

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 36206-6-II (consolidated)

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

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

BRIEF OF RESPONDENT

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Kenneth (“Ken”) and Catherine (“Kitty”) Frank created a charitable foundation, the Frank Family Foundation, in 1993. They deeded to the Foundation a square mile of undeveloped Mason County forest and lake property called Cranberry Lake. In 1996 they executed wills, both of which included unambiguous specific bequests of Cranberry Lake to the Foundation. The Foundation has existed and has pursued its charitable purposes since its inception.

Less than a month before both of the Franks died in late 2005, their son David Frank commenced a negligence action against lawyers and accountants whom he asserted had misled his parents into deeding Cranberry Lake to the Foundation. Ken and Kitty were also named as plaintiffs, although, according to the complaint’s caption, Ken (who was 98 years old when the action was commenced) brought the action “by and through David K. Frank, his attorney-in-fact.” CP 162. In addition to seeking money damages from the professionals, the plaintiffs sought rescission of Ken and Kitty’s deeds of Cranberry Lake to the Foundation.

Ken and Kitty did not, however, change their wills. Ken and Kitty both died less than a month after the commencement of the action. On David’s motion, the wills were admitted to probate, and he was appointed as personal representative (“PR”). On the Foundation’s subsequent

TEDRA petition, the Mason County probate court ruled that even if the rescission action were successful, title to Cranberry Lake would vest in the Foundation under the wills. The same judge, presiding over the civil negligence action, then granted the Foundation's motion for summary judgment, on the ground that David Frank as PR would have no cognizable interest in Cranberry Lake even if the deeds were rescinded, and therefore that he lacked standing to pursue rescission of the deeds.

David Frank as PR in this proceeding appeals from the decision of the probate court that the wills are enforceable according to their terms. The Foundation in response argues that (1) the equitable right to rescind a deed on the grounds of undue influence, misrepresentation or mistake is an equitable interest in property, and can be conveyed by a devise in a will; (2) Ken and Kitty's broad devise of all of their interest in Cranberry Lake to the Foundation encompasses their equitable interest in Cranberry Lake, including their equitable right of rescission (if any); (3) extrinsic evidence is inadmissible to vary the terms of the unambiguous devises; (4) David Frank as residuary beneficiary did not contest the wills, and the devises are now irrebuttably presumed to be the wills of the decedents, enforceable according to their terms, without regard to any of David Frank's arguments regarding equity or intent; (5) the doctrine of ademption has no application to this case, but in any event would not

operate to extinguish the specific devises; and (6) the Foundation is entitled to recover from the estates and David Frank personally its fees incurred in connection with this appeal.

II. STATEMENT OF ISSUES

Issues Relating to Appellant's Assignments of Error:

1. Whether the equitable right to rescind a deed on the grounds of undue influence, misrepresentation or mistake is an equitable interest in property, and can be conveyed by a devise in a will.

2. Whether the devise, in Article VII.2 of Ken and Kitty's wills, of Cranberry Lake to the Foundation devises their equitable interest in Cranberry Lake, including their equitable right of rescission (if any).

3. Whether extrinsic evidence is inadmissible to vary the terms of the unambiguous devises in Article VII.2 of Ken and Kitty's will.

4. Whether David Frank's effort to induce the probate court to decline to enforce Article VII.2 of the wills on grounds of equity, mistake, undue influence or evidence of contrary intent must have been asserted in a will contest petition under RCW 11.24 and not having been so asserted, is waived.

5. Whether the doctrine of ademption applies to invalidate Article VII.2 of the wills, where Ken and Kitty during their life brought an action alleging that their deeds to the Foundation were void, or were the

product of undue influence, misrepresentation and mistake, and should be rescinded.

6. Whether Foundation is entitled to recover from the estates and from David Frank personally its fees incurred in connection with this appeal.

III. STATEMENT OF THE CASE

A. Factual Background

Kenneth (“Ken”) and Catherine (“Kitty”) Frank created the respondent Frank Family Foundation (“Foundation”) on or about December 30, 1993. The Foundation is a nonprofit corporation organized under RCW 24.03, with a principal place of business in Mason County, Washington. The Foundation is qualified under Section 501(c)(3) of the Internal Revenue Code and is therefore exempt from federal income tax under Section 501(a) of the Code. The Foundation is classified as a private operating foundation under Section 3942(j)(3) of the Code. CP 211.

At the time they created the Foundation, Ken and Kitty owned all but 80 acres of a full section (640 acres) of Mason County land, commonly called Cranberry Lake, and legally described as Section 28, Township 21 North, Range 3 West, WM. Cranberry Lake is undeveloped forest and lake property. The Franks created the Foundation for the

purpose of owning Cranberry Lake in perpetuity, and managing Cranberry Lake for educational and research purposes related to forest and wildlife management. CP 211-12.

On December 30, 1993, Ken and Kitty conveyed 4% of their interest in Section 28 (Cranberry Lake) to the Foundation. CP 495. A year later, on December 28, 1994, they conveyed *all* of their interest in Section 28 (Cranberry Lake), “together with all after acquired title of the grantor(s) therein,” to the Foundation. CP 498. A few weeks later, in January 1995, David Frank and his wife, who owned the other 80 acres of Section 28, conveyed those 80 acres to Ken and Kitty by Statutory Warranty Deed. This deed was recorded on January 24, 1995. CP 500-01. Title to this 80 acre parcel immediately vested in the Foundation under the after acquired title language of the 1994 deed from Ken and Kitty to the Foundation, and under Washington’s after acquired title statute, RCW 64.04.070. As of January 1995, Ken and Kitty had thus conveyed to the Foundation all of Section 28. Ken and Kitty subsequently executed another deed on December 23, 1997, conveying the 80 acre parcel to the Foundation (CP 503), but because title to the 80 acres had already passed to the Foundation, the new deed did not operate to convey title to any property. The Foundation continues to own and manage

Cranberry Lake for the purposes described in the documents that created the Foundation. CP 212.

