3-12-2018

Lanham v. Fleenor Appellant's Brief Dckt. 45488

IN THE SUPREME COURT OF THE STATE OF IDAHO

THOMAS E. LANHAM Plaintiff/Appellant, v. DOUGLAS E. FLEENOR, Defendant/Respondent.	)	**Docket No. 45488** Ada County Case No. CV-OC-16-8252

APPELLANT'S BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County,
Honorable Richard D. Greenwood, Presiding

Allen B. Ellis
Ellis Law, PLLC
2537 W. State St., Ste 140
Boise, Idaho 83702
Telephone: (208)345-7832
Facsimile: (208)345-9564
Attorney for Appellant

Richard L. Stubbs
Carey Perkins, LLP
300 N. 6th St., Ste 200
P.O. Box 519
Boise, ID 83701
Telephone: (208)345-8600
Facsimile: (208) 345-8660
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES Page

STATUTES

RULES

OTHER

STATEMENT OF THE CASE

Nature of the Case: This action sounds in legal malpractice and centers around the Will of Gordon Lanham ("Gordon"), father of the plaintiff Thomas Lanham ("Thomas"). Upon Gordon's death in 2013, the Will was placed into probate.[1] The Will, which disinherited Thomas, failed to devise two pieces of real property and lacked a residuary clause[2]. Under Idaho law, this circumstance creates an intestacy as to property not devised.

Ignoring these two omissions which, plaintiff argues, created a partial intestacy to his benefit, the Magistrate ruled that the Will devised Gordon's estate in its entirety to Robert and Joseph Lanham, Gordon's grandsons:

> Decedent's intent is sufficiently clear from the language of the will, particularly as bolstered and explained by contemporary audio recordings and the affidavits submitted, to allow administration and, if necessary, judicial enforcement. As to the claimant, Thomas Everett Lanham, decedent's intent is very clearly that claimant take by the will only one dollar **($1M0)** and a bed and there is no lawful reason to frustrate decedent's intent.

R. p. 45.

Upon the Magistrate's ruling, plaintiff Thomas instructed his attorney, defendant Douglas Fleenor, to appeal the decision. Defendant Fleenor did so, but filed the notice of appeal late and, accordingly, the appeal was ultimately dismissed as dilatory by the Court of Appeals. See *In the Matter of the Estate of Lanham,* Idaho , 369 P.3d 307 (App. 2016).

---

[1] Through clerical inadvertence, the Will, as Exhibit A to defense counsel Lundberg's affidavit (R. p.16), was not included in the clerk's record. For ease of reference, counsel's affidavit and Exhibit A (the Will) is attached hereto as Addendum A. An appropriate motion to augment will be made.

[2] As used herein, the meaning of the term "residuary clause", is consistent with the definition in Black's Law Dictionary: "A testamentary clause that disposes of any estate property remaining after the satisfaction of specific bequests and devises". *Id.,* Seventh Edition, p. 1311.

Plaintiff Thomas filed suit against defendant attorney alleging that as a proximate result of the failed appeal his entitlement as an intestate heir was lost. In summary judgment proceedings, the Complaint was dismissed. The district court ruled that, had there been a timely appeal, plaintiff Thomas would not have prevailed in the probate matter, i.e., the Will gave the personal representative a power of appointment, precluding an intestate distribution of the undevised real property. That is, ruled the Court, because a timely appeal would not have given the plaintiff the status of an intestate heir, plaintiff's claim for professional negligence lacked the element of proximate causation.

Course of Proceedings Below:

(1) Complaint: The Complaint in this matter (R. p. 9) was filed on behalf of plaintiff Thomas Lanham and Keith Lanham ("Keith") alleging professional negligence against attorney/defendant Douglas Fleenor by reason of a tardy notice of appeal. Although Keith was not a client of defendant Fleenor, he alleged that the defendant owed him a duty of care, as a non-client, based upon the factor test set forth in *Harrigfeld v. Hancock,* 140 Idaho 134, 138, 90 P.3d 884 (2004), e.g., foreseeability, proximate causation, clear financial loss. Plaintiffs allege that as a proximate result of the late appeal their status as intestate heirs of certain real property was lost. Plaintiffs further allege that their intestate entitlement is based upon the failure of the Will to devise the real property and the absence of a residuary clause (R. pp. 10-11).

