

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

FILED
COURT OF APPEALS
2010 AUG 27 PM 2:49

Estate Of MARY L. WICKS,)	
Deceased,)	NO: 64401-7-1
)	
Respondent,)	RESPONDENT'S MOTION
)	ON THE MERITS,
Vs.)	MOTION TO DISMISS,
)	MOTION TO STRIKE
EDWARD HOWARD,)	EXHIBITS, AND MOTION
)	FOR AWARD OF
Appellant.)	ATTORNEY FEES
_____)	

1. Identity Of Moving Party.

Respondent requests the relief designated in Part 2.

2. Relief Requested.

Respondent requests pursuant to RAP 18.9 that the Court dismiss the appeal, or pursuant to RAP 18.14 that the Court affirm the decision of the trial court. Respondent requests that the Court strike all exhibits attached to Appellant's Opening Brief that were not part of the record of the proceedings before the trial court. Respondent requests pursuant to RAP 18.1 an award of attorney fees and expenses against Appellant.

3. Facts Relevant To Motion.

This litigation involves a TEDRA Petition to resolve a dispute concerning the Estate of Mary L. Wicks, filed in Snohomish County

ORIGINAL

Superior Court. Mary Wicks' oldest daughter was appointed Administrator of the Estate¹ because it was thought Mary died intestate and that each of her four children would therefore share equally in their mother's Estate. Mary Wicks' youngest son Edward Howard, Appellant, filed a holographic Last Will and Testament that named him and his sons as beneficiaries of the Estate. The Will was handwritten by Appellant and signed by Mary Wicks on her death bed at Skagit Valley Hospital. (CP 67², Finding 6, attached) The dispute concerning the validity of the Will was resolved at trial before the Snohomish County Superior Court Judge Thomas J. Wynne on October 15, 2007. Appellant was represented at trial by attorney Michael W. Hall. The trial court entered Findings Of Fact, Conclusions Of Law And Order on November 30, 2007 and determined that Mary was not competent when she signed the Will, she was unduly influenced to sign the Will on her death bed by Appellant and the Will was invalid. (CP 67, Conclusions 1 through 7)

This appeal has been a series of missteps by Appellant who is now a pro se litigant and this Court has been most patient. It is now time for the Court to rule on the merits because the appeal is clearly without merit and

¹ The probate was initially filed in Skagit County Superior Court, but later transferred to Snohomish County.

² The Clerk's Papers from Superior Court are confusing and it is not clear to counsel whether the Findings have been designated. The sub-number designation on the Docket indicates that 67 is the Court's Findings, Conclusions and Order, copy attached hereto.

the Appellant has failed to identify assignments of error, or assign errors to the Findings of Fact entered by the trial court. Appellant's Brief is also defective in failing to make reference to relevant parts of the record. This error is compounded by Appellant's failure to make citation to any authority.

A) Brief Contains No Assignments Of Error: Appellant's Opening Brief³ contains no assignments of error. Appellant does not assign error to any findings of fact or conclusions of law. The Rules Of Appellate Procedure require that concise statements of each error be identified by the party appealing the trial court decision. RAP 10.3(g) requires the following regarding appeal of a bench trial:

A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

Appellant plainly has not followed the rule. It is impossible to know what Finding or Conclusion is being appealed and what error is being assigned. Our courts have held that unchallenged Facts are not subject to review and unchallenged Conclusions become the law of the case. *King Aircraft Sales, Inc. v. Lane*, 68 Wash. App. 706, 846 P. 2d 550

³ The Opening Brief served on counsel for Respondent did not include page 3 and it is assumed that page 3 is a continuation of Appellant's argument about ineffective assistance of counsel at trial.

(1993); *Allied Daily Newspapers of Washington v. Eikenberry*, 131 Wash 2d 205, 848 P. 2d 1258 (1993).

Failure to assign any error to any finding or conclusion is sufficient basis upon which to dismiss the appeal.