On August 30, 1996, some 18 months after conveying the Cranberry Lake property to the Foundation, Ken and Kitty executed substantively identical wills. CP 236-52 (Ken's will).¹ Article VIII of each will provided in part as follows:

RECOGNITION OF FOUNDATION . . .

1. On December 30, 1993, my wife and I created a non-profit corporation known as the Frank Family Foundation. Any reference in this document to "the Foundation" shall be understood to mean the Frank Family Foundation herein referenced.

CP 133. In Article VII.2, both wills provided as follows:

2. All of my interest in Section 28, Township 21 North, Range 3 West, commonly known as Cranberry Lake, I give to my wife, provided that she survives me by a period of thirty (30) days. In the event that she fails to survive me, . . . my interest in this property shall be distributed to the Frank Family Foundation referenced in Article VIII below.

CP 133. Ken and Kitty each subsequently executed a First Codicil dated October 2, 2000 (CP 234-35), a Second Codicil dated July 8, 2002 (CP

¹ The parties filed substantially identical sets of pleadings and supporting documents in the estates of both Ken and Kitty. By agreement of counsel, counsel have not designated clerk's papers from Kitty's estate, in order to avoid unnecessary copying. *See* Letter, George W. Akers to David C. Ponzoha, Clerk of Court, dated May 15, 2007. References are therefore to papers designated from Ken's probate only.

228-33), and a Third Codicil dated August 20, 2003 (CP 224-27).

Although these codicils made substantial changes to many provisions in the wills, including provisions affecting the disposition of other items of real property, neither Ken nor Kitty ever modified or revoked Articles VII and VIII above. David Frank is the residuary beneficiary under the wills. He would also be the sole heir of Ken and Kitty under the laws governing intestacy.

On November 4, 2005, the plaintiffs filed a complaint in the Mason County Superior Court, under Cause No. 05-2-01057-0 (the "Negligence Action"). The original plaintiffs in the Negligence Action were David Frank, his wife Patricia L. Frank, "Kenneth W. Frank by and through David K. Frank, his attorney-in-fact," and Kitty Frank. CP 162. The defendants are Mary G. Gentry (an Olympia attorney), John A. Clees (an Olympia attorney and accountant), and Laurie McClanahan (a Shelton accountant) (together the "Professional Defendants"), all of whom were alleged to have assisted Ken and Kitty in the conveyance of Cranberry Lake into the Foundation. The plaintiffs also named the Foundation as a defendant. *See* CP 162-72.

The plaintiffs alleged in the complaint, *inter alia*, that the Professional Defendants through breach of duty, misrepresentation or otherwise, wrongfully induced Ken and Kitty to convey the Cranberry

Lake property into the Foundation. (The complaint does not allege that the Foundation itself acted wrongfully in inducing the Franks to convey Cranberry Lake to the Foundation.) The plaintiffs in the complaint seek damages against the Professional Defendants on account of their alleged misconduct. In addition, the plaintiffs seek rescission of the conveyance of Cranberry Lake into the Foundation. *See* CP 162-72.

Ken died on November 15, 2005, less than two weeks after the plaintiffs filed the Negligence Action. Ken's August 30, 1996 will and the three codicils were admitted to probate in Mason County Cause No. 05-4-00230-2 on December 30, 2005. The court appointed David Frank as personal representative. He continues to serve in that capacity.

Kitty died on December 3, 2005, only 18 days after Ken, and one day short of a month after the Negligence Action was filed. Her Last Will and Testament, dated August 30, 1996, and the three codicils were admitted to probate in Mason County Cause No. 06-4-00014-6, on January 20, 2006. The court appointed David Frank as personal representative of Kitty's estate. CP 211.

On or about December 26, 2006, with leave of court, David Frank as PR filed an Amended Complaint. The Amended Complaint is substantially identical to the original complaint, but substitutes David Frank as PR for Ken and Kitty as plaintiffs in the action. CP 671-83.

B. Procedural Background

While they lived, Ken and Kitty may well have had standing to pursue rescission of the Cranberry Lake deeds (whether or not the claims were meritorious). Once they died, however, their wills were irrevocable. Under Article VII.2 of the wills, which David himself offered for probate, Ken and Kitty specifically devised Cranberry Lake to the Foundation. If, therefore, the original deeds were rescinded, title to Cranberry Lake would return to the estate and immediately vest in the Foundation under the wills. *See* RCW 11.04.250. David as PR therefore had no current or prospective interest in Cranberry Lake, and lacked standing to seek rescission of the deeds. The Foundation on November 13, 2006, therefore filed petitions in both probates under the Trust and Estate Dispute Resolution Act, Ch. 11.96A RCW, seeking an order declaring that if the estates of Ken and Kitty ever acquired any interest in Cranberry Lake, the personal representative of the estates would be required under the specific devise contained in Article VII.2 of the wills to distribute Cranberry Lake to the Foundation. CP 209-216. The Foundation also asked the Court to order the removal of David Frank as personal representative of Ken and Kitty's estates, for judgment against David Frank (both individually and as personal representative) for damages incurred as a result of David's breach of fiduciary duty in asserting claims against the Foundation, and for

judgment for attorneys' fees and costs incurred in connection with bringing the petition. CP 209-16. The petition was supported by a declaration of counsel attaching, among other things, the wills, the complaint and a proposed amended complaint. CP 124-201.

The Foundation also filed a motion for summary judgment in the Negligence Action. The Foundation argued (in prospective reliance on the order sought in the probate petitions) that David Frank as PR lacked standing to seek rescission of Ken and Kitty's original conveyances of Cranberry Lake to the Foundation, for the reasons set forth above. CP 629-49.