(2) Defendant's Rule 12(b)(6) Motion to Dismiss and Plaintiff's Cross-Motion for Partial Summary Judgment: Defendant's motion sought a dismissal of the Complaint based upon a purported power of appointment held by the personal representative which, argued defendant, precluded intestate succession of the undevised real property. That is, because the appeal would

have been without merit, defendant's late notice of appeal was not the proximate cause of plaintiffs' lost heirship. Additionally, as to plaintiff Keith Lanham, defendant's motion sought the dismissal of his claim based upon the absence of an attorney/client relationship between defendant and plaintiff Keith.

The plaintiffs filed a cross motion for partial summary judgment arguing that defendant's negligence precluded an appeal and was the proximate cause of plaintiffs' lost inheritance as undisputed intestate heirs. In the course of an order declining to adopt the parties' stipulation for a briefing schedule, the Court gave defendant the option to re-file his Rule 12(b)(6) motion to dismiss as a Rule 56(c) summary judgment motion in view of the extraneous exhibits accompanying the motion.

(3) Cross-Motions for Summary Judgment: Upon plaintiffs re-filing their partial motion to dismiss as a summary judgment motion (R. p. 89), defendant filed his motion for summary judgment (R. p.109). Following hearing, the District Court granted defendant's motion, in part, by dismissing plaintiff Keith's complaint based upon his status as a non-client of defendant Fleenor (R. p. 174).

As to the remaining cross-motions for summary judgment, the District Court declined to rule until the entirety of the underlying probate file was entered into the record (R. p. 174)

(4) Entry of Summary Judgment: Upon supplementation of the record as ordered, the Court denied plaintiff Thomas' motion for summary judgment and granted the defendant attorney's motion for summary judgment, dismissing plaintiff Thomas' complaint.

Preliminary rulings: (a) Explicit in the district court's ruling is that where an estate is only partially devised and there is no residuary clause, the undevised property must descend

by intestate succession (R. pp. 254,258)

(b) As a further preliminary matter, the Court had correctly opined that "the outcome of any hypothetical appeal was a legal issue to be determined by the Court as an issue of law" (R, p. 252).

(c) The Court also correctly ruled that the decedent's disinheritance of Thomas and Keith "cannot operate to prevent [them as] heirs of law from taking under the statutory rules of inheritance when the decedent has died intestate as to any or all of his property", quoting *Matter of Estate of Baxter,* 827 P.2d 184, 186 (Okla. App. 1992) (R. p. 255; bracketed material explanatory) (R. p. 255)

Gist of summary judgment: The district court rejected plaintiff's claimed status as that of an intestate heir, ruling that a timely appeal would have been decided adversely to plaintiff. This result, opined the Court, was based upon the conclusion that the "power of attorney" referenced in the Will was, in fact, a power of appointment as to the entirety of Gordon's estate assets, including undevised real property (R. p. 258). In turn, the Court held that the absence of this indispensable causal element, i.e., intestacy arising from undevised real property, rendered plaintiff's allegations of professional negligence defective. That is, because the Court saw the appeal as not meritorious, its late filing visited no financial loss on plaintiff Thomas, i.e., there was no proximate causation.

As the district court opined:

> At the very end of the will, he [the testator Gordon] repeats:
>
> > "I want to state in here again that the executor of my Will is Judd Max Lanham and I am giving him a Power of Attorney for full control now and even after I am dead. I want him to be able to distribute my

> property and my personal effects as stated in my Last Will and Testament".
>
> This language shows the clear intent to create a general power of appointment and give his friend and cousin the power to dispose of the real estate . . . Use of the words "power of attorney" are simply a layman's miscues of a legal term of art. Giving Judd Lanham full control "even after **I** am dead" is sufficient. Gordon Lanham's intent was to create a power of appointment, so that Judd could distribute his assets after his death. The will was effective to dispose of the contested real estate through the power of appointment.

R. pp. 257-258 (bracketed material explanatory).

Notwithstanding the term "power of attorney", the Court concluded that this phrase in the Will, "when the will is read as a whole', unambiguously created a "power of appointment" in the executor Judd Lanham (R. p. 258). Accordingly, concluded the Court, the Will disposed of the entirety of the decedent's estate, and any appeal would have been unsuccessful in establishing an intestate heirship in plaintiff Thomas.

> *Had the appeal in this case been timely filed, it would have been unsuccessful.* Because it appears that in the absence of a successful appeal, plaintiff suffered no injury *caused* by the negligence, if any, of Defendant Fleenor, the case will be dismissed.

