

FILED

MAR 20 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 309959

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

In Re the Estate of

THEODORE ROOSEVELT ALSUP,
Deceased

NICOLA J. WARREN,
Appellant,

v.

MICHAEL J. BRESSON,
Respondent.

BRIEF OF RESPONDENT

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Attorneys for Respondent

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I. INTRODUCTION

This appeal arises from probate proceedings concerning the estate of Theodore R. Alsup. Before he died, Mr. Alsup executed a will and contracted marriage with the appellant, Nicola Warren, after being adjudged incapacitated and placed under protective guardianship. The trial court refused to probate the will and declared the marriage invalid, reasoning the guardianship orders divested Mr. Alsup of the rights to marry and make a will. The propriety of that ruling is at issue here.

The respondent, Michael Bresson, is the estate's personal representative, charged with administering the affairs of the estate. He was appointed as an independent personal representative following a dispute between Ms. Warren and Andreda Golden, Mr. Alsup's foster sister and creditor of the estate, regarding the validity of Mr. Alsup's will and marriage and who should be appointed personal representative.

Because of the existing dispute, Mr. Bresson brought a motion for declaratory judgment, seeking guidance from the trial court as to the proper distribution of the estate. Like the declaratory judgment motion, this appeal asks the Court to determine (1) the validity of a will executed by a ward while under full guardianship of his person and estate and (2) the validity of a marriage contracted by the ward while under limited

guardianship of his person and estate.

II. STATEMENT OF THE ISSUES

1. Whether the trial court erred in ruling that Mr. Alsup's will is invalid.

2. Whether the trial court erred in ruling that Mr. Alsup's marriage to Ms. Warren is invalid.

III. STATEMENT OF THE CASE

Theodore R. Alsup became disabled in 1995. CP at 21. Thereafter, he suffered a series of illnesses and guardianship proceedings were commenced on his behalf in 1997. CP at 21, 110. On August 15, 1997, the Grant County Superior Court declared Mr. Alsup incompetent and, "by reason of his incapacity," ordered a full guardianship of his person and estate. CP at 38. The guardianship order set forth the capacities, conditions and needs of Mr. Alsup as follows:

That said incompetent requires 24-hour a day care (sic) nursing care in a nursing facility and is in need of a guardian to supervise his nursing care, give consents to medical providers; and to handle his financial affairs

CP at 39. The order does not specifically address whether Mr. Alsup retained the right to execute a will or contract marriage. See CP at 38-41.

Without prior court approval, Mr. Alsup executed a will on January 2, 2001. CP at 23-27. The will made substantial bequests to Mr. Alsup's future guardian, Ms. Catherine McKinzy. CP at 25, 132, 166.

On February 16, 2001, the full guardianship over Mr. Alsup was modified to a limited guardianship by order of the court. CP at 169. The order placed certain limitations upon Mr. Alsup, including that "the Ward shall not have the authority to enter into *any* contract" CP at 170 (emphasis added). Despite this limitation, and without prior approval from his guardian or the court, Mr. Alsup was taken to Idaho by Ms. Warren and the two were married in Coeur d' Alene on September 13, 2002. CP at 21-22, 110, 134, 193.

Mr. Alsup died on May 12, 2011, leaving property subject to probate. CP at 1, 32. Andreda Golden filed a petition for letters of administration on June 17, 2011. CP at 1-5. Ten days later, Ms. Warren filed a petition for letters of administration. CP at 180-90. In her petition, Ms. Warren alleged she was Mr. Alsup's surviving spouse and attached a copy of Mr. Alsup's will, dated January 2, 2001.¹ CP. at 180-90. Ms. Warren also filed a copy of the will and the affidavits of attesting witnesses on June 29, 2011. CP at 23-27.

¹ Although Mr. Alsup's will is attached to this petition, Ms. Warren did not request the will be admitted to probate. See CP at 180-90.

Ms. Golden then filed an objection to Ms. Warren being appointed personal representative, arguing that (1) Ms. Warren's alleged marriage to Mr. Alsup was invalid because Mr. Alsup was under guardianship and incapable of consenting to the marriage, that (2) Ms. Warren was unfit to act as personal representative because she had pleaded guilty to a crime involving moral turpitude, and that (3) Mr. Alsup lacked testamentary capacity to execute a will. CP at 191-94. Ms. Golden supported her objection with a declaration. CP at 193-94. Attached to that declaration as Exhibit C is a copy of the December 19, 2002 Report of Guardian ad Litem (GAL) Bruce Pinkerton, detailing, to some extent, Mr. Alsup's incapacity. CP at 203-16. Mr. Pinkerton had been Mr. Alsup's court-appointed GAL in 2000 and filed a report on October 27, 2000. CP at 203. In his 2002 report, Mr. Pinkerton states:

I met with Theodore Alsup on November 6, 2002 at his current care facility run by Sylvia Hernandez, the caregiver. My impressions of Theodore were that over the last two (2) years, there has been very little change in his functioning. I had received reports from various individuals that Theodore was functioning much better and able to communicate much clearer than before. During my conference with Theodore I was unable to reach those conclusions. I believe it is possible that he is able to write in written form possible a little better than he did in the year 2000. However, his verbal communication skills have not improved and I found it very difficult to communicate in a meaningful manner with Theodore Alsup. There is no doubt that the need for the Guardianship continues.