The Mason County superior court judges and the Mason County court commissioner recused themselves from participation in these actions. Oral argument on the probate petitions and the motion for summary judgment in the Negligence Action were heard by the Honorable Nelson Hunt, Judge of the Lewis County Superior Court, sitting by designation, on February 5, 2007. In an "Order Granting in Part and Denying in Part the Petition of Frank Family Foundation for Declaration Regarding Application of Will Article VII.2 to Cranberry Lake, and for Other Relief" entered March 9, 2007, the probate court granted the Foundation's petition regarding the application of Article VII.2 of Ken and Kitty's wills. The court ordered that if the plaintiffs in the Negligence

Action were to obtain a judgment against the Foundation that ordered rescission of the conveyance of Cranberry Lake to the Foundation, the judgment would vest legal title to Cranberry Lake in Ken and Kitty's estates, and that the PR of the estates would then be obligated to distribute all of the estates' interest in Cranberry Lake to the Foundation under the wills. CP 69-72.

In the same order, the court denied the Foundation's request that David Frank be removed as personal representative of the estates, and denied the Foundation's request for an award of damages against David Frank. The court found that David did not breach his fiduciary duty to the Foundation, the Foundation is not entitled to recover damages from David, and that there "is no reason to remove" David as personal representative of the estates.² CP 69-72.

Having granted the principal relief that the Foundation sought in the two probate petitions, the Court also granted the Foundation summary judgment dismissing the rescission claims in the Negligence Action, on the ground that David Frank as PR lacked standing to seek rescission of the original Cranberry Lake conveyances.³ CP 261-64.

² The Foundation filed a Notice of Cross Appeal of the March 6, 2007 Order on April 17, 2007, seeking review of this portion of the Court's order, but is not pursuing its cross appeal.

³ In a separate motion for summary judgment, the Foundation also argued that the rescission claim was barred by the applicable statute of limitations, RCW 4.16.020,

Approximately one month later, in an order signed April 13, 2007, the probate court granted the Foundation's Motion for Award of Attorneys' Fees, and awarded the Foundation the sum of \$19,576.50. CP 704-705.

David Frank as PR timely filed a Notice of Appeal of the March 6, 2007 Order in Mason County Superior Court on April 4, 2007. CP 6-7.

On subsequent motion of David Frank as PR, the trial court in the Negligence Action directed the entry of final judgment in favor of the Foundation and against David Frank as PR under CR 54(b). David Frank as PR then filed a timely Notice of Appeal in the Negligence Action. That appeal is currently pending in this Court. *See Frank v. Frank Family Foundation*, No. 36603-7-II. David Frank as PR filed his Appellant's Brief in that appeal on November 14, 2007.

IV. ARGUMENT

A. Standard of Review.

The matter came on before the trial court on a petition under the Trust and Estate Dispute Resolution Act, Ch. 11.96A RCW. The court decided the matter at the initial hearing, *see* RCW 11.96A.100. The probate court was presented with declarations regarding intent (albeit

pursuant to which an action for the recovery of real property, or for the recovery of possession of real property, may not be maintained unless the plaintiff was seized or possessed of the premises in question within ten years before the commencement of the action. CP 504-510. The trial court denied that motion. CP 257-60.

largely if not exclusively filed in connection with the motion for summary judgment in the Negligence Action, not the TEDRA petition), but based its ruling on propositions of law. The probate court did not take oral testimony or make express findings of fact.

Factual findings are reviewed based on a substantial evidence standard. In applying this standard, the appellate court is to determine whether the evidence was sufficient to persuade a fair minded person of the truth of the matter. *See, e.g., In re Riddell*, 138 Wn. App. 485, 491-92 (2007). The court's order in the issue now *sub judice* on appeal was decided largely if not exclusively as an issue of law. *See* CP 69-74, and CP 71, Par. 2-6. Rulings on issues of law are reviewed *de novo*. *Id.*; *see also, e.g., Bank of America, N.A. v. Presance Corp.*, 160 Wn.2d 560, 564, 160 P.3d 17 (2007).

B. The Probate Court Correctly Concluded That Legal Title to Cranberry Lake, If Recovered Into the Estates in the Negligence Action, Would Be Immediately Distributable to the Foundation Under Ken and Kitty's Wills.

1. The Claim of a Right to Rescind Ken and Kitty's Deeds of Cranberry Lake to the Foundation Is an Equitable Interest in Property That May Be Devised By Will.

In the Negligence Action, the plaintiffs allege a right to set aside and cancel the Cranberry Lake deeds to the Foundation, and to rescind the

conveyance. They allege in the Amended Complaint that “the Deeds are void *ab initio*, are unenforceable, and/or should be rescinded as allowed at law or in equity.” CP 200. They make these allegations on the ground that the “Deeds were the product of mistake, undue influence, misrepresentation, professional negligence” and improvident gifting. *Id.* They specifically seek a judgment “quieting title to the Property [in] Ken and Kitty over and against the interest of the Foundation”

David Frank’s pursuit of rescission of the Cranberry Lake conveyances in the Negligence Action plainly sounds in equity. Rescission is an equitable remedy. *See Busch v. Nervik*, 38 Wn. App. 541, 547, 687 P.2d 872 (1984).

Where the owner of property transfers it, being induced by fraud, duress or undue influence of the transferee, the transferee holds the property upon a constructive trust for the transferor.

RESTATEMENT (FIRST) OF RESTITUTION § 166 (1937).

It is a fundamental principle of probate law that the “power of testamentary disposition extends to all property, to all rights, and to all interests as if they belong to and survive the testator at his death,” *See* 1 PAGE ON THE LAW OF WILLS § 16.1 (Rev. Ed. 2003) (hereinafter “Page on Wills”). An equitable interest in real property like that asserted in the Negligence Action may be devised by a testamentary instrument:

If testator has conveyed realty under such circumstances that the grantee will be held in equity as the trustee for the grantor, and will be required to make a reconveyance to the grantor, *the grantor has an equitable interest in such realty which he may devise.*

1 Page on Wills § 16.18, at 940 (emphasis added). Appellants themselves admit as much. *See* Appellant’s Brief, at 46-47. According to Appellant’s brief:

[T]he interest held by the Franks at the time of death is the equitable right to take the property away from the Foundation. They had only the right to rescind the gift, . . . which they began to exercise prior to death

...