R. p. 258 (emphasis added).

Now this appeal by plaintiff Thomas.

Statement of Facts:

Preliminary note: The statement of facts in this case has a variable scope depending upon whether the Will is seen as ambiguous or not. If not ambiguous, the Court is required to limit its focus to the "four corners of the document". If there is ambiguity, then the Court is entitled to consider extraneous facts in order to achieve clarity. See authorities cited below. The "statement

of facts" presented here covers both scenarios.

Circumstances of the Will's authorship and its quirky provisions: This strange document was not prepared by an attorney nor was it executed in the conventional fashion. Rather, it was dictated into a machine over a period of six days by the decedent Gordon and then transcribed (by one Rebecca Clift; R. p. 16 Ex. A, Addendum A). In addition to its murky dispositive provisions, the Will chronicles, *inter alia*, the current weather, a grandson's tonsillitis, the kindness of neighbors, and an uncle's death.

Will dictated ..... November 18, 2010 through January 7, 2011

Will transcribed ..... January 19, 2011

Will executed ..... February 19, 2011

R. p.16 Ex. A, Addendum A

Gordon Lanham died on December 15, 2013 **{R.** p. 219). Plaintiff is not challenging the formalities of the Will and is not asserting the existence of incompetency or undue influence.

References in the Will to real property in dispute: The subject real property, to which plaintiff claims intestate entitlement, consists of 200 acres in Gem County ("the Ranch") and 47 acres in Valley County ("Big Creek"). This property is described in the Estate inventory of the Personal Representative (Judd Lanham) as follows:

> Ranch and Land at 3555 Butte Rd., Emmett,
> ID; Gem County Parcel #RP00418817
>
> 45+ acres on Big Creek in Valley County

R. p. 72

At page 1 of the Will (R. p. 16, Ex. A, Addendum A): "I am going to make my friend and cousin Judd Max Lanham executor to my estate and give him Power of Attorney over all my

personal and real property". As to the property actually devised in the Will, its provisions effectively disinherited the testator's only children, plaintiff Thomas Lanham and Keith Lanham, (R. p. 16 Ex. A, Addendum A, pp. 1, 2).

The Will's reference the Big Creek property: The Will provides at page one:

> This is another day...it is November 19' and I want to state in here that the executor of my Will is Judd Max Lanham and I am giving him a Power of Attorney for full control now and even after I am dead. I want him to be able to distribute my property and my personal effects in any way he sees fit and I will try and put all the wording about the personal effects. *I also have a 47-acre of property in Big Creek Idaho, Valley county and I will try to describe about how I want that administered, etc. I am gonna stop now.*

R. p. 16, Will, Addendum A, p. 1 (emphasis added).

And at the third page of the Will: "I just been doing a lot of thinking and I want to think about that 47 acres in Big Creek, Idaho, Plot 35. I am going to administer $^1/_2$ to one person and $^1/_2$ to another" (R. p. 16 Ex. A, Addendum A, p. 3).

There is no further reference to the Big Creek property in the Will, including reference to the decedent's dispositive intentions thereto.

The Will's reference to the Ranch property: The sole reference to the Ranch property in the Will is: "I have a ranch with 120 acres" (R. p. 16 Ex. A, Addendum A, p. 1). The Will contains no other reference to this property, dispositive or otherwise.

The Ranch property was properly included in the PR's Estate inventory (R. p. 72). However, approximately one month prior to his death in 2013, the decedent executed a "deed" to the Ranch to his grandson Joseph Lanham (R. p. 21). As reflected in the authorities cited below, this so-called deed was an ineffective instrument because, despite the language of conveyance, testator/grantor Gordon, in addition to reserving a life estate, reserved "an unrestricted power to convey during [his] lifetime,

which included] the power to sell, gift, mortgage, lease and otherwise dispose of the property and to retain the proceeds from the conveyance" *(Id.)*. Because of Gordon's retained interest in the Ranch property, the deed to Joseph was an ineffective conveyance. Accordingly, the Personal Representative properly included the Ranch as part of the Estate inventory. A fair inference is that Gordon's attempted inter-vivos conveyance, although ineffective, was in lieu of a testamentary disposition of the Ranch property in the Will. That is, the failure of the decedent to devise the Ranch in the Will was in contemplation of this attempted conveyance by deed.