CP at 204.

To resolve the dispute as to who should be appointed personal representative, the parties moved for the appointment of an independent personal representative. CP at 33. The trial court granted the motion on July 20, 2011, appointing Michael Bresson as personal representative of the estate. CP at 33-34. Mr. Bresson was not granted nonintervention powers. CP at 34. Indeed, he was ordered to take no further action without court order. CP at 34. Letters of administration were issued to Mr. Bresson on August 8, 2011. CP 35.

On October 14, 2011, Mr. Bresson filed a notice of appointment of representative and pendency of probate. CP 44-45. The notice stated:

On July 20, 2011, the above Court appointed MICHAEL BRESSON as Personal Representative of Decedent's estate. A copy of a Will that is purported to be Decedent's *Will* is attached to this *Notice & Declaration*.

RCW 11.24.010 provides among other things that any action affecting the validity of a Will is required to be filed with the Court within four months after the date the Will was admitted to probate, otherwise the admission of the Will will be final and binding.

CP at 44. This notice was given to all known legatees and persons interested in the matter. *See* CP at 45.

Because this is a full intervention probate and questions had arisen regarding the validity of the will and marriage, Mr. Bresson filed a motion

for a declaratory judgment on January 11, 2012. CP at 177-79. He provided notice to all known legatees and persons interested in the matter. *See* CP at 177-79. The motion asked the court to determine whether the will was valid and also to determine whether the purported marriage between Mr. Alsup and Ms. Warren was valid. CP at 60, 177. Mr. Bresson drew the court's attention to Mr. Pinkerton's 2002 GAL report and hand-written documents belonging to Mr. Alsup demonstrating his inability to intelligibly communicate in written form. CP at 55-70, 78-87.

Ms. Warren failed to respond to Mr. Bresson's declaratory judgment motion. She did, however, file two petitions on February 21, 2012. CP at 72-74, 75-77. The first petition requested, *inter alia*, that the will be admitted to probate. CP at 73. The second prayed for an order establishing Ms. Warren as a pretermitted spouse entitled to three quarters of the estate. CP at 75-77. The petitions were followed by a motion for summary judgment, which Ms. Warren filed on March 14, 2012. CP at 114. As she had before, Ms. Warren argued that the will and marriage were valid and that she is an omitted, surviving spouse entitled to a portion of the estate. CP at 88-95, 114-16.

All motions were heard on March 30, 2012. CP at 143. The court issued an oral ruling declaring the marriage and will invalid. CP at 145. Ms. Warren moved for reconsideration, pointing out that Mr. Alsup was

under a limited (not full) guardianship at the time he married Ms. Warren. CP at 129-41. The court denied the motion for reconsideration and again declared the will and marriage invalid on the basis that Mr. Alsup lacked court authority and capacity and to execute a will or contract marriage. CP at 155-58. Ms. Warren appeals. CP 159-64.

IV. ARGUMENT

A. Standard of Review

This is an appeal from an order resolving several different motions. Declaratory judgments are generally reviewed de novo, as are motions on affidavits presenting questions of law. *In re Estate of Gardner*, 103 Wn. App. 557, 560-61, 13 P.3d 655 (2000). Likewise, orders granting summary judgment are reviewed de novo. *Wm. Dickson Co. v. Pierce County*, 178 Wn. App. 488, 492, 116 P.3d 409 (2005). The Court must therefore review the summary judgment decision under the CR 56 standard, engaging in the same inquiry as the trial court. *Id.* Finally, trial court decisions denying a motion for reconsideration are reviewed for abuse of discretion. *Drake v. Smersh*, 122 Wn. App. 147, 151, 89 P.3d 726 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or rests on untenable reasons or grounds. *Id.*

B. The Trial Court Possessed Ample Authority to Reject the Probate of Mr. Alsup's Will.

Ms. Warren asserts the trial court lacked jurisdiction to determine the validity of the will because Mr. Bresson did not serve the summons (also called a "citation") specified in RCW 11.24.020.² Br. of App. at 28-29, 34. The assertion should be rejected. First, this is not a will contest governed by chapter 11.24 RCW. That chapter sets forth the procedures governing contests brought after the trial court issues a formal order either admitting the will to probate or refusing to probate the will. RCW 11.24.010 states:

If any person interested in any will shall appear within four months immediately *following the probate or rejection thereof*, and by petition to the court having jurisdiction contest the validity of said will, or appear to have the will proven which has been rejected, he or she shall file a petition containing his or her objections and exceptions to said will, or to the rejection thereof.

