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DIVISION II

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STATE OF WASHINGTON
DEPUTY

IN THE MATTER OF THE ESTATES OF KENNETH FRANK AND
CATHERINE FRANK

Appeal from Mason County Superior Court

APPELLANT'S REPLY BRIEF

Robert N. Windes, WSBA #18216
William A. Keller, WSBA #29361
MORAN WINDES & WONG, PLLC
5608 17th Avenue Northwest
Seattle, Washington 98107
Telephone: 206-788-3000
Facsimile: 206-788-3001
Attorneys for Appellant

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The Foundation has taken two distinct paths in an attempt to maintain ownership of the property and circumvent the efforts of Ken and Catherine Frank in their rescission claim in Mason County Superior Court. First, the Foundation argues that the provision in the 1996 will gifting the property after death provides for the Foundation to receive the Estate's claim for equitable rescission against the very same Foundation.¹ In essence the Foundation argues that the Franks' intent evidenced by the will was to have given their rescission claim to the very entity against which they brought the rescission claim. The Probate Court made no such finding regarding the intent of the will as to find such intent would have been an odd and absurd result. Cp 71-72 Second, should the Foundation's claim to own the right to bring the rescission action against itself fail, they rely on several technical and unsupportable arguments as to why ademption should not occur, including (1) that ademption cannot occur because the claims of the Franks cannot defeat the will provision giving the property to the same Foundation, (2) that ademption cannot

¹ As an initial matter, the Foundation's attempt to portray this lawsuit as being created and solely handled by David Frank is simply false as set forth in the deposition testimony of Catherine Frank which was cited to and provided in the opening brief. Appellant presumes the Foundation makes these assertions in furtherance of its equitable arguments; however, the Court should not be swayed by innuendo but instead should take notice that Ken and Catherine instituted the rescission lawsuit prior to death, and had pursued the claims for more than two years before then.

occur because the property would only be returned to the Estates through the rescission action and (3) that ademption cannot apply because all property was gifted prior to the will - in spite of the uncontroverted evidence that the sole purpose of the will provision was to ensure the property would pass to the Foundation in case they died before completing the intervivos transfers, and also that a deed to the property was gifted to the Foundation in 1997 after the will was made.

First, the law of Washington and elsewhere does not support the legal argument made by the Respondent below and accepted by the trial court, that ademption can only occur where the intervivos gifting is done after the will is made. Further, whether the Franks gave the property away before or after the execution of the 1996 will should not make any difference as to whether the 1996 will provision is valid or invalid. If they did not own the property but instead, at the time of death, were involved in a lawsuit for its return, a court of equity should find that ademption had occurred.

Nevertheless, even if ademption required the gift to be after the will, the Franks executed a deed in 1997 gifting the Cranberry Lake property to the Foundation. CP 75-81. The Foundation attempts to avoid this fact by claiming that earlier the Franks signed a deed with an after acquired title clause such that the 1997 deed is meaningless. Certainly the

1997 deed is evidence of gifting occurring after the will was made. Certainly, in the Franks' minds they must have believed they were deeding something. Otherwise, their accountants and lawyers (now being sued) would not have drafted the transfer for them as a means of ensuring the gifting process. CP 75-81.

At some point a probate court charged with equitable duties must see that equity is indeed done. The Personal representative sought to do this by continuing Ken and Catherine's lawsuit as allowed and required under the Washington Survival Statute RCW 4,20.046. CP 477-489.

A. The Court Should find That the Will Provisions Gifting The Property To The Foundation Adeemed.

The undisputed evidence is that the Foundation had possession and title to the Cranberry Lake property at the time Ken and Catherine Frank died. The Cranberry Lake property was not part of the Estates at the time they died. As set forth in the opening brief the two types of ademption are ademption by extinction and ademption by satisfaction. The bottom-line in each is that the specific legacy given in the will is no longer part of the estate at the time of the testator's death.

The doctrine of ademption by extinction focuses on two questions only: (1) whether the gift is a specific legacy and, if it is, (2) whether it is found in the estate at the time of the testator's death." *Dennison*, 91 Am.