Language in the Will which may inform (1) the meaning and the scope of the decedent's reference to "power of attorney" in the Will and (2) whether a "power of appointment" can be or should be included in a "power of attorney:

Executor Judd Lanham's "power of attorney" was "for full control now and even after I am dead". The conventional power of attorney operates during the principal's life and terminates upon the principal's death. See Idaho Code § 15-12-110(1)(a). The phrase "for full control now", articulated in the Will (R. p. 16 Ex. A, Addendum A) is consistent with the features of a garden-variety power of attorney, i.e., the "power" is immediately operative but does not survive death.

The Will's provisions respecting Big Creek reflect three facts: (1) the decedent's repeated uncertainty as to who would receive this property: (2) the designated beneficiary of this property would be named by the decedent himself, i.e., an actual devise: and (3) the failure of the Will to devise the Big Creek property.

Page 1 of the Will (R. p. 16 Ex. A, Addendum A) references Big Creek: "I also have a 47-acre of property (sic) in Big Creek Idaho, Valley county and I will try to describe about how I want that administered, etc. I am gonna stop now." This provision is to the effect that, whether by power of

appointment or actual devise, the Will would, at some place thereafter, set forth the decedent's testamentary intent.

Page 3 of the Will (R. p. 16 Ex. A, Addendum A) corroborates the decedent's continuing uncertainty and makes clear that, at some point, he himself, not an appointee, would determine who would be the beneficiary of Big Creek. "I just been doing a lot of thinking and I want to think about that 47 acres in Big Creek, Idaho, Plot 35. *I am going to* administer 1/2 to one person and 1/2 to another" (emphasis added).

Notwithstanding the decedent's expressed intentions, the Will contains no provisions identifying the beneficiary or beneficiaries of Big Creek or how the decedent was going "to administer ½ to one person and 1/2 to another". The last sentence of the Will reminds us that the executor is to distribute the testator's estate "as stated in my last Will and Testament". The Will fails to devise of the Big Creek property notwithstanding the testator's expressed intention of what he was "going" to do.

Extrinsic evidence:. In proceedings before the magistrate, the Personal Representative ("Executor") Judd Lanham presented his affidavit in summary judgment proceedings respecting the intent of testator Gordon Lanham (referred to as "Tom"). In the event the Will is deemed "ambiguous", this affidavit testimony sheds light on the testator's intent (R. pp. 216 - 221).

ISSUES PRESENTED ON APPEAL

Whether the district court committed an error of law by (1) concurring with the Magistrate decision and ruling that the decision would be affirmed on appeal; and (2) opining and ruling that the Will, which lacked a residuary clause, contained a power of appointment arising from the testator' s reference to a "power of attorney" in the Will which, in turn, precluded intestate succession.

ARGUMENT

STANDARD OF REVIEW

A recent Idaho Supreme Court decision articulated the standard of review in the summary judgment context:

> "When reviewing an order for summary judgment, this Court applies the same standard of review that was used by the trial court in ruling on the motion for summary judgment." *Quemada v. Arizmendez (In re Estate of Ortega)* 153 Idaho 609, 612, 288 P.3d 826, 829 (2012) (quoting *Vreeken v. Lockwood Eng'g, B.V.,* 148 Idaho 89, 101, 218 P.3d 1150, 1162 (2009)). Summary judgment is proper, "if the pleadings and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Green v. Green, 161 Idaho 675, 389 P.3d 961, 964 (2017).

As respects the existence or not of ambiguity in a will, the district court correctly defined the standard of review: "Whether a document is ambiguous is a question of law over which appellate courts exercise free review. *Beus v. Beus,* 151 Idaho 235, 241, 254 P.3d 1231, 1237 (2011). R. p. 257

POINTS OF LAW AND FACT WHICH ARE NOT IN DISPUTE

(1) In the event of intestacy, plaintiff/client Thomas is an intestate heir.

(2) Where there is a failure to perfect an appeal, determination of the merits of the appeal is within the exclusive province of the Court, not the jury: Citing *Daugert v. Pappas,* 704 P.2d 600 (Wash. 1985) and Legal Malpractice, 2012 Edition, Vol 4, sec. 33.43 (p. 942), the District Court concluded:

> The treatise [Legal Malpractice] cites multiple cases from several jurisdictions. For example, the Washington Supreme Court held that for "cases involving an attorney's alleged failure to perfect an appeal" courts have consistently recognized that the determination of the success of the appeal is within the exclusive province of the court and not the jury.