The right to rescind is devisable if it existed at the time of the testator’s death. . . .

Id.; *see also, e.g. Brown v. Hilleary*, 147 Ore. 185, 190 (1934) (“That an equitable estate or interest in lands may be the subject of a valid devise is so elementary that it needs no further citation of authorities to support it.”); *Smith v. Jones*, 4 Ohio 115, 1322 (1829) (“If the testator may pass equitable interest in land, by will, in England, there can be no doubt he may do it under the more comprehensive terms of our statute.”).

With respect to the specific issues involved in this appeal, a testator may devise the right to bring an equitable cause of action to rescind a conveyance of real property based on a claim of fraud or undue

influence. *See, e.g., Pepper v. Truitt*, 158 F. 2d 246 (10th Cir. 1946) (“the modern and more generally accepted rule [is] that the equitable right of a grantor to seek the cancellation of a deed or other instrument obtained under fraud, undue influence, or failure of consideration, survives to his heirs, devisees, or personal representatives.”).

For example, in *Brown v. Hilleary*, 147 Or. 185, 32 P.2d 584 (1934), a mother executed a will leaving the residue of her estate to her son and grandson. At the time the mother executed the will, mother had sold to her daughter a farm, subject to a mortgage held by the mother. The mother subsequently reacquired the farm in a mortgage foreclosure. The mother then deeded the farm to her son. After the mother’s death, the daughter in a related action successfully sued to set aside and cancel the deed to the son, on the ground that the mother’s execution of the deed was the product of the son’s undue influence. The mother’s will, however, left the residue of her estate to her son and grandson, and the farm fell into the residue. The daughter asserted in the probate court that the residuary clause in mother’s will should not be construed to pass title to the farm to son and grandson, because the mother did not have legal title at the time of her death. The court rejected the daughter’s argument, holding that the mother’s right to set aside the deed as procured by undue influence was an equitable interest in the property, which she could convey by her will:

“* * * If testator has conveyed realty under such circumstances that the grantee will be held in equity as trustee for the grantor, and will decree a reconveyance by the grantee to the grantor, *the grantor has an equitable interest in such realty which he may devise. An interest which can not be enforced unless a conveyance, release and the like is first set aside, may be devised; and the right to have the conveyance or release set aside will pass with the devise.*”

Id., 32 P.2d at 585-86, quoting Page on Wills (2d. ed.), § 213. And again, if a testator has made a conveyance of land that may be set aside on equitable grounds,

. . . he remains the owner, . . . and the consequence is that he may devise the estate, not as a legal estate, but as an equitable estate, wholly irrespective of all questions as to any rights of entry or action, leaving the conveyance to have its full operation at law, but looking at the equitable right to have it set aside in this Court. The testator therefore has a devisable interest.

Id., 32 P.2d at 586, quoting *Stump v. Gaby*, 42 Eng. Rep. 1015. The court also cited, in support of its decision, Oregon’s after acquired property statute, which was in substance identical to Washington’s current statute, RCW 11.12.190. *Id.* at 586.

The facts are even stronger here than in *Brown v. Hilleary*. The bequest in *Brown* was by a residuary clause that did not purport to specifically devise the farm property. Both the court and the parties

assumed, however, that if mother had (as in this case) specifically devised the farm to her son and grandson, there would have been no question as to her power to devise the farm property notwithstanding her lack of legal title. *Id.* at 585.⁴ See also *Spurgeon v. Coate*, 1959 Ok. 39, 337 P.2d 732 (1959) (holding that a testator who died testate in 1936 could pass by her will, rather than by intestacy, her equitable interest in land wrongfully misappropriated by the United States during the War of 1812, although she never knew of the claim, and although the United States did not compensate her for the misappropriation until 1955, 19 years after her death, pursuant to a claim filed by the Kaw Tribe of Indians; testator may pass by will property in which she has only an equitable interest); *Bethany Hospital v. Philippi*, 82 Kan. 64 (1910).

In *Bethany Hospital*, the testator in his will made a specific devise to the plaintiff hospital of certain real property. The testator subsequently conveyed the real property to a child. After the testator died, the hospital brought an action to set aside the conveyance on the grounds of undue influence. The grantee under the deed defended on the ground that the conveyance had adeemed the specific devise to the hospital. The lower

⁴ David Frank as PR attempts to distinguish the holding of *Brown v. Hilleary* on the ground that the farm passed as part of the residue rather than by specific devise. Appellants' Brief, at 40-41. The distinction is one without a difference. If a testator can pass an equitable interest in real property under a residuary clause, he can certainly do so by means of a specific devise.

court gave judgment for the hospital, on the ground that a conveyance that is invalid by reason of undue influence cannot operate to adeem the specific devise. The appellate court affirmed the lower court, and affirmed the judgment for the hospital. The effect of the ruling was that the subject property passed to the hospital under the specific devise in the will, notwithstanding that the testator had not owned legal title at his death, but merely a then unasserted equitable right to recover legal title as against the grantee who had procured title through undue influence.

David Frank as PR argued below that the estate's right in Cranberry Lake did not pass under the specific devises in the will because Ken and Kitty had not actually acquired legal title at their death. CP 106-07. There is no reason that the construction of the will should depend, however, on the fortuity of whether an action to rescind, commenced by the testator while alive, was concluded and the rescission effected, before the testator died. It should in fact not matter whether the action was commenced at all prior to the death of the testator, since a testator's action for rescission survives to the personal representative.