(emphasis added). The statute plainly speaks only to proceedings commenced subsequent to the probate or rejection of the will. The same is true of RCW 11.24.020, which expressly conditions its notice requirement

² RCW 11.24.020 provides:

Upon the filing of the petition referred to in RCW 11.24.010, notice shall be given as provided in RCW 11.96A.100 to the executors who have taken upon themselves the execution of the will, or to the administrators with the will annexed, to all legatees named in the will or to their guardians if any of them are minors, or their personal representatives if any of them are dead, and to all persons interested in the matter, as defined in *RCW 11.96A.030(5).

“upon the filing of the petition referred to in RCW 11.24.010.” *See also In re Estate of Young*, 23 Wn. App. 761, 763, 598 P.2d 7 (1979) (holding that the time period contained in RCW 11.24.010 for bringing a will contest begins to run from the date the will is admitted to probate); *see also In re Estate of Rynning*, 1 Wn. App. 565, 462 P.2d 952 (1969) (treating hearings regarding the validity of a will before the will is admitted or rejected as distinct from will contests brought under RCW 11.24.010); *see also* RCW 11.20.020(1) (stating that “[a]pplications for the probate of a will and for letters testamentary, or either, may be made to the judge of the court having jurisdiction and the court may immediately hear the proofs and either probate or reject such will as the testimony may justify. Upon such hearing the court shall make and cause to be entered a formal order, either establishing and probating such will, or refusing to establish and probate the same, *and such order shall be conclusive except in the event of a contest of such will as hereinafter provided.*”) (emphasis added).

Ms. Warren petitioned for the probate of Mr. Alsup’s will under RCW 11.20.020. CP at 73; *see* RCW 11.20.020. Before entering an order probating or rejecting the will, the trial court, in the exercise of its discretion, considered the parties’ motions concerning the will’s validity, effectively turning what would otherwise be a hearing on the petition into

an adversarial proceeding. See *Gordon v. Seattle-First Nat'l Bank*, 49 Wn.2d 728, 306 P.2d 739 (1957); see *State ex rel. Perry v. Jordan*, 50 Wn.2d 93, 309 P.2d 383 (1957). At the time the parties submitted their motions, the will had neither been admitted to probate nor rejected. Accordingly, Mr. Bresson was not required to give the notice specified in RCW 11.24.020.³

Moreover, it should be noted that, regardless whether the trial court lacked jurisdiction to hear Mr. Bresson's declaratory judgment motion, the issue of whether to reject or probate the will was nonetheless properly before the court. CP at 72-74 (petition praying that will be admitted to probate). The court had ample authority to either reject or probate the will and to consider issues germane to that determination. RCW 11.20.020; RCW 11.96A.020; RCW 11.96A.040; RCW 11.96A.060; *Gordon v. Seattle-First Nat'l Bank*, 49 Wn.2d 728, 306 P.2d 739 (1957); *State ex rel. Perry v. Jordan*, 50 Wn.2d 93, 309 P.2d 383 (1957). The court was cognizant of the fact Mr. Alsup was under full guardianship at the time he

³ Even assuming, *arguendo*, that RCW 11.24.020 applies to this matter, Mr. Bresson substantially complied with its citation requirement. See *In re Estate of Kordon*, 157 Wn.2d 206, 213, 137 P.3d 16 (2006) (noting that "[s]ubstantial compliance with the RCW 11.24.020 citation requirement . . . may be sufficient."). He issued a notice regarding the pendency of the probate of Mr. Alsup's will to all known legatees and interested persons and also directed them to RCW 11.24.010. CP at 44. When he moved for declaratory judgment, Mr. Bresson issued a notice to all known legatees and persons interested in the matter, notifying them of the fact he had brought a motion asking the court to determine the validity of the will and marriage, and he communicated the place and time of the hearing. CP at 177-79; *cf.* RCW 11.06A.100.

made the will (without resort to the declaratory judgment motion) and the court invalidated the will on that basis. CP at 20-22, 36-41, 72, 75-76, 88-100, 181-83, 191-216, 156-57. The order declaring the will invalid, from which Ms. Warren appeals, is in effect an order refusing to probate the will. *See* CP at 155-58. The propriety of the trial court's ruling does not turn on whether the court had jurisdiction under the will contest statutes, chapter 11.24 RCW. As discussed below, it turns on whether the court properly applied the law in ruling that the 1997 guardianship order divested Mr. Alsup of his right to execute a will.

