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No. 63761-4-I

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

In the Estate of William Ross Taylor, Deceased

On Appeal From King County Superior Court
Cause No. 06-4-02116-6 SEA
HON. JAMES ROGERS

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1.1 The trial court erred in not continuing the summary judgment hearing when the moving party failed to give all parties of record 28 days' notice of the hearing as required by the Civil Rules of Procedure;

1.2 The trial court erred in considering and ruling upon a motion that constituted a preemptive strike, precipitously foreclosing the ability of any future Personal Representative to investigate and advance theories that were not yet even before the Court;

1.3 The trial court erred in hearing a motion involving the administration of estate assets when the trial court had removed the Personal Representative of the Estate and no new Personal Representative had been appointed.

II. STATEMENT OF THE CASE

Every estate planning document that William R. Taylor prepared in the years and months before his death disclosed two harmonious intentions: First, to insure that his child A.C.T. receive all of his assets, and second, to insure that his ex-wife received none of his assets. Clerk's Papers ("CP") 227-229; 250. Aside from two small bequests to Stanford University and the University of Illinois, there were no other beneficiaries

designated in William Taylor's will. CP 227. William Taylor's estate planning documents disclosed no intention to provide for his adult brother or father upon his death. CP 227-229; 250-253.

In his estate planning documents, William Taylor nominated his brother, Charles, to serve as his Personal Representative and as Trustee, and his father, Reuben, if Charles failed or ceased to act as the Personal Representative and Trustee. CP 228. Though his estate planning attorney failed to actually create a testamentary trust, William Taylor's intentions were clear from his estate planning documents.

William Taylor had a history of impulsive and compulsive behavior with regard to his investments and his oft-stated intention that in the event of his death, his son should inherit everything. CP 287-291. For example, in the spring and summer of 2003, William Taylor contacted Charles Schwab & Co. no fewer than 11 times, changed his password three times in one week, and expressed paranoia that his ex-wife might come after his Schwab account. CP 287-291.

On July 13, 2005, William Taylor changed the ownership designation of his Northwestern Mutual Life Insurance policies from himself to Reuben Taylor, his father. CP 455-460. On July 21, 2005, William Taylor designated Charles as the beneficiary of an IRA obtained through his new employment. CP 285. And on July 25, 2005, William

Taylor designated Charles as the beneficiary of three AIG insurance policies obtained through his new employment. CP 272-275. The effect of these changes and designations was to direct approximately \$910,000 away from William Taylor's son and to his father and brother. There is no evidence that William Taylor intended to disinherit his only child.

William Taylor drowned in Lake Washington less than two months after making these designations and changes. CP 360. His brother Charles was appointed Personal Representative. CP 7. Reuben Taylor used the ownership designation William Taylor signed on July 13, 2005 in order to change the beneficiary designation on all of the Northwestern Mutual Insurance policies to himself on October 16, 2005. CP 21-23. Charles Taylor received checks totaling \$692,000 in July, 2006.

On March 20, 2006, William Taylor's ex-wife Patricia Caiarelli filed a TEDRA action seeking an order that William Taylor's son was entitled to receive the proceeds from all probate and non-probate assets identified in William Taylor's will or owned by him at the time of his death.

On March 13, 2009, Charles and Reuben Taylor, acting in their personal capacities, filed the motions for summary judgment that are the subject of this appeal. CP 100-101; 119-120. The hearings were held on April 3, 2009 over the objection of counsel for Caiarelli. CP 177. The

trial court failed to record the hearings. At the time of the hearings were noted the Court had dismissed Charles Taylor as Personal Representative but had not yet appointed a replacement Personal Representative. A new Personal Representative was not appointed until March 27, 2009.

Supplemental Designation of Clerk's Papers, Sub No. 172. The trial court granted the Taylors' motions. This appeal followed.

III. ARGUMENT

- A. The trial court erred in forcing parties to participate in a summary judgment on less than the 28 days' notice required by the civil rules of procedure.