Jur. Proof of Facts 3d 277, section 13, citing cases. Ademption by satisfaction considers the testator's intention to satisfy the bequest or devise or not. *Trustees of Baker University v. Trustees of Endowment Association*, 222 Kan. 245 (1977). To do so, the courts consider all of the circumstances of the case to determine whether the testator intended to satisfy the legacy. *Id.*

As respects ademption by extinction, the gift of the property to the Foundation was a specific legacy, which property was no longer in the estate at the time of death. As respects ademption by satisfaction, the evidence in the record is clear that the Franks intended to gift the entire property inter vivos, as is set forth by the testimony of Mary Gentry. The will was merely a "safety net". CP 75-81.

The Respondent offer or make any new legal arguments or citations to authorities which would support the trial courts dispositive and erroneous ruling that gifting must be completed before the will is made in order for ademption to apply. Therefore, those important points of law and citations to authorities put forward in the Appellant's opening brief (see Appellant's Brief, sections III. A-G) will not be restated here, but should be reviewed by this Court in reply to the Respondent's response briefing.

B. The Evidence Presented Below Indicated That the Franks Executed the Will To Ensure the Gift Occurred If they Failed To Complete the Intervivos Gift Before They Died

The Court below made factual findings that the Franks had gifted all interest in Cranberry Lake to the Foundation prior to the execution of the 1996 wills and denied ademption solely on that fact. CP 71-72. The first question is whether sufficient evidence supports the findings of fact underlying the trial court's decision. *Bartlett v. Betlach*, 136 Wn. App. 8, 18 (Wash. Ct. App. 2006); *Cox v. Lewiston Grain Growers, Inc.*, 86 Wn. App. 357, 367, 936 P.2d 1191 (1997). When reviewing findings of fact entered by a trial court, the appeal court's role is to determine whether substantial evidence supports the findings. *Ridgeview Props. v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). The next question is whether the findings are sufficient to support the trial court's decision. This is a question of law reviewed *de novo*. *Bartlett v. Betlach*, 136 Wn. App. at 18.

To reach its factual conclusion that the Franks' had been divested of all interest in Cranberry Lake by the time they added the provision gifting the property in the 1996 wills, the Court had to ignore the only testimonial evidence produced on the point – the testimony of the drafter, Mary Gentry. (see Appellant's opening brief, sections III G-H) Gentry testified that the 1996 will provision was drafted to ensure that the property would be gifted to the Foundation in case Ken and Catherine happened to die before completing the intervivos transfer. CP 75-81. Gentry further

testified that she drafted another deed for the Franks in 1997 wherein the Franks gifted the remainder of the Cranberry Lake Property, and/or what they perceived to be the remainder of the property. *Id.* Essentially the Court found both the will provision and the 1997 deed unnecessary and irrelevant to the ademption argument as he found neither had any impact whatsoever on the gifting of the property as it already had completely occurred. Why Gentry would have added the provision to the will and later done another deed is a mystery then. Common sense dictates, however that the Franks and the attorney who drafted the will, and the 1993 and 1994 deeds (Mary Gentry) believed that not all interest in the property had been transferred. The court should not have rejected the evidence as it was the only testimony on the point. At the very least the 1997 deed should be evidence of ademption by satisfaction.

Nevertheless, as stated in the opening brief, even if all the property was transferred prior to the will, the will provision should still be found to adeem. To deny ademption and to allow a Foundation to obtain property through a will, when it is being sued to rescind the intervivos transfer defies equity and logic. The Foundation's argument that ademption did not occur because the gift of property took place before the will provision is an exercise of semantics as opposed to equity, which is the duty of the probate court. As was previously address in the probate court and in

appellant's brief through the inclusion of the testimony of Mary Gentry, the gift provision was placed in the will to ensure that the entirety of the property would be gifted away to the Foundation in case Ken and Catherine died before completion of the inter vivos transfers. CP 81. (Mary Gentry's deposition testimony). In 1997 they executed the final deed and certainly the Franks must have intended something by providing and delivering a deed. Such an action should not be dismissed simply as superfluous. Regardless of whether the deed actually served to convey any further property, it is certainly evidence that the Franks believed they were deeding Cranberry Lake property to the Foundation after the execution of the will and further demonstrates that the will provisions should be nullified under the doctrine of ademption by satisfaction.

C. The Concept that the Gift of the Property to The Foundation in the 1996 Wills Does Not Adeem Because the *Intervivos* Gift to the Foundation Was Procured Through Misrepresentation, Mistake and Undue Influence Should Not Be Accepted As Law In This State

The Respondent argues that a disposition of property that is unenforceable or subject to rescission does not result in an ademption of the property, citing to several cases and Page on Wills. Respondent's Brief, at 27-29. Respondent and Page significantly overstate the analysis and holdings of the cases cited, and fail to acknowledge that the very

sources it cites to explain that only dispositions which are void rather than voidable may not result in an ademption.