C. **The 1997 Guardianship Order Directed a Full Guardianship Over Mr. Alsup's Person and Estate and Should be Interpreted as Divesting Mr. Alsup of the Right to Make a Will.**

The Legislature has given Washington courts authority to dispossess an incapacitated person of certain rights, including the rights to marry and make a will, for the protection of the incapacitated person. RCW 11.88.005; RCW 11.88.010; RCW 11.88.030(5)(b); RCW 11.88.095. The imposition of a full guardianship of the person and estate results in the loss of all rights enumerated in RCW 11.88.030(5)(b), including the right to make a will.⁴

⁴ However, the incapacitated person will not lose the right to vote unless "the court determines that the person is incompetent for purposes of rationally exercising the franchise in that the individual lacks the capacity to understand the nature and effect of

The significance of a full guardianship is made clear by examining the statutes addressing limited guardianships. RCW 11.88.010(2), for example, authorizes the superior court to appoint limited guardians for the persons and estates of incapacitated persons and states that “[a] person [shall not] lose any legal rights or suffer any legal disabilities as the result of being placed under a limited guardianship, except as to those rights and disabilities specifically set forth in the court order establishing such a limited guardianship.” RCW 11.88.095(3) states: “*If* the court determines that a limited guardian should be appointed, the order shall specifically set forth the limits by either stating exceptions to the otherwise full authority of the guardian or by stating the specific authority of the guardian.” (emphasis added). Thus, it is only when a limited guardianship is ordered that the order must specifically articulate the rights lost or retained by the incapacitated person. There is no such requirement in the case of full guardianships, the assumption being that the ward is divested of all rights, including the right to make a will. *See also* RCW 11.88.030(5)(b).

There is no question the 1997 guardianship order is one of full guardianship. The order does not contain any reservation of rights or limit the authority of the co-guardians. CP at 38-41. Nor does it anywhere use the word “limited.” CP at 38-41. Indeed, the February 16, 2001

voting such that she or he cannot make an individual choice” and the guardianship specifies “whether or not the individual retains voting rights.” RCW 11.88.010(5).

guardianship order straightforwardly states that “[t]he *full guardianship* over the ward is hereby modified to a limited guardianship.” CP at 169 (emphasis added). Thus, Mr. Alsup was under full guardianship at the time he made the will in question and was wholly without right to do so.

Ms. Warren contends the 1997 guardianship order did not divest Mr. Alsup of the right to make a will because the order did not expressly state that Mr. Alsup lost that right. Br. of App. at 30-31. But, it is only in the case of limited guardianships that the incapacitated person retains rights not specifically set forth as revoked in the order. *See* RCW 11.88.010(2). Under Ms. Warren’s proposed interpretation, Mr. Alsup did not lose *any* rights under the order, as the order fails to explicitly mention that any rights were taken away. Such view is unreasonable and, if adopted, would in many circumstances result in confusion as to the scope of a guardian’s authority and would undermine the basic purpose of the guardianship statutes, which is “to provide a means by which another person may exercise the decision-making power of an individual who is not legally competent to make decisions.” *In re Schuoler*, 106 Wn.2d 500, 504-05, 723 P.2d 1103 (1986); RCW 11.88.005.

It has long been recognized that “[t]he right to make a testamentary disposition of property is purely a creature of statute and within absolute legislative control.” *Irwin v. Rogers*, 91 Wash. 284, 286, 157 P. 690

(1916); *In re Estate of Phillips*, 193 Wash. 194, 202, 74 P.2d 1015 (1938); *In re Estate of Drown*, 60 Wn.2d 110, 113, 372 P.2d 196 (1962). Exercising its plenary power, The Legislature has authorized courts, through the guardianship statutes, to divest incapacitated persons of the right to execute a will. Mr. Alsup was divested of this right by virtue of the 1997 guardianship order. He therefore lacked authority to make the will in question and the trial court's ruling on that point should be upheld.

D. The Issue of Testamentary Capacity Should Not Arise.

Although it is somewhat unclear, it seems the trial court invalidated the will on two related but conceptually distinct grounds: that Mr. Alsup (1) lacked the "right" to execute a will, and (2) lacked the "capacity" to execute a valid will. CP at 156 (finding no. 5), 157 (stating that "Decedent did not have the capacity or the right to create and/or execute a Will"). As discussed above, the trial court's ruling should be upheld on the first ground. As to capacity, that issue has been subsumed by the guardianship statutes as well.