David Frank's argument that a specific devise only affects property in which the testator held legal title at the date of death would work plainly wrong results. Were David's analysis correct, real property converted by persons who prey on the elderly and infirm would pass by

intestacy, when recovered into the victim's estate, rather than under a specific bequest or the residuary clause of the victim's will. If the husband in a marital community held all community real estate in his name alone, as is sometimes the case, the wife would be unable to make a specific devise or general bequest of her half of the community property, because she would not have legal title to it. RCW 11.48.090 authorizes a personal representative to bring actions for the recovery of property, if the decedent could have maintained such an action. Property so recovered, if not legally held in the name of the decedent at death, and if previously subject to third party's unenforceable or voidable claim of ownership, would pass by intestacy, and not under the decedent's will.

2. Article VII.2 of the Wills Is Unambiguous and Must Be Enforced According to Its Plain Meaning.

If the plaintiffs are correct in the Negligence Action that Ken and Kitty had an equitable right to rescind the Cranberry Lake conveyances, it is plain from the authorities cited above that they had the power to devise that equitable interest under their wills. It is equally plain that Article VII.2 of the wills can only be construed to devise that equitable interest to the Foundation. Under Washington law,

[e]very devise of land in any will shall be construed to convey *all the estate of the devisor therein which he could lawfully*

devise, unless it shall clearly appear *by the will* that he intended to convey a less estate.

RCW 11.12.170 (emphasis added). While the statute allows for the obvious possibility that a testator may choose to convey a lesser estate, that intention must appear, under the statute, “by the will”

This language is consistent with Washington case law holding that extrinsic evidence is not admissible to explain or alter the meaning of a provision of a will that is unambiguous on its face. While it is true, as David Frank argues, that the intent of the testator is the touchstone in enforcing the testator’s will, where a will is unambiguous, the will is to be enforced according to its terms. Under Washington law, “where it can be ascertained from the four corners of the will that it was intended that the gift go to the heirs of the named beneficiary under such circumstances, that intent will be given effect.” See *Matter of Griffen's Estate*, 86 Wn. 2d 223, 226, 543 P.2d 245 (1975). “[T]he actual intent of the testator should be ascertained from the language of the will itself, unaided by extrinsic facts.” *Id. Carney v. Johnson*, 70 Wn.2d 193, 197, 422 P.2d 486 (1967) (“if the intent of the testator can be gathered from the will, it is the duty of the court to see that such intention is given effect”); *Holmes v. Holmes*, 65 Wn.2d 230, 233, 396 P.2d 633 (1964) (“The court cannot rewrite the will; the intent of the testator, as manifested by the language of the will, must

be given effect if it is lawful.”). Extrinsic evidence is admissible in aid of the interpretation of a will only where the court finds one of three types of ambiguity: latent, patent, or equivocation. *In re Estate of Price*, 73 Wn. App. 745, 754, 871 P.2d 1079 (1994). Even then, the extrinsic evidence is not admissible to contradict the provisions of the will, merely to assist the court in resolving the ambiguity. *See Carney*, 70 Wn.2d at 197. David Frank does not argue, nor could he, that Article VII.2 is ambiguous.

David cites *Zartner v. Holzhauer*, 204 Wis. 18 (1931) for the proposition that the right to rescind a conveyance of property should vest in the person entitled to take the property under the will, that, in other words, the right of action and the property itself should vest in the same person. On this premise David argues that Ken and Kitty’s action for damages and rescission survives to him as PR under RCW 4.20.046, and therefore, apparently, that the “recovery, whether it be for damages or the rescission of the gift, should . . . be for the benefit of the residuary legatees,” Appellant’s Brief, at 48, *i.e.*, for the personal benefit of David, who is the residuary beneficiary under the wills. The logic is difficult to follow. The right of action may survive to the PR, but the PR administers the estate for the benefit of all of the beneficiaries, not just for himself or

the residuary beneficiaries, and the disposition of whatever property is at issue is ultimately governed by the will.⁵

C. The Court Lacks the Power To Rescind, Reform or Disregard Article VII.2 of the Wills.

In the proceedings below, David Frank asserted that if he is successful in the Negligence Action in quieting title in Cranberry Lake in himself as personal representative, the court would then have the authority also to “rescind” Article VII.2 of the wills, or to “reform” the wills to exclude Article VII.2, on the ground that Ken and Kitty included Article VII.2 in their wills as a result of a mutual or unilateral mistake.

CP 108-09. On appeal, David Frank makes similar arguments.

Appellants/ Brief at 3 (Issues 6-8); *id.* at 38-47. These arguments are nothing more than an invitation to the court to disregard Article VII.2, and to treat it as invalid and ineffective.

The time within which David Frank may challenge any provision of the wills has passed. A challenge to the enforceability of Article VII.2 of the wills would constitute a will contest, which under RCW 11.24.010 must be brought within four months of the admission of the will to probate, or be forever barred. RCW 11.24.010. The statute is strictly applied. *See State ex rel. Wood v. Superior Court*, 76 Wash. 27, 135 P.

⁵ The main holding of *Zartner*, that an equitable action for rescission does not survive the death of the testator, was, as appellant mentions, subsequently overruled. *Glojek v. Glojek*, 254 Wis. 109, 35 N.W.2d 203 (1948).

494 (1913) (one day late); *Estate of Peterson*, 102 Wn. App. 456, 9 P.3d 845 (2000), *review den.*, 96 Wn.2d 1021 (2001) (“discovery rule” does not apply to will contests); Mark Reutlinger, WASHINGTON LAW OF WILLS AND INTESTATE SUCCESSION (W.S.B.A. 2d ed. 2006) (“Reutlinger”), at 364-65. The probate court has no power, at law or in equity, to invalidate a provision of the will, if no will contest is filed.