Civil Rule 56 requires no less than 28 calendar days' notice of a motion for summary judgment: "The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served no later than 28 calendar days before the hearing." CR 56(c). The requirement that notice of the motion for summary judgment be filed and served 28 days before the hearing "is intended to prevent summary judgment from being too summary." *Mayflower Air-Conditioners, Inc. v. West Coast Heating Supply, Inc.*, 54 Wn.2d 211, 339 P.2d 89 (1959).

The summary judgments in this matter were too summary. The motions were filed on March 13, 2009. The original hearing was scheduled on April 10, 2009, which still would have been less notice than required by the civil rules. But in fact, the motion was rescheduled to

April 3, 2009, on the grounds that the trial court's calendar did not allow any other time for a hearing. CP 177. But of course the trial court's calendar allowed another time for a hearing—it had a more or less infinite amount of time to schedule a hearing that would have complied with the civil rules of procedure.

Though a party complaining of insufficient notice is generally required to demonstrate that they were prejudiced by the insufficient notice, a denial of over a week's time—one-fourth of the time allotted for a response—is prejudicial on its face. This Court should not force the parties to prove what all lawyers recognize as plain fact—losing an entire week in which to respond to a motion for summary judgment is prejudicial.

The trial court denied the process due to the non-moving parties in this matter and unfairly shortened by 10 days the amount of time the non-moving parties had to review and respond to the motion. This was reversible error.

- B. The trial court erred in considering and ruling upon a motion that constituted a preemptive strike, precipitously foreclosing the ability of any future Personal Representative to investigate and advance theories that were not yet even before the Court.

With regard to the Northwestern Mutual Life Insurance policies, Reuben Taylor moved for summary judgment on issues that were not

before the trial court. This is a jurisdictional issue—these were not matters over which the trial court had jurisdiction because no party had raised the issues in a TEDRA petition. Reuben Taylor was not even named as a party in the original TEDRA petition and he had not been added to the TEDRA petition at the time that he moved for summary judgment. Although he was later added as a party by the stipulation of the parties, this is clearly indicative of an ambush-style motion designed to preemptively foreclose an issue before other parties can even raise it.

By hearing argument on and granting Reuben Taylor’s motion for summary judgment with regard to the Northwestern Mutual Life Insurance policies, the trial court improperly and prejudicially insulated those policies from the efforts of a responsible and neutral Personal Representative seeking to marshal estate assets. Furthermore, the trial court insulated those policies in such a way as to deny a full and fair opportunity for a responsible and fair Personal Representative to even investigate the possibility of marshalling those policies as estate assets.

A party may not ambush the other side by advancing new theories for summary judgment in its rebuttal materials. If permitted, this would deny the opposing party a fair opportunity to respond and a court may not consider grounds first advanced in rebuttal materials a basis for granting summary judgment.

Editorial Commentary to CR 56, Court Rules Annotated 2nd Edition, Washington Thomson West, 2008.

Although this Commentary is admittedly directed to an “ambush” in rebuttal documents rather than in the initial summary judgment motion itself, the rationale applies with at least equal force in this context. The TEDRA petition did not make a claim to the Northwestern Mutual Life Insurance policies. The parties had not directed any discovery toward the question of whether they were or could arguably be estate assets. That may have been a theory that a party, including a neutral and responsible Personal Representative, ultimately investigated and advanced, but it was improper for the court to consider it in the context of a TEDRA proceeding that did not raise it.

This is not to say that a party seeking a final determination of their rights, liabilities or interests in an estate are required to passively waiting for another party to advance an unfavorable theory and win by defeating it. The Taylors were free to initiate a TEDRA proceeding of their own, which is what they should have done. *See* RCW 11.96A.080 (“any party may have a judicial proceeding for the declaration of rights or legal relations with respect to any matter, as defined by RCW 11.96A.030. . . .”); *see also* RCW 11.96A.030(“‘Matter’ includes any issue, question, or

dispute involving: The determination of any question arising in the administration of an estate or trust. . . .”).