Early Washington decisions recognized that the mere fact of guardianship was not dispositive of the issue whether the ward possessed sufficient testamentary capacity to execute a valid will. *See In re Estate of Bottger*, 14 Wn.2d 676, 129 P.2d 518 (1942) (stating that appointment of guardian of estate does not establish incapacity to make will, unless

appointment is based on express findings of mental defect affecting testamentary capacity); *In re Estate of Forsman*, 177 Wash. 38, 30 P.2d 941 (1934) (implying that testamentary incapacity is not definitively established by fact of guardianship of person and estate, but holding that 82-year-old testator was incompetent to make a will when evidence showed he had been placed under guardianship due to mental and physical incompetency, failed to recall his daughter's name and contributory cause of death, 6 days after executing will, was senile dementia); *Dean v. Jordan*, 194 Wash. 661, 79 P.2d 331 (1938) (holding that a presumption of incapacity arises upon an adjudication of insanity and placement of guardianship, but that presumption can be rebutted by clear evidence that testator possessed sufficient capacity at time of making will); *In re Estate of Miller*, 10 Wn.2d 258, 116 P.2d 526 (1941) (same).

This decisional law, when viewed in light of RCW 11.88.030(5)(b), no longer controls the question of whether a will is valid. To the contrary, the question is controlled by the Legislature's intent that a person deemed incapacitated and placed under full guardianship loses the power to make a will. After the right has been restricted, the proper procedure is to move to modify the guardianship under RCW 11.88.120 and allow the court to determine whether it is in the best interests of the incapacitated person to make a will.

In the event this Court disagrees, however, and determines capacity is in fact an issue to be resolved, it should note that full factual development relevant to that question has not occurred below. Accordingly, if this Court determines the guardianship order did not take away Mr. Alsup's right to make a will, interested parties should be afforded opportunity to bring a challenge in accordance with RCW 11.24.010.

E. **The Trial Court's Ruling that the Marriage is Invalid Should Be Upheld on the Ground that Mr. Alsup was Divested of his Right to Marry by Virtue of the February 16, 2001 Limited Guardianship Order.**

"[T]he marriage relation is entered into by civil contract." *Wash. Statewide Org. of Stepparents v. Smith*, 85 Wn.2d 564, 568, 536 P.2d 1202 (1975); RCW 26.04.010(1) ("Marriage is a civil contract . . ."). The state is a third party to such contracts and retains ultimate regulatory power, including the power to divest an incapacitated person of his or her right to marry. *Grover v. Zook*, 44 Wash. 489, 500, 87 P. 638 (1906); H. Clark, *The Law of Domestic Relations in the United States* § 2.2 (2d ed. 1987); *see Zablocki v. Redhail*, 434 U.S. 374, 392 (1978) (Stewart, J., concurring); *see* RCW 11.88.030(5)(b).

Mr. Alsup married on September 13, 2002, after the court entered the guardianship order of February 16, 2001, which expressly divested Mr.

Alsup of the right to “enter into *any* contract.” CP at 170 (emphasis added); CP at 21-22, 110, 134, 193. Under the order’s plain meaning, Mr. Alsup did not have the right to contract marriage. *See Zink v. City of Mesa*, 162 Wn. App. 688, 707, 256 P.3d 384 (2011) (“Generally, a court order is enforced according to the plain meaning of its terms, read in light of the issues and purposes surrounding its entry.”). The trial court’s order should be upheld on the ground the Mr. Alsup lacked authority or the right to contract marriage.

Further, the bar against post-death collateral attacks on the validity of the marriage should have no application when the claim is made that the person contracting marriage had been dispossessed of that right. In such cases, the marriage never came into being and Washington courts have the inherent power to declare the marriage invalid and of no force or effect. *See In re Estate of Lint*, 135 Wn.2d 518, 539-41, 957 P.2d 755 (1998) (recognizing that RCW 26.09.040 is not applicable in all cases, the Legislature did not intend to entirely occupy the field and that trial courts have common law authority to declare a marriage invalid in certain exceptional circumstances). The grounds set forth in RCW 26.09.040 do not include situations where an incapacitated person was dispossessed of the right to marry for their own protection. Accordingly, the trial court ruling invalidating the marriage between Mr. Alsup and Ms. Warren

should be upheld on the ground that Mr. Alsup lost his right to marry and, as such, no marriage came into existence. In short, the marriage runs contrary to the positive law of this state as reflected in the guardianship statutes. *See State v. Fenn*, 47 Wash. 561, 563, 92 P. 417 (1907) (recognizing a marriage valid in the contracting state may nonetheless be declared invalid if it is contrary to the positive law of Washington).⁵