B) Documents Not In Record Should Be Stricken: Appellant has attached to his Opening Brief several documents that are not part of the record below. This is not the first attempt by Appellant to supplement the trial court record. This court took note of these post-trial documents in a letter to the parties dated January 22, 2010, which stated:

Since then, Howard on several occasions has sent additional materials to the Court by facsimile, in essence rearguing his motion and requesting that the Court consider evidence that was not before the trial court. Howard has apparently not yet been evicted. These subsequent submissions suffer from the same deficiencies as Howard's earlier materials. The Court will not consider evidence not submitted to the trial court unless relief is granted pursuant to RAP 9.11 and will not retry the case.

Appellant now submits some of the same post-trial documents that were not part of the record below by marking them as exhibits. Exhibit A consists of four (4) pages and are letters from DSHS dated October 26, 2009, which is after the trial and therefore was not part of the record below. Exhibit B consists of six (6) pages, some are from the trial records and other pages are not in the record. The first page is dated October 26,

2009 and is post-trial. The second page is dated October 19, 2009 and is post-trial. The other four pages appear to be part of the record, but have been altered by the Appellant by underlining certain sections.

C) Appeal Is Without Merit: The appeal is without merit and should be dismissed pursuant to RAP 18.9. The appeal is frivolous and the Appellant has disregarded the rules. The Court should dismiss and award sanctions against Appellant pursuant to RAP 18.9(a). In *Federal Land Bank of Spokane v. Redwine* 51 Wash. App. 766, 755 P.2d 822, 824 (1988) Division 3 of the Court of Appeals stated:

We also agree with the Bank that it is entitled to an award of terms against Mr. Redwine. RAP 18.9(a) provides, in part:

The appellate court on its own initiative or on motion of a party may order a party or counsel who uses these rules for the purpose of delay or who fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply.

The propriety of an award of sanctions involves consideration of various factors:

In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, we are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not

frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Boyles v. Department of Retirement Sys., 105 Wash.2d 499, 716 P.2d 869 (1986) (quoting *Millers Cas. Ins. Co. v. Briggs*, 100 Wash.2d 9, 15, 665 P.2d 887 (1983)).

Land Bank of Spokane v. Redwine, *supra*, page 770.

The appeal in this matter has delayed probate of the decedent's Estate since the TEDRA Petition was filed in December 2007. Appellant's goal has been to deprive his siblings of any share of their mother's estate based upon a testamentary document he wrote for his mother while she was on her deathbed. (CP 67, Findings 6 and 11) The delay in distributing the Estate and closing the probate has created needless expense and costs to the heirs of Mary Wicks.

D) Claim of Ineffective Assistance of Counsel: Appellant cites no authority for this issue and does not point to anything in the record to support the argument. Respondent is unable to find any legal authority in civil matters concerning ineffective assistance of counsel. There is no risk of wrongful incarceration or deportation involved in this matter. There is no claim of a constitutional right involved and counsel for Respondent finds no Washington case law supporting Appellant's claim. Mr. Howard

makes no reference to anything in the record that would begin to support this claim. The claim is frivolous.

E) Claim of Unsubstantiated Evidence: There is an abundance of evidence to support the trial court's findings about undue influence. The testimony and the medical records clearly demonstrated to the court that Mary Wicks was suffering from dementia, senility and Alzheimer's disease when she was presented the handwritten Will by her son on her death bed. (CP 67 Findings 12 through 20) The competency of Mary Wicks is an issue that Appellant does not raise on appeal and does not assign any errors to findings or conclusions. However, the fact that she was not competent at the time she signed the holographic Will prepared by her son is related to the undue influence her son had over her and her affairs. Her illness and mental confusion contributed to her vulnerability. The trial court found that "There is also evidence that she was under a great deal of stress and depression because of her family situation and was confused about events and circumstances surrounding her at that time." (CP 67, Finding 13)

The trial court made several findings concerning undue influence, including the following: Mr. Howard, his girlfriend and their two sons lived with Mary Wicks for two years in Arlington, before Mary became ill. (CP 67, Finding 8) On October 4, 2007, the day Mary Wicks signed

the Will, a case manager at the hospital noted that Mary reported that she lived alone in Arlington, could not recall the name of her primary care physician, was stressed about financial concerns and refused to give permission to her bank for her son to access her bank account. (CP 67, Finding 16) Mary Wicks was dependent on Mr. Howard's girlfriend for transportation, because she was the only person with a valid drivers' license. (CP 67, Finding 21) Mr. Howard had day to day control of Mary Wicks' life from the time he moved his family to her home in Arlington. (CP 67, Finding 23) Mr. Howard and his girlfriend comingled all their funds into Mary Wicks' checking account after they moved into her home and had their disability checks deposited into her account. (CP 67, Finding 22) Mary Wicks did not consult with a lawyer, accountant or independent advisor before she signed the holographic Will written by her son, Edward Howard. (CP 67, Finding 6)