Had the Taylors availed themselves of their rights under TEDRA, it would have given all interested parties the opportunity to be fully apprised of the theories and issues they sought to advance, a full and fair opportunity to conduct discovery and retain experts as appropriate, and an opportunity to move for summary judgment or adjudication on the merits, as the case may have been.

To affirm the trial court’s actions in hearing motions on and making decisions regarding the Northwestern Mutual Life Insurance policies is tantamount to saying that in a single TEDRA action any party or non-party can move for summary judgment on any issue regarding any matter of estate administration whether that matter has ever been raised in the proceedings before. That is wrong, and the trial court’s consideration of the Taylors’ new theories advanced in a TEDRA action that did not raise them was reversible error.

- C. The trial court erred in hearing a motion involving the administration of estate assets when the trial court had removed the Personal Representative of the Estate and no new Personal Representative had been appointed.

An estate being probated without an acting Personal Representative is an unrepresented and defenseless “party.” The right to

bring actions on behalf of and defend a probated estate resides in the Personal Representative. *See* RCW 11.48.010 (“It shall be the duty of every personal representative to settle the estate The personal representative shall be authorized in his or her own name to maintain and prosecute such actions as pertain to the management and settlement of the estate, and may institute suit to collect any debts due the estate or to recover any property, real or personal, or for trespass of any kind or character.”)

The Estate of William R. Taylor was unrepresented at the time the Taylors brought their various motions for summary judgment. SDCP at Sub 172. Charles Taylor was removed as the Personal Representative on March 5, 2009. A new Personal Representative was not appointed until March 27, long after the Taylors had filed their motions and after responses thereto were due. It was reversible error for the trial court to allow the Taylors to take advantage of this fact by filing preemptive motions that improperly handcuffed the new Personal Representative. This was reversible error.

D. The Personal Representative of the Estate of William Ross Taylor is entitled to costs and fees awarded on appeal.

Pursuant to RCW 11.96A.150 and RAP 18.1, this Court “may, in its discretion, order costs, including reasonable attorneys’ fees, to be

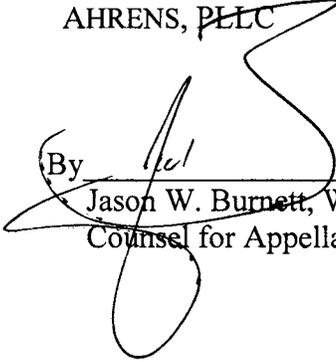
awarded to [the Personal Representative].” Under the same statute, this Court may order that those fees be paid by any party to the proceedings, including the Taylors, or from the estate assets. See RCW 11.96A.150(1). This litigation is intended to benefit the Estate of William Ross Taylor, a factor this Court is entitled to and should consider in exercising its discretion under this statute. *See* RCW 11.96A.150.

IV. CONCLUSION

The trial court improperly and prejudicially denied a full 28 days notice to the nonmoving parties. The trial committed further reversible error by hearing motions regarding and ruling on matters that were not property before the Court and by doing so when the Estate did not even enjoy the benefit of a Personal Representative. These were individually and collectively reversible error. The Personal Representative respectfully requests this Court reverse the trial court’s grants of summary judgment, remand this matter for continuing discovery, and award fees and costs to the Personal Representative from the Taylors personally, pursuant to RCW 11.96A.150 and RAP 18.1.

DATED this 16 day of November, 2009.

REED, LONGYEAR, MALNATI, &
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By 

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No. 63761-4-I

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William Ross Taylor

Deceased.

CERTIFICATE OF SERVICE

I declare under penalty of perjury, under the laws of the State of Washington, that on 11/16/2009 I caused true and correct copies of the APPELLANT'S OPENING BRIEF, and this Certificate of Service, to be served to the parties and counsel of record as follows:

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DATED this 16th day of November, 2009.


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