⁵ Ms. Warren does not claim that Idaho law should govern the determination as to the validity of the marriage. As such, Mr. Bresson will assume Washington law applies here. It is interesting to note, however, that there is some uncertainty in the law on this point. Washington courts generally endorse the rule of *lex loci contractus* in adjudications concerning the validity of marriage. *In re Estate of Wilbur v. Bingham*, 8 Wash. 35, 37, 35 P. 407 (1894) (“The general rule is that the *lex loci contractus* is controlling, in adjudications involving the validity of marriages”); *Willey v. Willey*, 22 Wash. 115, 117, 60 P. 145 (1900) (same); *In re Estate of Gallagher*, 35 Wn.2d 512, 514-15, 213 P.2d 621 (1950) (“Although this state does not recognize common-law marriages, if originally contracted and consummated in this state, we have sustained the validity of such marriages which have been contracted and consummated in other states where they were lawful under the *lex loci contractus*.”). Under the rule, the validity of a marriage is governed by the law of the place where the marriage was contracted. *Id.*

The rule of *lex loci contractus* also appears to be codified in RCW 26.09.040(4)(c), which grants authority to the trial court to invalidate a marriage “[i]f it finds that a marriage contracted in a jurisdiction other than this state, was void or voidable under the law of the place where the marriage was contracted, and in the absence of proof that such marriage was subsequently validated by the laws of the place of contract or of a subsequent domicile of the parties.” But, there is some doubt as to the validity of the rule in all cases. In the case of *In re Estate of Shippy*, 37 Wn. App. 165 (Div. II 1984), the Washington Court of Appeals held that the validity of a marriage contracted in Alaska was governed by Washington law. As described in 19 Tegland, Wash. Prac., Family and Community Property Law § 4.17 n.1, at 69-70 (5th ed. 1997): “The court held that the need to resolve conflicting claims to property located in Washington and belonging to a deceased state resident provide the state of Washington with a dominant interest in the validity of the deceased resident’s marriage. Thus, the law of Washington, giving retroactive effect to a nunc pro tunc California divorce decree, applied to validate a marriage that took place before the husband’s divorce in a previous marriage was final.” Although *Shippy* has been described as an “unusual case,” 19 Tegland, Wash. Prac., Family and Community Property Law § 4.17 n.1, at 69-70 (5th ed. 1997), the facts are similar enough to this case to warrant application of its “substantial relation” test. *See In re Estate of Shippy*, 37 Wn. App. at 165-70.

F. **Mr. Bresson Concedes He Lacked Standing Under Washington and Idaho Law to Challenge the Validity of the Marriage After Mr. Alsup's Death on the Ground of Insufficient Mental Capacity.**

This Court need not address the question of mental capacity if it concludes Mr. Alsup's marriage to Ms. Warren is invalid on the basis that the guardianship order entered February 16, 2001 dispossessed Mr. Alsup of the right to marry. If, however, this Court disagrees with the trial court on that point, the following discussion is intended to assist the Court in resolving issues relevant to whether the marriage may rightfully be declared invalid on the ground of insufficient mental capacity.

It is an unsettled question whether the right to collaterally attack a marriage after the death of one of the spouses is to be determined according to the law of Washington or the law of the state where the marriage was contracted. *See In re Romano's Estate*, 40 Wn.2d 796, 800-08, 246 P.2d 501 (1952) (declining to address the question of whether the law of Washington or Nevada determines the right to attack the validity of a marriage contracted in Nevada after the death of a spouse). The question need not be resolved here. Under Washington and Idaho law, a post-death collateral challenge to the validity of a marriage is prohibited when the ground asserted is that a spouse lacked mental capacity.

Historically, Washington decisional law permitted a post-death, collateral attack on a void marriage, but limited attacks to voidable marriages to the lifetime of the parties. *Id.* at 803-06; *In re Estate of Hollingsworth*, 145 Wash. 509, 510, 261 P. 403 (1927). But enactment of RCW 26.09.040—part of the Dissolution Act of 1973—terminated the right to attack the validity of a marriage if one of the spouses is deceased, regardless whether the marriage was alleged to be void ab initio. RCW 26.09.040; 21 Tegland, Wash. Prac., Family and Community Property Law § 48.6, at 138, § 48.33, at 163-64 (5th ed. 1997) (discussing how the language and drafting history of RCW 26.09.040 clearly indicates a legislative intent to prohibit actions to declare a marriage invalid after the death of a spouse).