Respondent has not taken issue with Appellant's citations to the law of Washington which establishes that each of the claims made by Appellant in support of claims for rescission render the gifts voidable, rather than void. See Appellant's brief, at 43-4, as well as briefing to trial court. Where, as here, a gift or conveyance of property is only voidable rather than void, it is a valid transfer of title unless and until a party entitled to challenge it successfully does so. *See Eg. Dwight v. Waldron*, 96 Wash. 156, 160 (1917); *Puget Sound National Bank of Seattle v. Fisher*, 52 Wash. 246, 249 (1909); *Fisher v. Bryant*, 194 Wash. 70, 75 (1938); *Heinrich v. Titus-Will Sales*, 73 Wn.App.147, 158 (1994).

The Respondent cites and quotes from the New Mexico case, *Brown v. Heller*, 30 N.M. 1, 227 P.594 (1924), for the proposition that a property transfer based on undue influence does not result in an ademption. The significance of that out-of-state case is to help understand the only circumstance on which any of the courts has held that a transfer of property cannot act as an ademption. In that state and time, a contract secured by undue influence was an absolute nullity, and in considering that, the court ruled that no ademption could occur because:

This is clearly seen to be the correct rule, when we keep in mind what we have previously stated herein, that the reason for ademption or revocation is that after the conveyance there is no property or estate left upon which the will can operate, nor title to any estate which can be passed by it. Such would not be the situation where the conveyance is void because secured by undue and improper influence, or overreaching the testator's will. Such a deed does not pass title to the property. It is a nullity, and the real title remains in the testator in the will, because no valid conveyance has been executed by him which passed such title to another..."

Id. at 12. In the first sentence of this quote, the *Brown* court referred to the need to "keep in mind what we have previously stated herein." It is helpful to understanding the reasoning of the court to also consider that which it there refers, which is:

This conclusion [that ademption may apply] seems irresistible when we pause to consider the real purport and effect of a will which is merely the designation or appointment of some one to take certain property which belongs to the testator at the time of his death. The necessary consequence that he must own the property at the time of his decease is indeed indispensable in order that the will have any effect whatever.

Id. at 596-7.

In other words, where a purported transfer of title is "void" such that "no valid conveyance has been executed by him which passed such title to another", an ademption cannot occur, because ademption by extinction is based on there being no title in the estate at the time of death of the testator on which the will can operate.

For purposes of applying the distinction so made by the *Brown* court to the circumstances of this case, one need to consider whether, at the time that the Foundation was created and the deeds transferred to it, title to the property passed. In Washington law, this calls into question whether title to the property passed to the Foundation when the gift was made to it. This requires that it be first determined whether the title to the property in that transaction was “void” as the *Brown* court determined was the case under the law of New Mexico, or simply voidable.

As noted above, Respondent has not taken issue with Appellant’s citations to the law of Washington which establishes that each of the claims made by Appellant in support of claims for rescission render the gifts voidable, rather than void.

Respondent also cites to *Bethany Hospital v. Philippi*, 107 P. 530 (Kan. 1910), stating only that the case held that a deed of property by incompetent grantor will not adeem a specific devise of real property. Appellant does not dispute that assertion and even finds the reasoning of the court there helpful in explaining why the gift in the instant case adeemed the testamentary provision. In *Bethany Hospital*, the grantee of the conveyance of property argued that the “deed, being valid on its face and at most only voidable, operated to revoke the will” wherein the

grantor/testator devised the same property to another. The court disagreed holding that the conveyance of the property was an absolute nullity:

[The devisee] contended and the court found that the deed was an absolute nullity. If [the testator] had no capacity to execute a deed, no property was conveyed. If the instrument signed was an utter nullity, [the testator] was the owner at the time of death. If the title of the property was in [the testator] when he died, it became subject to the provisions of the will and passed to [the devisee].

Id. at 532.

While the issue in *Bethany Hospital* was standing rather than ademption, this analysis is equally applicable in determining whether the gift to the Foundation adeemed the testamentary provision. If the gift to the Foundation had been an absolute nullity, the transfer by the Franks to the Foundation would not adeem the will provision, and indeed Appellant would have no standing to bring this action (it is interesting that no such argument has been made here). If on the other hand, as is the case under Washington law, the transfer to the Foundation was only voidable rather than void (see above), then the transfer to the Foundation clearly adeemed the will provision as, at the time of the Franks death, the title to the property was not in the testator/estate when he died.

