased and downloaded off the Internet, which he used as a template ten or twenty times. (CP 260-262 and Exhibit 6, CP 450-466). A copy of the form of trust he claims he used as a template is attached as Exhibit 6 to his deposition. (CP 450-466).

On October 9, 2015, Gary and Kristin's counsel, Mark Wilson went to the same website as Zingarelli and purchased a form of trust. (CP 467-500).

The form of trust purchased on the Internet by Wilson on October 9, 2015, has the same terms as the Way trust interpreted by the Court of Appeals in its decision. (*Compare* CP 475-492 *with* 1570-1585).

The form of trust Zingarelli claims he used as a template for the Way trust is markedly different from both the Way trust and from the form of trust downloaded by Wilson. (*Compare* CP 450-466 *with* CP 475-492 *and with* 1570-1585).

However, it is readily apparent that the form of trust purchased by Wilson on October 9, 2015, is more similar to the Way trust than the one Zingarelli says he purchased and used as a template for the Way trust. *Id.* Zingarelli concedes this fact. (Answer, p. 5; CP 326-327). Furthermore, Marjory concedes in her brief of respondent in the Court of Appeals that “circumstantial evidence suggests” that in drafting the Way trust Zingarelli referred to the trust form downloaded by Wilson rather than the form of trust attached as Exhibit 6 to Zingarelli’s deposition. (Brief of Respondent, p. 34-35).

Again, the form of trust purchased and downloaded by Wilson has been available on the Internet to countless attorneys and the general public from at least February 29, 2012 to October 9, 2015.

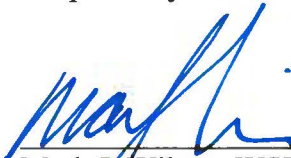
Therefore, the Opinion by the Court of Appeals involves a significant public interest and should be reviewed by the Supreme Court.

IV. CONCLUSION

For all of the foregoing reasons and for the reasons set forth in the petition, petitioners respectfully request this Court grant the petition and accept review of the Opinion.

Dated: March 27, 2017

Respectfully submitted,



Mark J. Wilson, WSBA No. 16675
Attorney for Petitioners

CERTIFICATE OF SERVICE

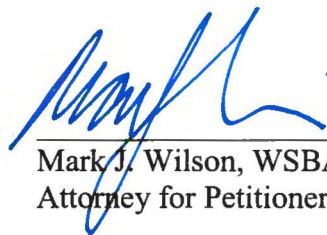
I, Mark J. Wilson, certify that on March 27, 2017, I caused a copy of this Reply of Petitioners and an unsigned copy of this Certificate of Service to be served by e-mail pursuant to mutual agreement of counsel for the parties on the following persons at the following email addresses:

Lorna S. Corrigan
Lorna@NewtonKight.com
Newton Kight L.L.P.
P.O. Box 79
Everett, WA 98206

Beth A. McDaniel
beth@bethmcdaniel.com
272 Hardie Ave. SW
Renton, WA 98057

Kimberly Staraitis
kstaraitis@bethmcdaniel.com
272 Hardie Ave. SW
Renton, WA 98057

Dated: March 27, 2017 at Seattle, Washington.



Mark J. Wilson, WSBA No. 16675
Attorney for Petitioners