Under RCW 26.09.040(1), a petition to have a marriage declared invalid may be “sought” only “[w]hile both parties to an alleged marriage . . . are living.” *See also* 20 Tegland, Wash. Prac., Family and Community Property Law § 43.6 n.19, at 573 (5th ed. 1997) (explaining how the statement in subsection .040(1) that an action may only be sought while the spouses are living, in light of the similarity to § 208(b) of the Uniform Marriage and Divorce Act, upon which the statute is based, works as a prohibition of collateral attacks). The statute permits “the guardian of an incompetent spouse” (not a personal representative of a deceased spouse’s

estate) to challenge the validity of the marriage, but makes clear the action abates upon the death of a party to the marriage. RCW 26.09.040(4).

Idaho arguably subscribes to the common law rule that a post-death collateral attack on a void marriage may be made, but most likely does not. In the case of *In re Duncan*, 83 Idaho 254, 260, 360 P.2d 987 (1961), the Idaho Supreme Court stated that “[a] purported marriage, void for any reason, is ‘subject to both direct and collateral attack, by anyone, at any time, in any court or in any proceeding in which the fact of marriage is material.’” (quoting 35 Am.Jur., Marriage, § 172, p. 287). However, the statement was a broad reference to the power of a Utah court to declare a marriage between two of its residents invalid when it was contracted in Nevada. *Id.* And, under Idaho statutory law, a marriage is merely voidable on the ground of mental incapacity (“unsound mind”), Idaho Code § 32-501(3), and an annulment action for such a cause may be brought only “by the party injured, or relative or guardian of the party of unsound mind,” and only “before the death of either party.” Idaho Code § 32-502(3).

Thus, Washington and Idaho prohibit a challenge to the validity of a marriage, brought after the death of a spouse, when the basis for the challenge is that one of the parties was of unsound mind. Accordingly,

Mr. Bresson concedes he lacks standing to challenge the validity of the marriage on the ground that Mr. Alsup lacked mental capacity.

G. **If the Marriage Was Not Rendered Invalid by the February 16, 2001 Guardianship Order, the Court Should Consider Remanding for Further Proceedings on the Issue of Whether There Were Exceptional Circumstances Indicating Fraud of the Grossest Kind.**

Despite the prohibitions of RCW 26.09.040, the Washington Supreme Court has ruled that Washington courts have the inherent power to declare a marriage void when there is a lack of solemnization or exceptional circumstances indicating fraud of the grossest kind. *In re Estate of Lint*, 135 Wn.2d 518 (holding that marriage may be declared void after the death of one of the spouses, despite RCW 26.09.040, when there is a lack of solemnization or exceptional circumstances indicating fraud of the grossest kind); *In re Romano's Estate*, 40 Wn.2d at 806 (observing that "[t]here are also cases where, under exceptional circumstances indicating fraud of the grossest kind, without apparent opportunity to detect or correct the inequity during the lifetime of the deceased spouse, a collateral attack after death has been permitted.").

Here, the issue of whether there had been fraud of the grossest kind was briefly addressed by the parties. CP at 65-67, 93-94. Yet, the trial court declined to rule on the issue, basing its decision on the fact that Mr. Alsup was under guardianship as to his person and estate and thus without

authority to contract marriage. CP at 155-58. This seems proper; proof of such fraud in most cases requires factual determinations by the trier of fact. *See, e.g., In re Estate of Lint*, 135 Wn.2d 518 (1998). Here, the only evidence before the trial court arguably bearing on the issue of fraud is (1) the Declaration of Nicola J. Warren, CP at 20-22, (2) the 2002 GAL Report of Mr. Pinkerton, CP at 57-58, 203-16, (3) the Declaration of Michael Bresson with the attached hand-written documents of Mr. Alsup, CP at 78-87, and the Affidavit of Nicola J. Warren in Support of Motion for Summary Judgment, CP at 109-11.

The facts currently before the trial court appear insufficient to justify a ruling on whether fraud of the grossest kind had occurred. *Cf. In re Estate of Lint*, 135 Wn.2d 518 (1998). Because the trial court did not address the issue and full factual development has not occurred below, the most appropriate course of action may be to remand, allowing interested parties opportunity to present evidence directly touching upon the issue whether there has been such fraud in this case.

H. The Issue of Whether Mr. Alsup Possessed Sufficient Mental Capacity to Marry Should Not Arise.

The trial court ruled the marriage invalid under the guardianship order entered February 16, 2001. Like the part of the order addressing Mr. Alsup's will, the court arguably advanced two reasons for the invalidation

of the marriage: that Mr. Alsup (1) lacked “authority” (or the “right”) to contract marriage and (2) lacked the “capacity” to contract marriage. CP at 157 (stating that “since the Decedent lacked the *authority* or *capacity* to enter into a contract and because marriage is a contract, the marriage is invalid and void”) (emphasis added). As shown above, the trial court’s decision should be upheld on the first ground. And, as with the will, the question of whether Mr. Alsup possessed sufficient capacity should not arise.