The third case put forward by Respondent is *Thompson v. Ford*, 236 SW 2 (Tenn. 1921), claiming that the sale of the business there was “voidable” under the statute of frauds and yet did not adeem a bequest to

another. The Respondents effort to characterize the conveyance there as only voidable is not supported by the facts of that case, and the decision clearly turned on a Tennessee statute not on the books in the State of Washington. First, no title passed or even existed insofar as the property there at issue was a partnership interest in a business, rather than real property. Therefore, whether the title was voidable or void was not considered. Second, the *Thompson* court's decision turned on its observation that the purported conveyance was only verbal with no writing about it, such that "the contract could not have been enforced by any party in the absence of any writing." *Id.* at 4. With no title transferred and not even a writing on which to base a contract or maintain an action to enforce a claim to the property, this case has no bearing on the instant case, and cannot be said to involve a "voidable" contract. It cannot even be said that a contract came into existence in the first instance.

This point is further made by the *Thompson* court in distinguishing the case of *Donohoo v. Lee*, 1 Swan 119. The court noted that in the *Donohoo* case, there was a "valid binding contract of sale" and that in such a case, "equity considers the title to have passed to the vendee under such a contract." The *Thompson* court, by way of contrast, found that the case of *Blair v. Snodgrass*, 1 Sneed 1, was controlling. *Thompson v. Ford, supra.* at 4. In the *Blair* case, the court held that the purported land sale

contract was simply “void”, as the papers produced were wholly silent as to price and terms of sale and had no description of the land to be sold.

D. A Will Contest Was Unnecessary For This Dispute Both Legally and Equitably

The Foundation makes much ado about the personal representative’s failure to institute a will contest. It defies logic that the personal representative would need to challenge a will provision when the property no longer was in possession of the Estate, while at the same time their existed a lawsuit to rescind the intervivos transaction. If the property had been in the Estate at the time of death there would have been no need to have the rescission lawsuit in the Superior Court.

Furthermore, in a will contest “the court cannot ordinarily construe the will or attempt to distinguish between valid and void dispositions; and must admit the will to probate” unless it can be attacked because of a factor which would deem the will invalid at its inception. *In re Wiltzius*, 42 Wn.2d 149 (citing Bancroft’s Probate Practice (2d ed.) 436, 439 §180.

E. The Foundation’s Cited Case Law Does Not Support Its Misleading Argument That Ademption Does Not Apply If An Equitable Claim Can Pass.

As expected, the Foundation relies heavily on the very same case law set forth below and discussed at length in Appellant’s opening brief. Although Appellant does not wish to re-hash in full his discussion of said

case law, in short, Appellant believes that the cited case law, including *Brown v. Hilleary*, 147 OR. 185 (1934), *Spurgeon v. Coate*, 1959 OK. 39 (1959) and *Bethany Hospital v. Philippi*, 82 Kan. 64 (1910) actually help explain why ademption should have been found in the instant case.

The Respondent relies heavily in his briefing on the case of *Brown v. Hilleary*, 147 Ore. 185, 32 P.2d 584 (1934). That case actually has nothing to contribute to the analysis in this case. First, there was no passing of an equitable interest in a property at issue in the case. As of the date of the court's decision, the transfer of the property made during the testator's lifetime had already been set aside. The issue was not whether the son would be devised a right to sue himself for rescission, as the Respondent would here argue for itself. As respects the operation of the will, the only issue was whether the legal title to the property would pass under the residuary clause to the son, not whether an equitable interest would pass.

Further, while the Respondent does not actually say so, the impression left by the Respondent's arguments is that ademption by extinction should not apply in the instant case because the *Brown* court noted that an equitable interest to recover the property was still in the estate and could be devised. It is notable that the term "ademption" does not appear anywhere in the case. There is a good reason for that. The will

provision at issue in that case was only a general legacy under a residuary clause.² As put forward in Appellant's opening brief (at pages 16-17), and is not disputed, ademption by extinction does not apply to general legacies, but only to specific legacies. *Estate of Doepke*, 182 Wash.556 (1935); *Estate of Parks v. Hodge*, 87 Ohio App.3d 831 (1993); *Newbury v. McCammant*, 182 N.W. 147 (Iowa 1979). Therefore, ademption was not and could not have been an issue in the *Brown* case, and the case has no bearing whatsoever on the ademption arguments in this case.