R. p. 173 (explanatory material in brackets).

(3) The Will does not devise the real property and there is no residuary clause: As opined by the District Court:

> For purposes of the issues presented here, the record reveals some uncontroverted facts. The decedent Gordon Thomas Lanham died, leaving two children, Thomas and Keith. At the time of his death he owned three parcels of real property. He left a will. The will is homemade. It is apparently a transcription of recorded statements by the Decedent. The will has no identifiable residuary clause as that term is generally understood. Nor does the will explicitly directly dispose of the real estate. In the will decedent directed at three places that his cousin Judd Max Lanham dispose of decedent's property.

R. p. 254

It is also undisputed that the Decedent left no surviving spouse.

(4) Absent a residuary clause, the property undevised by the Will must pass according to the law of intestacy: In the absence of a specific devise of the property as well as the absence of a residuary clause, Idaho case law requires that this real property descend according to intestate succession, i.e., there is a partial intestacy arising from the Lanham Will:

> In other words if the will clearly discloses that the testator did not dispose of all of his property, particularly in the absence of a residuary clause, then the omitted property must descend according to the laws of succession.

In re Corwin's Estate, 86 Idaho 1, 5, 383 P.2d 339 (1963).

Defendant Fleenor acknowledged this point of law in his unsuccessful motion for summary judgment: "When a devise fails and the will lacks a residuary clause, the residue passes through intestate succession. *In re Corwin's Estate* . . " See Fleenor brief (R. p. 26), the executor's brief (R. p. 28) and Fleenor's reconsideration brief (R. p. 37)

Plaintiff recognizes that the Courts "favor testacy rather than intestacy". *In re Corwin's Estate,*

86 Idaho at 5. Notwithstanding, a Court may not be allowed to speculate as to testamentary intent.

> However, in order to avoid intestacy, either partial or complete, the court is not permitted to place on the will any construction not expressed in it, and which is based upon supposition as to the intention of the testator in the disposition of his estate.

Id., 86 Idaho at 5.

There is not a hint in the Will as to whom the testator intended as beneficiary as to either Big Creek or the ranch property. In fact as to Big Creek, he expressed the desire to "think about" it (R. p. 16, Ex. A, p. 3, Addendum A). A fair inference is that the Will does not reference the ranch because it was decedent's intention, as borne out later, to dispose of it by an attempted inter-vivos transaction.

(5) <u>In the absence of a residuary clause, a testator's disinheritance of heirs at law cannot thwart the laws of intestacy as to undevised property;</u> A general principle of both American and British jurisprudence is that a testator can only alter the mandate of the intestacy laws by disposing of the property by will. That is, decedent's disinheritance of plaintiff Thomas does not impair his status as an intestate heir to the real property not disposed of by the Will.

> . . . Michigan has held that a testator could not limit or eliminate an heir from receiving that portion of an estate governed by the statute descent and distribution except by disposing of the property by will. *Southgate v. Karp,* 154 Mich. 697, 118 N.W. 600; *In re McKay Estate,* 357 Mich. 447, 98 N.W.2d 604.
>
> In these cases, Michigan followed the general rule in American and British jurisprudence. *Boisseau v. Aldridges,* 5 Leigh 222, 32 Va. 222, 27 Am Dec. 590; *Coffman v. Coffman,* 85 Va. 459, 8 S.E. 672, 2 L.R.A. 848; *Todd v. Gentry,* 109 Ky. 704, 60 S.W. 639; *Pickering v. Stamford,* (1797), 3 Ves. Jun. 492 (30 Eng. Rep. 1121); *Johnson v. Johnson,* 4 Beay. 318 (49 Eng. Rep. 361). See also Page on Wills (Lifetime ed.), § 939, p. 857; 96 C.J.S. Wills § 1225, p. 1072; 57 Am. Jur § 1170.

In the Estate of Brown, 106 N.W.2d 535, 537 (Mich. 1960).

The district court concurred, quoting *Matter of Estate of Baxter,* 827 P.2d 184 (Okla., 1992):

> [A] disinheritance clause, no matter how broadly or strongly phrased, operates only to prevent a claimant from taking under the will itself, or to obviate the claim of pretermission, but does not and cannot operate to prevent heirs at law from taking under statutory rules of inheritance when the decedent has died intestate as to any or all of his property.