The trial court concluded that there is a legal presumption of fraud or undue influence in the circumstances surrounding the signing of the Will. *Matter of Estate of Lint*, 135 Wash.2d 518, 957 P.2d 755 (1998) Mr. Howard did not rebut the presumption, leaving the court to find by clear cogent and convincing evidence that Mary Wicks was unduly influenced to sign the Will. (CP 67, Conclusions 2 through 4) These findings and conclusions are supported by substantial testimony, medical

records and evidence submitted at trial. All of this is unchallenged on appeal because Appellant has made no assignments of error to any Findings or Conclusions.

4. Motion For Attorney Fees: Pursuant to RAP 18.1 Respondent requests an award of attorney fees against Appellant. The trial court awarded \$32,623.00 in attorney fees and \$3,049.00 in costs to the Respondent.

(CP 67, Order) The TEDRA statute, RCW 11.96A.150, authorizes both the trial court and this Court to award reasonable attorney fees, and states:

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid 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.

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10).

The burden of this lengthy litigation has been borne by the Administrator of the Mary Wicks Estate, Cynthia Ossenkop for almost three years. Edward Howard took advantage of his ill, infirmed, depressed and incompetent mother on her death bed by getting her to sign a document that gave her estate to him and his sons, ignoring all three of her other children. Mr. Howard was not satisfied to inherit a quarter of his mother's estate, he wanted it all.

During the TEDRA litigation process, from December 2007 until the final orders entered November 2009, Appellant lived in Mary Wicks' home in Arlington. Mr. Howard refused to leave the house and was ordered to pay the mortgage and utilities pending the trial. During that time the real estate market declined significantly. Mr. Howard was intransigent during the litigation and after the order was entered. He filed this appeal pro se, while the Administrator of the Estate has been forced to pay out of her pocket for the attorney handling this litigation.

Since the appeal was filed attorney fees are in excess of \$8,910.00, and will continue if these motions are not granted.

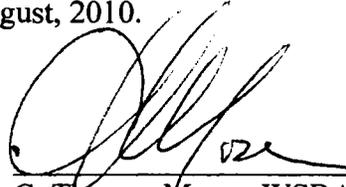
5. Conclusion.

The court should dismiss the frivolous appeal or grant the Motion On The Merits to affirm the trial court. The court should strike the exhibits

from Appellant's Opening Brief that were not part of the record below.

The Court should award sanctions and attorney fees to Respondent.

DATED this 26 day of August, 2010.

A handwritten signature in black ink, appearing to read 'C. Moser', written over a horizontal line.

C. Thomas Moser, WSBA #7287
411 Main Street
Mount Vernon, WA 98273
(360) 428-7900

1 **FILED**

2 NOV 30 2009

3 SONYA KRASKI
4 COUNTY CLERK
5 SNOHOMISH CO. WASH.

6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
7 IN AND FOR THE COUNTY OF SNOHOMISH

8 Estate Of MARY L. WICKS, Deceased,)

9 Petitioner,)

10 vs.)

11 EDWARD HOWARD,)

12 Respondent.)

No: 08-4-00261-1

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER**

13 **THIS MATTER** having come before the court for trial on October 15, 2009, the
14 Petitioner being represented by attorney C. Thomas Moser and the Respondent being represented
15 at trial by attorney Michael W. Hall, and the court having received the evidence and having
16 listened to the witnesses testimony and argument of counsel now makes the follows:

17 **FINDINGS OF FACT**

18 1. Mary L. Wicks died in Skagit County on October 15, 2007, survived by her four adult
19 children. She was an 86 year old widow at the time of her death. Believing that she died
20 intestate, Cynthia G. Ossenkop, through Anacortes attorney Terry Froese, filed a petition in
21 probate in Skagit County Superior Court, Cause Number 07-4-00304-5. Cynthia Ossenkop is the
22 natural daughter of the decedent and was appointed Administrator of the Estate of Mary L.
23 Wicks on October 19, 2007

24 2. Respondent Edward Howard is the son of the decedent and half-brother of the
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1 Administrator of the Estate. After probate was commenced Mr. Howard alleges that on October
2 4, 2007 the decedent signed a holographic Last Will and Testament (hereinafter referred to as
3 "document" or 'Will") which he filed in Snohomish County Superior Court, then being
4 represented by attorney Roy Stegena of the Law Office of B. Craig Gourley.

5 3. Petitioner filed a Complaint and TEDRA Petition on December 27, 2007 in Skagit
6 County Superior Court, Cause Number 07-4-00304-5, in response to the allegation that the
7 decedent, Mary Wicks had signed a Last Will and Testament.

8 4. The Petitioner asked that the court declare that either the document is a forgery or that
9 it was signed by Mary Wicks when she was not competent and subject to undue influence. There
10 is an additional allegation that the document is not properly authenticated or witnessed.

11 5. Upon motion of Respondent venue in this matter was changed by order of the Skagit
12 County Superior Court to this court.

13 6. Edward Howard hand wrote the Will for Mary Wicks and then asked her to sign it
14 while she was in bed at Skagit Valley Hospital on October 4, 2007. She signed the document in
15 the presence of two witnesses. The Will gives virtually the entire-estate of the testator to Edward
16 Howard and his two sons. Mary did not consult with a lawyer, accountant or any independent
17 advisors prior to signing the Will.

18 7. The two witnesses were Dolores Akins and Adina Knoche, but there was no notary
19 public to witness the signing. On the same day the Will was signed, Mary Wicks signed a
20 Durable Power of Attorney at the hospital before a notary public who worked at the hospital.

21 8. Dolores Akins has lived with Edward Howard for approximately 25 years and is the
22 mother of his two children. They resided as a family with Mary Wicks for approximately two
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1 years in Arlington, Washington before Mary's death.

2 9. Adina Knoche is Dolores Akins' best friend and did not testify at trial. She signed a
3 declaration as a witness to the testamentary document signed by Mary Wicks, but in a
4 subsequent deposition she testified she had never seen the declaration before and does not know
5 how her signature appeared on that declaration.

6 10. Petitioner produced a hand writing expert, Hannah McFarland, who believes that the
7 signature on the Last Will and Testament may not be genuine. Her written testimony was
8 submitted by stipulation at trial. The court finds that her testimony is not very helpful and is not
9 determinative.

10 11. The court finds that the signature on the Will was not a forgery and in fact was signed
11 by Mary Wicks on her death bed.

12 12. At the time of signing the document, Mary Wicks was a very sick woman and seemed
13 to be the only person that did not know that at that time she was in fact dying. She died eleven
14 days after the signing of the testamentary document.

15 13. On October 4, 2007, Mary Wicks was suffering from dementia, senility, and
16 Alzheimer's disease. There is also evidence that she was under a great deal of stress and
17 depression because of her family situation and was confused about events and circumstances
18 surrounding her at that time.

19 14. Mary Wicks was given a code status at the hospital, but her doctor noted on October
20 2, 2007 that she did not seem to understand the nature of her illness, she was not eating and she
21 was failing rapidly. He recommended she be release to a care facility in 2 or 3 days.

22 15. On October 4, 2007, the day Mary Wicks signed the Will, she was suffering from
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1 bilateral pneumonia, urinary tract infection, critical aortic stenosis, chronic congestive heart
2 failure, renal insufficiency and malnutrition secondary from refusal to eat. Her physician, Dr.
3 Fish, concluded that her prognosis was very grim.

4 16. On October 4, 2007, the day Mary Wicks signed the Will, a case manager at the
5 hospital noted that Mary reported that she lived alone in Arlington, could not recall the name of
6 her primary care physician, was stressed about financial concerns and refused to give permission
7 to her bank for her son to access her bank account.