There are circumstances that will render an unambiguous provision of a will inoperative even in the absence of a will contest. These circumstances include the execution of a subsequent will, or the cancellation, tearing or obliteration of the will, *see* RCW 11.12.040; the subsequent marriage of the testator, *see* RCW 11.12.050; a pretermitted child, *see* RCW 11.12.090; a lapsed legacy or devise, *see* RCW 11.12.120; and ademption. *See In re Gherra*, 44 Wn.2d 277, 286, 267 P.2d 91 (1954). None of these circumstances is present here. David Frank as PR cites no authority, and there is none, for the proposition that the court may disregard an otherwise unambiguous provision of a will on grounds of equity or because the testator allegedly took actions during his life that suggest a contrary desire.

Estate of McCarthy, 5 Cal. App. 3d 158 (1970), cited by David Frank as PR, is not to the contrary. The court in that case held only that an action to rescind a testator’s conveyance of real property prior to her death

on the grounds of undue influence was not a will contest, and did not violate the will's *in terrorem* or no contest clause. The Foundation does not argue here that the rescission action is an action to construe or change the will; but rather that David Frank would be contesting the will if he were permitted to argue, after his hypothetical recovery of Cranberry Lake into the estate, that the property should not pass under the unambiguous provisions of Articles VII.2.

The main thrust of David Frank's argument that the court should not enforce the will according to its plain terms appears to be that Ken and Kitty could not have intended that the Foundation would take Cranberry Lake under the wills, if at the same time Ken and Kitty were pursuing the Negligence Action with the purpose of annulling and rescinding their original conveyances into the Foundation. There was at one time a solution to this conundrum, if it ever existed: if Ken and Kitty were competent when it allegedly dawned on them that they had conveyed Cranberry Lake to the Foundation as a result of misrepresentations and that they wanted to rescind the transactions, they could have easily executed codicils modifying or eliminating Article VII.2 of the wills. They did not do so. Within four months after the admissions of the wills to probate, David Frank could have contested the wills. He did not do so. Having been admitted to probate, and the time for a will contest having

passed, the wills are now conclusively presumed to reflect Ken and Kitty's intentions regarding the distribution of their estates.

D. The Specific Devises in Articles VII.2 of the Wills Did Not Adeem.

1. Ademption Is Not at Issue.

David Frank focuses much of his brief on the argument that the bequests in Article VII.2 adeemed. Ademption may occur when, after a testator has executed a will containing a specific devise of property, the testator validly conveys the property to a third party, or to the beneficiary, or the property is destroyed, so that in any event the property is not in the estate and is not available for distribution. If the devise is held to have adeemed, then the proceeds of the property (the sale price, or in the case of property destroyed, perhaps the insurance proceeds) pass as part of the residue; but if ademption is held not to have occurred, then proceeds of the property would pass to the specific devisee or legatee. In *Thompson v Ford*, 236 S.W. 2 (Tenn. 1921), for example, the business that was the subject of a specific legacy had been sold, and the issue was whether the proceeds of the sale were to be distributed to the grandson as specific legatee (i.e., no ademption), or to the residuary beneficiaries (ademption).

Here, by contrast, there are no proceeds; Ken and Kitty donated Cranberry Lake to the Foundation without consideration. The question in

this case, which we have tried to address above, is whether (if David were to prevail in the Negligence Action) Ken and Kitty held an interest in Cranberry Lake that they could devise. We nonetheless address the ademption arguments that David Frank as PR raises in his Appellant's Brief.

2. An Unenforceable Conveyance Does Not Work an Ademption.

Ademption does not occur where the testator's disposition of the property subsequent to the will occurs through a conveyance that is unenforceable or subject to rescission. *See* Page on Wills, § 54.8. In particular, a conveyance by a transferor subject to undue influence "does not adeem a devise in a prior valid will." *Id.*, citing *Brown v. Heller*, 227 P. 594 (N.M. 1924).

In *Brown v. Heller*, the trial court determined that the testator's deed conveying property subject to a specific bequest was the product of undue influence:

There seems to be no contrariety of opinion among the courts of this country, as they agree that a deed, which is secured, and whose existence is brought about, in the manner found to have been exercised here, cannot operate to adeem the property from the provisions of the will . . . , and that it is insufficient to serve as a revocation of the will This is clearly seen to be the correct rule, when we keep in mind . . . 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 by overreaching the grantor's will. Such a deed does not pass title to the property. It is a nullity, and the real title still remains in the testator in the will, because no valid conveyance has been executed by him which passed such title to another, although the ostensible or record title has passed.* This has been the uniform holding by the several courts having occasion to pass upon the question, and the rule seems sound and meets with our approval.

Id. at 597, and cases cited therein; *see also, e.g., Bethany Hosp. v.*

Philippi, 107 P. 530 (Kan. 1910) (deed of subject property by incompetent

grantor will not adeem specific devise of real property). Likewise,

contracts for the sale of the specific property that are unenforceable under

a statute of frauds, or for any other reason, do not adeem a bequest or

devise, even if the executor does not assert a right to avoid the contract.

See, e.g., Thompson v. Ford, 236 SW 2 (Tenn. 1921) (oral contract for the

sale of a business, voidable under the statute of frauds, does not adeem a

bequest of the business to grandson, and grandson is entitled to proceeds

of sale, even though executor chooses not to void the contract).⁶

⁶ In contrast to the clear allegation in the Amended Complaint that the deeds were void *ab initio*, David Frank argues in his brief that the deeds were merely voidable, not void, and that a gift that is merely voidable does cause a specific bequest of the property in a will to adeem. *See Appellants' Brief*, at 39-44. They further claim that where a gift is "voidable," the party "has clearly been divested of title and by doing so, is held to have adeemed any testamentary gift of the same property." *Id.* at 43-44. The cases do not

These cases are another expression of the principle, discussed above, that a testator may pass by specific devise his equitable right to recover possession of real property. A deed, whether voidable or void, that is ineffective to convey real property or that is subject to rescission does not operate to adeem a specific bequest of that property, because under the law the testator/grantor retains either the property itself or an equitable interest in the property. The specific bequest remains effective, and passes all of the testator's interest in the property, including the equitable right to recover the property from the wrongful or the innocent transferee.