Id., 827 P.2d at 186. (R. p. 255)

And quoting a New York case, *In re Bayle 's Estate,* 113 N.Y.S.2d 39 (1952)

> In order to cut off the right of a distributee to inherit property, there must be a valid and legal bequest or devise to other persons. Mere words of disinheritance are insufficient to effectuate that purpose.

Id., 113 N.YS.2d at 40.

(6) The decedent's pre-death, attempted conveyance of the ranch property (R. p.21) did not remove the property from his estate because the decedent retained all ownership rights, including the right of sale and retention of the sale proceeds. *Garrett v. Garrett,* 154 Idaho 788, 791, 302 P.3d 1061 (2013). Hence, this property properly remained in the Estate inventory (R. p. 72).

WHETHER SUBJECT TO THE "PLAIN MEANING RULE", WHETHER CLARIFIED BY EXTRINSIC EVIDENCE, OR WHETHER CONTROLLED BY LEGAL STRICTURES, THE WILL FAILS TO DEVISE THE REAL PROPERTY, AND IT MUST PASS BY INTESTATE SUCCESSION.

The following arguments support the conclusion that the Will did not include a cognizable power of appointment. Absent that power and absent a residuary clause, the real property must pass by intestate succession.

(1) Plain meaning argument: First, the Will fails to reference a "power of appointment" or equivalent language. Even assuming the "power of attorney" referenced in the Will is to be read as a "power of appointment", the Will fails to identify which property of the decedent is subject to the

power given explicit ownership issues and expressed testamentary uncertainty.' Absent such identification and absent actual reference to a "power of appointment", the Will does not create a power of appointment.

Plaintiff concedes the correctness of the district court's comment that "no special or technical words" are required to create a power of appointment. However, the testator's usage of the term "power of attorney", a term having statutory specificity, hijacks any connotation that a power of appointment is intended. See Idaho Code § 15-12-101 *et seq.*

(2) **Judicial speculation resulting in dubious legal instruments:** The "power of attorney" referenced in the Will explicitly gives the executor, Judd Lanham, "full control *now* and even after I am dead", transforming the Will document into a simultaneous power of attorney. However, the district court also deemed the "power of attorney" to be a "power of appointment" which, by its terms ("full control now") is effective immediately, notwithstanding its placement in Gordon Lanham's "last will and testament".

This judicial spin is problematic for three reasons:

(a) According to the Uniform Power of Attorney Act "UPAA") (I.C. § 15-12-110(1)(a)), and unlike testator Lanham's power of attorney, a power of attorney must "terminate" upon the death of the principal.

(b) The testator Lanham's testamentary "power of appointment", unlike its more conventional brethren, is purportedly effective immediately, not awaiting his death.

---

[3]In reference to Big Creek, the testator "wants to think about" it. Referencing certain personal property items, it is not clear whether the testator is identifying them as other's property or in terms of who the beneficiary should be.

(c) Thirdly, Idaho law precludes a court from speculation as to testamentary intent in order to avoid intestacy:

> However, in order to avoid intestacy, either partial or complete, the court is not permitted to place on the will any construction not expressed in it, and which is based upon the supposition as to the intention of the testator in the disposition of his estate

In re Corwin's Estate, 86 Idaho 1, 5, 383 P.2d 339 (1963)

In seeking to avoid intestacy, the district court has created, by judicial fiat, documents which, in the eyes of the law, do not exist: (a) a power of attorney which survives the death of the principal is not recognized by the UPAA; and (b) a testamentary power of appointment which is immediately operative and which immediacy contravenes the inherent nature of a will, i.e., a will and any powers of appointment included therein are merely aspirational until the testator's death.

(3) **Ambiguity and admissibility of extrinsic evidence:** When a will contains the following provisions and omissions, a fair argument exists that, at the very least, an ambiguity is created as to the existence, or not, of a power of appointment:

(a) The Will endows the personal representative with a "power of attorney" for present and post-death empowerment ("full control now and even after I am dead") without referencing the legal device commonly known as "power of appointment". The term "power of attorney" has statutory specificity, creating an issue whether a "power of appointment" has been created.

(b) The will identifies two pieces of real property without designating them as subject to a power of appointment or, in equivalent terms, as subject to distribution by the personal representative.