8 17. On October 5, 2007 a social worker at the hospital noted that Mary stated she does
9 not remember signing a power of attorney, even though she had signed one the day prior.

10 18. On July 9, 2007, Mary Wicks told her family physician, Dr. Zylstra that her husband
11 died four months ago when in fact he had died in 2005. She further gave inconsistent reports to
12 the doctor about her home situation which was indicative of further mental confusion.

13 19. On July 10, 2007, her family physician reported that Mary Wick displayed an
14 inconsistent memory.

15 20. In July and August 2007, her physician noted that Mary Wicks was suffering from
16 depression, senility and dementia and prescribed antidepressants.

17 21. During the years that Edward Howard and his family lived with Mary Wicks in her
18 Arlington home, only one person in that home had a valid driver's license. That person was
19 Dolores Akins and she provided most of the transportation for Mary Wicks by driving Mary
20 Wicks' vehicles.

21 22. Both Edward Howard and Dolores Akins deposited their disability checks into Mary
22 Wicks' checking account. Mary Wicks was payee on Ms. Akins' social security checks. All four
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1 adults used Mary's checking account because all their funds were comingled in that account.

2 23. Edward Howard was in day to day control of Mary Wicks' life from the time that he
3 moved his family into the Arlington home with his mother.

4 24. The court finds that due to Mary Wicks' age and her health situation, she lacked the
5 mental acuity to make decisions about the disposition of her estate.

6 Based upon the foregoing, the court now makes the following:
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8 CONCLUSIONS OF LAW

9 1. Mary Wicks was not competent at the time that she signed the Last Will and Testament
10 on October 4, 2007.

11 2. There is a presumption of fraud or undue influence in the situation surrounding the
12 signing of the Last Will and Testament of Mary Wicks. See *Matter of Estate of Lint*, 135
13 Wash.2d 518, 957 P.2d 755 (1998). The factors that create the presumption include: Edward
14 Howard and his family resided with the testator; Edward Howard had day-to-day control of the
15 testator's life; Edward Howard wrote the Will and asked the testator to sign it; Edward Howard
16 received virtually the entire estate; the testator's advanced age and poor health; the testator's lack
17 of mental acuity; testator was on her death bed and did not seem to realize she was dying at the
18 time of signing.

19 3. The Respondent, Edward Howard, has not rebutted the presumption with evidence
20 that Mary Wicks was not unduly influenced to sign the Will.

21 4. The court finds that by clear cogent and convincing evidence that Mary Wicks was
22 unduly influenced to sign the Last Will and Testament.

23 5. Mary Wicks was not competent to direct or request the witnesses to the signing of the
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1 Will to subscribe their names. See RCW 11.12.020. The attestation fails.

2 6. Petitioner is entitled to an award of attorney fees and costs against the Respondent.

3 7. The Last Will and Testament of Mary Wicks is invalid.

4 Based upon the foregoing findings and conclusions, the court now makes the following:

5 **ORDER**

6 **IT IS HEREBY ORDERED** adjudged and decreed that the TEDRA Petition is granted
7 and the Last Will and Testament of Mary Wicks is declared invalid and the probate shall
8 continue as an intestate administration of the Estate; and

9 **IT IS FURTHER ORDERED** that all prior orders of this court allowing Respondent to
10 reside in the home of Mary Wicks are now dissolved and declared void; and

11 **IT IS FURTHER ORDERED** that attorney fees in the sum of \$32,625.00 and
12 costs in the sum of \$3,049.00 are awarded to the Administrator, Cynthia G. Ossenkop against
13 Respondent; and

14 **IT IS FURTHER ORDERED** that the above award for attorney fees and costs against
15 Respondent shall first be taken as a set off against Respondent's share of the Mary Wicks Estate
16 and any unpaid sum shall become a judgment against Respondent; and

17 **IT IS FURTHER ORDERED** that this court shall retain jurisdiction over this matter
18 until the judgment is satisfied.

19 Done in open court this 30 November, 2009

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23 _____
24 Judge Thomas J. Wynne

1 Presented by:

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3 C. Thomas Moser, WSBA #7287
4 Attorney for Petitioner

5 Entry Approved:

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7 Edward Howard, Pro Se Respondent

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