3. Once Adeemed Is Not Always Adeemed.

The plaintiffs argue that a gift under a will, once adeemed, is always adeemed. Appellant's Brief, at 21-22. It is not clear what plaintiffs intend the import of this argument to be. If they intend to argue that once a testator conveys away property that is subject to a specific bequest in his then existing will, the bequest adeems and is not revived even if the testator reacquires the property during his life, they are

make this distinction, nor would it be logical to do so. A transaction that is void *ab initio* need not be rescinded, and the property in question would remain that of the testator continuously. A transaction that is merely voidable – like transfers made under undue influence or by incompetent transferors – would leave the transferor without legal title, but do not support the legal inference that the transferor intended by the gift to revoke or annul or adeem a gift of the same property in the will. The inference is not supported because a transferor acting under undue influence or while incompetent did not voluntarily or meaningfully formulate an intent to dispose of the property.

incorrect. As the plaintiffs themselves argued below, CP 105, a gift of property disposed of but reacquired prior to death is not adeemed. *Newman v. Proffit*, 59 Tenn. App. 397, 403-05, S.W.2d 827 (1968). In the instant case, the issue is irrelevant; if Ken and Kitty had an equitable right to a rescission of the Cranberry Lake deeds when the Negligence Action was commenced in November 2005, they always had such a right, and the gift of Cranberry Lake under Article VII.2 therefore could not have adeemed.

4. The Doctrine of Ademption Does Not Apply Where the Conveyance Precedes the Execution of the Will

The doctrine of ademption by satisfaction applies when a testator, having executed a will containing a specific devise or legacy of property, subsequently conveys all of his interest in the property, so that at his death it is no longer possible to convey any interest in the real property to the specific devisee.

Page on Wills is unequivocal that ademption does not occur where the conveyance occurs prior to the execution of the will:

If testator makes a gift to A, and subsequently testator executes a will in which a legacy is given to A, the gift to A which was made before the execution of the will is not an ademption of such legacy in the absence of some agreement to that effect.

Page on Wills, § 54.24. Washington courts have adopted this view of ademption, and the Washington Supreme Court in *Estates of Doepke*, 182 Wash. 556, 47 P.2d 1009 (1935), so characterized the doctrine:

“Ademption of a specific legacy is the extinction or withdrawal of it, in consequence of some act of the testator equivalent to its revocation, or clearly indicative of an intention to revoke. The ademption is effected by the extinction of the thing or fund bequeathed, or by a disposition of it *subsequent to the will*, which prevents its passing by the will, from which an intention that the legacy should fail is presumed. *Kenaday v. Sinnott*, 179 U.S. 606, 617 . . . ; *Ford v. Ford*, 23 N.H. 212 (1851)”

Estates of Doepke, 182 Wash. at 563, quoting *Kramer v. Kramer*, 201 F. 248 (5th Cir. 1912) (emphasis added). See also, e.g., *Buder v. Stocke*, 343 Mo. 506, 519, 121 SW 2d 852 (1938) (“Acts or events which . . . work the ademption of a specific legacy . . . occur, if at all, *after the will is made*.” [emphasis added]); *Brown v. Heller*, 227 P. at 596 (conveyance by the testator “*subsequent to the execution of the will*, of property devised therein, . . . operates as an ademption of such property” [emphasis added]); Reutlinger, *supra*, at 166 (for ademption by satisfaction, i.e., ademption by conveyance of the property to the specific devisee, the testator must have the contemporaneous specific intent to satisfy the testamentary gift).

The reason is obvious: the underlying theory of ademption, as set out in *Doepke*, is that the testator’s conveyance of the property after his

execution of the will is presumed to be a manifestation of his intent that the specific legacy fail. Where, however, the testator executes a will making a specific legacy of identifiable property *after* having disposed of the property, no such inference may fairly be drawn.

Here, both Ken and Kitty executed their wills leaving Cranberry Lake to the Foundation eighteen months after they completed the conveyance of Cranberry Lake to the Foundation. They executed three subsequent codicils, none of which modified Article VII.2. The fair inference or presumption from these actions would be that they intended, in a belt and suspenders approach, to ensure that whatever interest in Cranberry Lake that they had not transferred by *inter vivos* deed would pass to the Foundation at their death; not that on each occasion they intended in one stroke to devise Cranberry Lake to the Foundation in their wills and simultaneously nullify the devise.⁷

⁷ Appellant's brief suggests that Ken and Kitty did not complete the conveyance of Cranberry Lake to the Foundation until December 23, 1997, and that the Foundation's arguments below to the contrary constitute a "legal fiction." The "legal fiction" to which the plaintiffs allude is apparently the after acquired title language of Ken and Kitty's 1994 deed, and Washington's after acquired title statute, RCW 64.04.070, both of which operated independently to give the Foundation title to the entirety of Section 28 at the moment that David and his wife deeded their 80-acre parcel to Ken and Kitty in January 2005.

E. David's New Argument That He is Seeking Rescission of the Foundation, and Therefore That There Would Be No Foundation to Which to Distribute Cranberry Lake, Lacks Merit, and Was Not Raised Below.

David Frank suggests in Appellant's Brief that Ken and Kitty would not have established the Foundation but for the allegedly wrongful conduct of the Professional Defendants. David Frank suggests that it would be inequitable to distribute Cranberry Lake to the Foundation because if not for the alleged wrongful conduct of the Professional Defendants, the Foundation might never have come into existence, and that "the interest of equity would not be served by passing the equitable interest to the entity against which equity would apply" Appellant's Brief, at 39.