That the *Brown* case had nothing particular to offer on issues of ademption or any other principle of law may also be indicated by the fact that only one civil court in the seventy years since its publication has cited to the case, and then only for the meaning of a residuary clause. *Palmer v. Palmer*, 211 Ore. 342, 353 (1957).

The next case relied on by Respondent is *Spurgeon v. Coate*, 1959 Ok. 39, 337 P.2d 732 (1959), is of equally irrelevant to this case. As in the *Brown* case, the *Spurgeon* court did not anywhere refer to ademption, and since the case involved a general legacy under a residuary clause,

² Respondent suggests that at page 585 of the opinion, the *Brown* court and the parties assumed that if the mother had specifically devised the farm to her son, there would have been no question as to her power to devise the property notwithstanding her lack of legal title. (Respondent's Brief, pgs. 17-8). This attributed "assumption" is not even vaguely suggested in the text of the opinion.

ademption could not have been applied. As noted in Appellant's opening brief (at page 41), the premise of that case was only that a party may bequeath a right she had no knowledge of if her will has a proper residuary clause. Also, the right at issue was one to claim funds, not to rescind or cancel a deed or transfer of property.

The third case relied on by Respondent is *Bethany Hospital v. Phillippi*, 82 Kan. 64 (1910). That case did involve a specific bequest; however, the doctrine of ademption was not mentioned or argued. In fact, the issue argued was that of standing, and whether the plaintiff had "such an interest in the property as warranted it in maintaining an action against the [grantee]." *Id.* at 68. The court did not analyze the issues in terms of ademption and did not focus, as Respondent contends, on a claim of undue influence. The circumstance focused on was that the testator had "no capacity to execute a deed." *Id.* at 9. The court reviewed other cases in Kansas where conveyances were made by "an insane grantor" and a "lunatic", and noted that those cases held that any contracts made by such persons were "absolutely void" and "void per se". *Id.* at 10-11). Then, rather than rely on some passing of an equitable right, the court decided that in such circumstance, the court could resolve the standing issue by ruling that the title to the property never passed from the testator before his death, reasoning as follows:

[The devisee] contended and the court found that the deed was an absolute nullity. If [the testator] had no capacity to execute a deed, no property was conveyed. If the instrument signed was an utter nullity, [the testator] was the owner of the property at the time of his death. If the title of the property was in [the testator] when he died, it became subject to the provisions of the will and passed to [the devisee]. The theory of the case was not that it was merely voidable, but that it was utterly void, and hence the rules suggested by the appellant are not applicable. If the deed did not transfer the title from [the testator], then [the devisee] acquired complete title to the property upon the death of [the testator], and also the right to bring an action to have the deed declared void.

Id. at 532.

The respondent also cites to *Pepper v. Truitt*, 158 F.2d 246 (10th Cir. 1946), which also does not support the Foundation's case in this instance. In *Pepper*, the appellate court overruled a decision that an equitable action to rescind a gift for fraud and/or breach of contract did not survive. In *Pepper*, the grantee's of a gift of property failed to meet their obligation to care for the elderly grantor. As a result, the Court upheld the right of the grantor's heirs to bring claims for rescission of the gift of property for breach of agreement and/or fraud. The *Pepper* Court does not, however, provide any basis for passing an equitable right to rescind property to the party who wrongfully held it in the first place.

Having misread and misapplied these four cases, the Respondent goes on to argue an equally confusing policy argument not addressed by the cases he discussed. Without mentioning the word "ademption" (as the

cases did not), Respondent indirectly tries to undermine the substantial case law on ademption by suggesting that it would be enough not to adeem a bequest that there was an equitable right to recover property that the testator held at the time of death. This proposition is not supported by any of the three cases he has cited to, which do not even address ademption, or by any other case in the substantial history of the development of the doctrine of ademption around the country over a period of centuries.

Respondent then suggests that if Appellant's arguments (really the collective principles of ademption crafted by the courts) are accepted, real property converted by persons who prey on the elderly would pass intestacy rather than under a residuary clause. This is unfounded, and contrary to the *Brown* and *Spurgeon* cases he reviewed, which specifically support the passing of such properties under a residuary clause.

