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No. 73629-9-I

THE COURT OF APPEALS, DIVISION I

State of Washington

ELMER WAGNER,
Appellant/Cross-Respondent

Vs.

JILL WRIGHT,
Respondent/Cross-Appellant

CROSS-APPELLANT'S REPLY BRIEF

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The assertion that Mr. Wagner has engaged in the unauthorized practice of law is not a “will contest.”

At page 3 and 6-7 Mr. Wagner asserts that any effort to describe his behavior as “the unauthorized practice of law” amounts to an untimely will contest. But, generally, the result of a successful will contest would be to invalidate the will. Ms. Archer is not asking for that relief. Indeed, as explained at the top of page 19 of Ms. Archer’s opening brief, invalidating the will might well be advantageous to Mr. Wagner. No one is asking that the will be generally invalidated or set aside.

Whether the will is valid is irrelevant to the question of whether Elmer was practicing law in crafting it.

Mr. Wagner relies on *Estate of Palmer v. World Gospel Mission*, 189 P.3d 230, 146 Wn.App. 132 (Wash.App. Div. 2 2008) for the proposition that “A court will decline to reach a petitioner’s unauthorized practice of law claim when the petitioner failed to initiate a [timely] will contest.”

But, *Palmer* does not involve the unauthorized practice of law or address itself to that issue. In *Palmer*, a paralegal drafted the documents, which were reviewed by an Attorney. See *Palmer*, 146 Wn. App. At 134-35. By the time

of the appeal, the issue was described as: “[Appellant] asserts that her claims are not time-barred as they are based on the testamentary trust.” Appellant lost, but the appellate court made no comment about the time for asserting the unauthorized practice of law.

As indicated at pages 6-8 of Ms. Archer’s opening brief, the will is awful, and if drafted by a lawyer would almost certainly constitute malpractice. It’s the core problem in this case and certainly a cause of the litigation. That problem is part of any action to enforce distribution, including this TEDRA action. A TEDRA action is a special statutory action and RCW 11.96A.020 gives the court plenary authority to act, indicating that “If this title should in any case or under any circumstance be inapplicable, insufficient, or doubtful with reference to the administration and settlement of the matters listed [as powers of the court] the court nevertheless has full power and authority to proceed with such administration and settlement in any manner and way that to the court seems right and proper . . .” This vests the court with authority to entertain questions of what should result if a TEDRA participant has engaged in the unauthorized practice of law.

At page 13-14, Mr. Wagner asserts that no law requires an attorney draft a will. That's correct. Anyone can draft their own will. But, crafting the will of another is something different. Mr. Wagner stood to benefit significantly by the changes made in the decedent's will. All of the problems – in the old will and new – would have likely been avoided had Mr. Wagner simply sent Liz off to see a competent lawyer. Indeed, even an incompetent lawyer might have had malpractice insurance sufficient to address the problems.

The question of “undue influence” is a conclusion of law, reviewed de novo.

Page 14 Mr. Wagner's brief starts a section with this heading: “overwhelming evidence supports the trial court's ***finding*** that the will was not the product of undue influence.” (Emphasis added.)

Page 16 (last line) wraps up the argument with this sentence: “The factual findings support ***the conclusion of law*** that Elmer did not exert undue influence over Elizabeth.” (Emphasis added.)

In fact, whether undue influence was exerted is a conclusion to be drawn from the facts. The *facts* pertinent to

questions of undue influence are, as described at page 17 of Mr. Wagner's brief:

Certain circumstances may raise a question about undue influence, including (1) a fiduciary or confidential relationship between the testator and the beneficiary, (2) active participation by the beneficiary in preparing or procuring the will, and (3) the beneficiary's receipt of an unusually or unnaturally large part of the estate.¹⁴

The trial court's findings – well, really the uncontested evidence – indicates that 1) there was a fiduciary or confidential relationship arising because the parties were in a long-term marriage, 2) Mr. Wagner was an active participant in preparing or procuring the will, and 3) Mr. Wagner received an unusually or unnaturally large part of the estate as measured by a) Liz Wagner's prior will, and b) the statement appearing on page 1 of the Will that "Both my husband, Elmer, and I agreed prior to our marriage that assets owned prior to our marriage would be willed to our respective children per each of our individual choice." That language wasn't struck or changed in the new will, although Elmer Wagner did, later in the will, receive a large part of what Liz owned prior to her marriage.

The trial court didn't find specifically on these facts (although they are really undisputed), instead making findings that would support a conclusion that Liz Wagner was competent.

However, undue influence is separate and different from competence. No one disputes Liz Wagner's competence. But, there is abundant evidence of undue influence in this case.

At page 18 (bottom), Mr. Wagner asserts that Ms. Archer is trying to "add additional requirements to making a will." She is not. Had Liz Wagner self-prepared a will without Elmer's participation or, had she done what lots of people do: consult an attorney, there would be no serious dispute. Again, the Will is "valid." But, it's the product of undue influence by a person acting as Liz Wagner's lawyer.

The question of "undue influence" can be raised by the Estate Administrator as a defense in a TEDRA action even if raised beyond the time for filing a will contest.

Insofar as Ms. Archer has raised the question of undue influence, it's plain that this claim could have been made in an ordinary will contest. And, generally, a will contest must be brought within 4 months of a probate's filing. But there is

a difference when issues of undue influence are being raised “as a shield” rather than as a “sword.”