The plaintiffs in the Amended Complaint in the Negligence Action do not ask the court to annul the existence of the Foundation. They do not even allege that the Foundation engaged in any wrongful conduct with respect to the formation of the Foundation or the conveyances of Cranberry Lake. CP 671-83.⁸ In addition, David Frank did not raise make this argument in the extensive briefing and argument in the trial court. An

⁸ The plaintiffs do allege in the Amended Complaint that the Foundation breached fiduciary duties owed to Ken and Kitty in connection with the management of the Foundation *after* it was in operation. CP 675 (Par. 17). The court in the Negligence Action dismissed these claims in the Foundation's Motion for Summary Judgment. CP 263. The plaintiffs are not seeking reversal of that portion of the order in their appeal of that order in No. 36603-7-II.

issue, theory or argument not presented at the trial court level should not be considered on appeal. *See Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978), citing *Boeing v. State*, 89 Wn. 2d 443, 450-51, 572 P.2d 8 (1978); RAP 2.5(a). The purpose of this rule "is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials." *See Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447(2001) (declining review in context of review of grant of summary judgment).

F. If the Court Concludes That the Intent of the Testators Is For Any Reason Relevant to the Construction or Enforceability of Article VII.2 of the Wills, the Court Should Remand for Evidentiary Hearing.

David as PR argues that Articles VII.2 have adeemed. He appears to do so in part on the theory that Ken and Kitty must have intended ademption, because they would not otherwise have commenced the Negligence Action against the Foundation. Appellant's Brief, at 34-38.

At the same time, he argues in places that ademption by extinction is determined without regard to intent, *id.* at 16-17; and that ademption by satisfaction is determined by reference to intent, *id.* at 17, or alternatively without reference to intent, *id.* at 19. ("Even in cases where the courts have performed the analysis based on ademption by satisfaction, they often note that even if the requisite intent to adeem is not found, he legacy

is deemed if the property is no longer in the estate at the time of the testator's death." David Frank also admits that "[w]here such evidence of intent has been considered by the courts, '[t]he intention of the testator, so far as his intention is lawful, is his Will'"

The Foundation argues above that Articles VII.2 of the wills is unambiguous, and therefore that extrinsic evidence of intent is not admissible to vary the plain meaning of the wills. If, however, the Court determines that Ken and Kitty's intent with respect to the meaning of the will is admissible in connection with the construction or enforceability of the will, the Foundation requests that the matter be remanded for an evidentiary hearing.

G. The PR Has Waived His Appeal of the Court's Order Awarding Fees Against the PR and the Estate.

The trial court granted the Foundation's motion for an award of attorneys' fees. While David as PR assigned error to that ruling in his Appellant's Brief, at 1, 3, he did not argue the issue in his brief. An appellant waives an assignment of error for which he presents no argument. *See Puget Sound Plywood, Inc. v. Mester*, 86 Wn.2d 135, 142, 542 P.2d 756 (1975); *see also Smith v. King*, 106 Wn.2d 443, 451-452, 722 P.2d 796 (1986).

H. The Foundation Is Entitled to Recover Attorneys' Fees And Expenses on Appeal

RAP 18.1(a) provides that if “applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule . . .” The Foundation hereby makes such a request.

RCW 11.96A.150 provides as follows:

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.

RCW 11.96A.150 gives the court broad discretion to award necessary and reasonable attorneys fees. *See In re Estate of Jones*, 152 Wn.2d 1, 20-21, 93 P.3d 147, 157 (2004) (awarding attorneys fees where “litigation was necessitated” by personal representative’s breach of

fiduciary duty to beneficiaries of estate); *see also In re Estate of Elmer*, 91 Wn. App. 785, 792, 959 P.2d 701 (1998) (awarding attorneys fees under RCW 11.96.140 to party where personal representative failed to properly designate her as beneficiary of estate). Further, such fees may be awarded from any party to the proceedings, to any party of the proceedings, including from the personal representative in his individual capacity. *See id.*; *see also* RCW 11.96A.150. The burden of proving the reasonableness of the fees requested is upon the attorney requesting the fees. *Matter of Estate of Morris*, 89 Wn. App. 431, 434, 949 P.2d 401, 402 (1998) (interpreting RCW 11.96.140).

The Foundation has been forced to spend a significant amount of money to enforce its rights as beneficiary under the will, which the probate court confirmed in the Order that is now under appeal. The Foundation — whose principal asset is the Cranberry Lake property that Ken and Kitty devised to it in their wills — continues to be forced to spend significant sums to defend this appeal. The fees and expenses incurred by the Foundation in this appeal should be born by the personal representative of the estates.

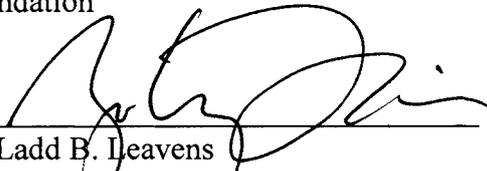
V. CONCLUSION

For the foregoing reasons, the Foundation requests that this Court affirm the orders of the trial court appended from, and award the Foundation its attorney's fees and expenses incurred on appeal.

Dated this 21st day of November, 2007.

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PROOF OF SERVICE

I hereby certify that on the 21st day of November, 2007, I mailed a true and correct copy of the foregoing document titled Brief of Respondent to counsel of record at the following address by depositing the envelope in regularly maintained interoffice mail. This mail is collected and deposited with the United States Postal Service on the same day it is deposited in interoffice mail, postage thereon being fully prepaid:

Robert N. Windes
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Moran Windes & Wong PLLC
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Executed at Seattle, Washington this 21st day of November, 2007.

Cindy Bourne

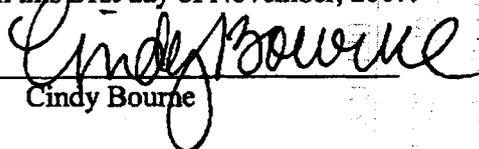
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