An early Washington decision discussed the quantum of mental capacity required to contract marriage in the context of a guardianship. *In re Estate of Gallagher*, 35 Wn.2d 512, 518, 213 P.2d 621 (1950). There, the court held that the mere fact of guardianship is not determinative of whether a ward possessed sufficient mental capacity to contract marriage. *Id.* But, that case does not control here. The guardianship statutes now make plain that an incapacitated person may lose the right to enter into any contracts, including marriage, and Mr. Alsup was indeed dispossessed of that right by virtue of the guardianship order of 2001.

I. **Ms. Warren's Request of Costs and Reasonable Attorney Fees Should be Denied.**

In its broad discretion, the Court should decline to order the estate to pay Ms. Warren's costs and attorney fees. Mr. Bresson filed the declaratory judgment motion in good faith, exercising "the skill, judgment and diligence that an ordinarily cautious and prudent person would employ in the management of his own affairs." *In re Estate of Wilson*, 8 Wn. App. 519, 527-28, 507 P.2d 902 (1973). His aim was to protect the estate from a doubtful obligation and to resolve a dispute already before the court. *See In re Estate of Shea*, 69 Wn.2d 899, 901, 421 P.2d 356 (1966) ("It is the duty of an administrator to protect the estate from invalid and doubtful claims and obligations.").

This dispute does not involve all beneficiaries and heirs as parties. CP at 23-26 (naming beneficiaries not involved in this dispute), 179 (naming heirs not involved in this dispute). Ms. Warren is the only party to this litigation and, as such, an award from the estate would harm all beneficiaries and heirs not involved. *See In re Estate of Niehenke*, 117 Wn.2d 631, 647-49, 818 P.2d 1324 (1991); *In re Estate of Black*, 153 Wn.2d 152, 173-74, 102 P.3d 796 (2004). "Where the award of attorneys' fees affects the interests of uninvolved beneficiaries and would result in their partially funding the attorneys' fees for the litigating parties,

attorneys' fees will not be assessed against the estate.” *In re Estate of Kuande*, 74 Wn. App. 65, 71, 871 P.2d 669 (1994).

Ms. Warren argues that her “actions in this case have produced a benefit to the Estate by establishing the final wishes of Theodore Alsup and by establishing which beneficiaries have a right to participate in his Estate.” Br. of App. at 33. The Court should note that such reasoning is equally applicable were this Court to uphold the trial court’s decision. Either way, the outcome would “benefit the estate” by establishing which persons (beneficiaries or heirs) are entitled to a share of the estate’s assets.

This case involves issues that have not been clearly decided in Washington, i.e., whether a guardianship order restricting the rights of a ward can effectively block a ward from marrying or executing a will. The Legislature has given Washington courts authority to dispossess an incompetent person of certain rights, including the rights to marry and make a will, for the protection of the incompetent person. RCW 11.88.005; RCW 11.88.030(5)(b); RCW 11.88.095. The estate should not be faulted for seeking resolution of an uncertain claim, especially given the fact Mr. Bresson needed a court order to take further action in distributing the estate’s assets.

Ms. Warren invokes RCW 11.24.050 as a basis for the Court to award her costs and attorney’s fees. Yet, that section is only applicable to

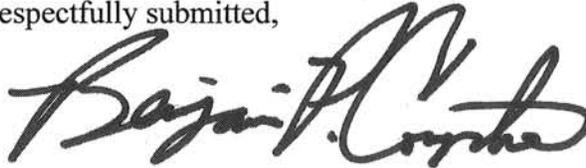
will contests brought under the preceding four sections, RCW 11.24.010-.040. *See In re Estate of Jolly*, 3 Wn.2d 615, 620-22, 101 P.2d 995 (1940). Because the will at issue had not been probated or rejected at the time Mr. Bresson brought his declaratory judgment action, he is not a “contestant” under RCW 11.24.010 or .050. *See* RCW 11.24.010 (making clear a will contest under the statute can only begin upon the filing of a petition *after* the probate or rejection of the will). Properly understood, the proceedings below concerned whether the will should be probated or rejected, the trial court order under review effectively deciding that issue. There has been no finding of bad faith by the trial court. Indeed, the trial court ruled in Mr. Bresson’s favor. Mr. Bresson urges this Court to decline Ms. Warren’s request of costs and attorney’s fees.

V. CONCLUSION

The trial court order should be upheld for the reasons stated above.

Dated this 20th day of March, 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Benjamin P. Compton, hereby declare that I served a true and correct copy of the foregoing Brief of Respondent, by first class U.S. Mail delivery, to all parties named below:

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