Furthermore, in the instant case, it should be noted that in the trial court's decision below, it did not obviate the ademption arguments in favor of merely finding that ademption did not occur because equitable title passed. There were no findings of fact or conclusions of law on this argument. Instead, what the trial court found dispositive on the issue of ademption was that found that all property had been conveyed prior to the

will, and that no interest had been retained at the time the will was drafted in 1996. See CP 71-72.

F. The Estate's Equitable Right To Rescind The Intervivos Gift To The Foundation Should Not Be Devised to the Foundation.

The Foundation argues that under Kenneth and Catherine's 1996 wills that it is entitled to distribution of their equitable right to rescind the conveyance from the Foundation. Put another way, the Foundation argues unabashedly that the wills allow the Foundation to take over the very equitable claims Ken and Catherine Frank made against the Foundation. To award this equitable right to the very party against which the right is asserted defies common sense, and would turn equity on its head. Equitable concepts such as equitable estoppel should preclude this legally absurd result.

The probate provisions accommodate the application of estoppel and other equitable principles. RCW 11.40.070(4). Indeed, the probate court may issue any orders necessary to properly settle a decedent's estate. RCW 11.96A.040. This Court review's those equitable rulings for abuse of discretion. *In re Proceedings of King County for Foreclosure of Liens*), 123 Wn.2d 197, 204, 867 P.2d 605 (1994); *In re Determination of Rights to Use Surface Waters of Yakima River Drainage Basin*, 112 Wn. App.

729, 748, 51 P.3d 800 (2002). Discretion here means "sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously." *Lenhoff v. Birch Bay Real Estate, Inc.*, 22 Wn. App. 70, 74-75, 587 P.2d 1087 (1978) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

The probate court's overriding duty is to determine and carry out the wishes of the decedent, not those of the disputing parties. *In re Estate of Stein*, 78 Wn. App. 251, 259, 896 P.2d 740 (1995). The probate court should go to the utmost possible lengths to ensure that the wishes of the deceased are not defeated by the carelessness or indifference of those charged with carrying them out. *In re Estate of Elliott*, 22 Wn.2d 334, 351, 156 P.2d 427 (1945). For this reason, Court's accord great deference to the probate court in the exercise of its discretion on behalf of a decedent. *Stein*, 78 Wn. App. at 259-60; *In re Estate of St. Martin*, 175 Wash. 285, 289, 27 P.2d 326 (1933). The court is charged with direct responsibility for the proper administration of every estate. It is not "merely a referee in a contest between private disputants. Instead, it is the agency primarily charged with the important function of administering decedents' estates." *In re Estate of Peterson*, 12 Wn.2d 686, 722, 123 P.2d 733 (1942). "As a result of this peculiar status of the courts in probate proceedings, if it becomes apparent during the course of administration that a mistake has

been made at some earlier stage, the court should immediately take steps to remedy the situation in so far as that is possible." *Id.* at 722-23.

1. The Probate Court Made No Factual Findings As To the Franks Intent Regarding the Equitable Rescission Claim

In construing a will or trust, testamentary intent controls. *In re Estate of Griffen*, 86 Wn.2d 223, 226 (1975). Testamentary intent is a question of fact. *In re Estate of Soesbe*, 58 Wn.2d 634, 636 (1961). The court reviews whether substantial evidence supports the findings of fact. *Lewis v. Estate of Lewis*, 45 Wn. App. 387, 389 (1986). "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Id.*, quoting *Nichols Hills Bank v. McCool*, 104 Wn.2d 78 (1985). Because a testator employs language in the will with regard to facts within his knowledge, the court must consider all the surrounding circumstances, the objects sought to be obtained, the testator's relationship to the parties named within the will, his disposition as evidenced by provisions to be made for them and the general trend of this benevolences as disclosed by the testament. *In the Matter of the Estate of Bergau*, 103 Wn.2d 431, 436 (1985). When, upon a reading of the will in its entirety, an uncertainty arises as to the testator's true intention, it is well accepted that extrinsic facts and circumstances may be admitted for the purpose of explaining the language of the will. *Id.*

Where there is an ambiguity in a will, the testimony of the drafter may be admitted to assist in resolving the problem. *In re Estate of Torando*, 38 Wn. 2d 642 (1951).