The case of *In re Estate of Kordon*, 137 P.3d 16, 157 Wn.2d 206 (2006) holds that “Tedra applies to will contests, but does not affect the RCW 11.24.020 citation requirement.” In that case, Helen Cleveland asserted that TEDRA obviated the need to comply with RCW 11.24.020 pertaining to the issuance of a “citation” on the personal representative of the decedent. The Washington Supreme Court held that, although “A will contest presents a ‘question arising in the administration of the estate,’ and therefore is clearly a ‘matter’ subject to TEDRA.” it does not affect the RCW 11.24.020 citation requirement.

Issuance of the citation is a prerequisite to the Superior Court’s acquiring personal jurisdiction over the personal representative. Because no citation was timely served on the personal representative, Ms. Cleveland’s will contest was dismissed.

Here, however, *Mr. Wagner* commenced this TEDRA action asserting that the personal representative, Ms. Archer, had improperly *deprived* him of benefits under the will. Ms. Archer raises issues of undue influence as a *defense* to those claims.

TEDRA ultimately is an equitable proceeding. If, for whatever reason, it would be inequitable to award to Mr. Wagner *more* than he had received before filing his action, then the court cannot in good conscience ignore *any* defense, including issues of undue influence, because to do so would be participating in awarding Mr. Wagner an *inequitable* portion of the estate.

Ms. Archer can simply waive defects in service of the citation – something the PR in *Kordon* was unwilling to do.

The deed of property in Federal Way was to more than one grantee.

At page 22, Mr. Wagner starts a section with the heading (in part): “the deed’s plain language indicates an intent to gift the property to one grantee.”

If so, then it’s odd that the grantor would identify ***two*** separate persons as grantees. Odder still is that they are identified by the disjunctive “or” without any description of which has a priority or what the conditions for priority are.

RCW 64.28.010(1) tells us that “Every interest created in favor of two or more persons in their own right is an interest in common, unless [does not apply].” This is a deed creating an interest in favor of two or more persons,

although the deed clearly is not the finest example of drafting. The statute resolves this part of the case. The statute does not require that a grantee, to acquire an interest, pay taxes, pay for maintenance or upkeep, or occupy the premises in order to acquire an interest.

The court did not err in refusing to remove Ms. Archer because there is no “well-documented breach of fiduciary duty.”

At page 30, an odd argument is made that, apparently conceding that Ms. Archer’s residence in Chicago does not *mandate* removal – that she should nonetheless have been removed due to “well-documented breaches of fiduciary duty.” The problem is that the trial court didn’t find any “well-documented breaches of fiduciary duty.”

Mr. Wagner asserts that somehow “Ms. Archer’s failure to submit argument on this issue should be a waiver of the issue.” However, before a party needs to submit argument in opposition, there’s a burden on the appellant to actually show the existence of facts supporting reversal of the trial court’s decision. Here, there just are no “well-documented breaches of fiduciary duty,” and the trial court found none.

Ms. Archer believes the balance of the arguments are adequately addressed in the prior briefing, and for these reasons, and those outlined in her opening brief on cross-appeal, Ms. Archer requests that the relief described in her prior briefing be granted.

CONCLUSION

Issues relating to the unauthorized practice of law are not truly a “will contest” under Ch. 11.24 RCW and TEDRA, which in all events encompasses will contests, vests the court with authority to consider that issue.

TEDRA, being an equitable proceeding, permits the court to consider also issues of undue influence if raised as a *defense* to assertions by the petitioner even if such claims might be untimely as an independent claim *against* the estate. Mr. Wagner is not entitled to a defense-free presentation of his argument that he’s been treated unfairly by Ms. Archer in the administration of the estate.

While the question of whether preparation of wills is the unauthorized practice of law is somewhat undecided, the reasoning of Justice Maddsen in the *Perkins* case cited in Ms. Archer’s opening brief most accurately reflects the best thinking. “Washington has never held that the practice of

law may be severed into two categorically separate tasks of legal discretion and scrivener-like activities,” and this Wagner case demonstrates well why people are likely to be harmed if there is not independent review and advice on wills from a competent lawyer. The court should rule that Mr. Wagner was engaged in the unlawful practice of law, should therefore be divested of all benefits from the will. The trial court’s determination to the contrary should be reversed with instructions to re-allocate the estate assets, Mr. Wagner to take nothing.

The case also presents all of the classic indicia of undue influence. While no one disputes that Liz Wagner was competent – in that sense “sharp as a tack,” the plain fact is that her will was crafted at a time when she was dependent on Mr. Wagner and the will was crafted while Mr. Wagner was alone with the decedent, and he very clearly made changes to her earlier will that gave him significant new assets, inconsistent with a long-standing agreement between the spouses. There is no plausible explanation for why Liz would want to suddenly make those changes. While none of that should mean she cannot make the changes, public policy demands that Mr. Wagner be able to obtain those assets only if Liz has truly independent, competent counsel to advise her

on the subject. A quiet change, made in the privacy of the home, can't be condoned, and that's exactly what undue influence law is designed to prevent.

If the court is not inclined to deny Mr. Wagner *all* the benefits of the will, then still the trial court should be reversed insofar as it denied Ms. Archer any interest in the Federal Way home because her name appearing on the deed intended to convey some interest in the home, and by statute, all parties identified as Grantees hold as tenants in common.

Also if the court is not inclined to deny Mr. Wagner *all* the benefits of the will, then still the \$52,143 awarded Mr. Wagner as an "equitable lien" should be reversed because an "equitable lien" is not appropriate when the home was occupied by Mr. Wagner or otherwise rented out.

In all events, the court should affirm the trial court's ruling that rejected the removal of Ms. Archer because that is within the discretion of the trial court even if she lives in Chicago.

Fees should be awarded as authorized by RCW 11.96A.150.

DATED this 30th day of March, 2016.



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