In this case, the probate court accepted evidence, including the testimony of the drafter. The evidence presented to the probate court regarding the reasons for the provision gifting Cranberry Lake to the Foundation in the 1996 will are undisputed and set forth in the testimony of Mary Gentry, the attorney who drafted the documents and who is among the professional defendants being sued for negligence and misrepresentation. As set forth in Appellant's opening brief, Ms. Gentry testified that the will provision was created as a safety net in case all the inter vivos transfers of the Cranberry Lake property had not yet been completed. Simply stated, the will provision was done in furtherance of the very transfers which were later alleged to have been based upon negligence, misrepresentation, mistake and undue influence.

In short, not only were Ken and Catherine Frank induced to sign over inter vivos gifts based on professional negligence and misrepresentation, they were further induced to add such a conveyance to the will to ensure completion of the induced transfer should they die before the full ramifications of the misrepresentations and negligence manifested. The Gentry testimony undermines any idea that the will

provision somehow was a manifestation of the Franks' intent to devise the equitable rescission claim to the Foundation. At the time of executing the will the Franks had no equitable rescission claim and in fact, in their minds, as evidenced by the testimony of Gentry, they had not yet transferred all the property to the Foundation which they subsequently did in 1997. For that reason the will provision, should not be considered to provide an equitable claim of rescission to the party who is already unjustly enriched by possession of the property.

Under the circumstances of this case where Ken and Catherine Frank have sought to rescind the transfer to the Foundation, the Foundation should not be permitted to make claim to an equitable right to rescind against itself, through operation of a will, particularly whereas the will itself makes no mention of a gift of a right to rescind.

As with cases dealing with claims of equitable title, equity should define and lodge the title where in truth it should be, whether any deeds were executed, formally or informally or were delivered or not delivered. *See e.g. Peterson v. Tull*, 85 Wash. 546, 550 (Wash. 1915) (delivery of deed was immaterial to equitable decision regarding title to property). The execution of such instruments as the Franks' wills, should be considered in light of the circumstances bearing on the equities of the case. Here the equities dictate that the equitable right to rescind a transaction to the

Foundation should remain with the personal representative and eventually pass through the residuary clause, not be distributed to the Foundation.

G. The Foundation's Award of Fees Below Should Be Overturned and Its Attempt to Collect Fees on Appeal Should Be Denied

The Foundation argues that its award of fees in the probate court cannot be overturned because Appellant somehow waived the argument. Appellant raised the issue in its brief in its statements of issues and assignment of error. As some point in this dispute common sense must make some headway in the law. If the probate court erred in granting the property to the Foundation, then the Foundation would not have been a prevailing party entitled to fees. There exists no need to brief the issue any further. Appellant simply asks that the Court act in accordance with reason in determining that issue as opposed to hyper-technical and incorrect arguments to the contrary.

H. The Foundation Should Not Be Awarded Fees On Appeal

The award of fees is discretionary. Ken and Catherine brought a lawsuit to rescind the gift of property to the Foundation prior to their deaths. The personal representative continued their lawsuit and has raised the ademption issue being litigated here in furtherance of the negligence and rescission lawsuit which continues the wishes of Ken and Catherine Frank. To allow the Foundation to obtain more funds from the Frank

Family after already unjustly receiving a 20 million dollar piece of property from the Estate would be unconscionable. None of the claims brought by the appellant are unreasonable. The Foundation cross-appealed in this case on issues it lost in the probate court, which cost the Estate significant resources to defend and would have justified the Court awarding Appellant fees and costs. The Foundation has now relinquished its appeal of those issues.

Any award of fees to the Foundation should be denied as the equities in this case do not support any award of fees.

CONCLUSION

Based upon the foregoing the probate's court's Order should be reversed as the will provision granting the Cranberry Lake property to the Frank Family Foundation has adeemed.

Dated and Signed this 16th day of January

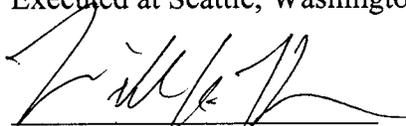

Robert N. Windes, WSBA # 18216
William A. Keller, WSBA #29361

PROOF OF SERVICE

I hereby certify that on the 16th Day of January 2008, I mailed a true and correct copy of the foregoing document titled Appellant's Reply Brief to counsel of record at the following address, postage thereon being fully prepaid:

Ladd B. Leavens
Zachary Tomlinson
Davis Wright Tremaine LLP
1201 third Avenue, Suite 2200
Seattle, WA 98101-3045
Attorneys for Respondent Frank Family Foundation

Executed at Seattle, Washington this 16th Day of January 2008.



William A. Keller

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