(c) As to one piece of property (Big Creek), the Will recites that the testator himself will

"administer '/2 to one person and ½ to another" (R. p. 16 Ex. A, Addendum A). However, no devise is made in the Will due to testator's uncertainty, i.e., "I want to think about, etc" (R. p. 16 Ex. A, Addendum A)

As the district court correctly observed, extrinsic evidence may be of service in clarifying testamentary ambiguities:

> If the language is ambiguous, interpretation of the will is a question of fact. The fact finder may resort to extrinsic evidence to resolve the ambiguity and find the intentions of the testator. *Matter of Estate of Berriochoa, 108* Idaho 474, 475, 700 P.2d 96, 97 (Ct. App. 1985).

R. p. 257

Symptomatic of the Will's ambiguity is the personal representative's motion for summary judgment which alleges, inconsistently, that the beneficiaries of the Estate are Lanham grandsons *and* whomsoever the personal representative distributes the property (R. p. 208). The Magistrate's Findings of Fact and Conclusions of Law fails to identify the Estate beneficiaries or recognize the personal representative's "power".

Extrinsic evidence contravenes the existence of a power of appointment:

The 120 acre ranch: The affidavit of the "executor" Judd Lanham (or "personal representative" as preferred by the Idaho Probate Code, I.C. § 15-3-101 *et seq),* provides insight into the intent of testator Lanham to which contravenes the existence of a "power of appointment". In short, he intended to dispose of the ranch by an inter-vivos transfer. That is, with respect to "the ranch with 120 acres" referenced the Will (R. p.16), Judd Lanham testified that the testator intended to and did deed the ranch to a relative prior to his death:

> After his experience with Thomas Everett, he wanted to be sure that he could live at the ranch for the rest of his life knowing that Joe and his

> wife would care for him and upon his death the ranch would be transferred, free and clear to his grandson, Joseph Lanham. A deed entitled Transfer on Death Deed was recorded to memorialize his intent, shortly before he passed away.

R. p. 218

The deed itself is part of this record. (R. p. 21).[4]

The 47 acres in Valley County: Again, according to the affidavit of Judd Lanham, the testator did not intend to give him, as executor, a power of appointment. Rather, according to Judd, testator Lanham's testamentary intent, which was made known on March 14, 2011, after the Will was executed (February 19, 2011) was to devise this property to certain named relatives.

> According to Track #9 (the entry dated March 19, 2011) of the CD previously submitted to the Court, Tom wanted the Big Creek property to be distributed as follows:
>
> "My plans are to leave that 27 acres, etc. [intention follows]
>
> I believe that this is a specific instruction.

R. p. 220 (bracketed material explanatory).

Based on the foregoing, testator Lanham's testamentary intent had not fully evolved at the time he executed the Will on February 11, 2011. Accordingly, and unfortunately, his ultimate testamentary intent remained unarticulated with respect to both real properties. Judd's affidavit also makes clear that, whatever "power" Judd was given by the Will, this power was not unrestricted and, in fact, Judd's decisions were informed exclusively by the testator's post-Will, pre-death instructions (R.p. 220).

Given the benefit of these extrinsic materials, the ambiguity created by reference to "power of

---

[4] However, as noted above, the ranch was retained in the estate inventory (R. p. 72) because the testator's retained fee simple interest in the property invalidated the deed. *Garrett v. Garrett,* 154 Idaho at 791.

attorney" is clarified, i.e., the Will fails to include the testator's intended disposition of the real property. The ranch property was to be disposed of by deed, and the Big Creek property was subject to testamentary plans, i.e, "my plans are to leave that 27 acres", which were never formalized as part of a will.

THE FAILURE TO TIMELY APPEAL THE MAGISTRATE DECISION PROXIMATELY RESULTED IN PLAINTIFF'S LOSS OF HIS STATUS AS AN INTESTATE HEIR.

Gist of alleged malpractice: The Lanham Will (R. p. 16 Ex. A, Addendum A) which lacked a residuary clause failed to devise two pieces of real property. Notwithstanding, the magistrate erroneously ruled that the Will bequeathed the testator's estate in its entirety. Defendant attorney appealed the magistrate decision but missed the appeal deadline by seven days. As a proximate result, plaintiff Thomas Lanham was prevented from reversing the magistrate decision by which reversal both plaintiffs would have acquired the status of intestate heirs to the decedent's real property.

According to the leading treatise on legal malpractice, attorney errors in post-judgment and appellate matters make up a substantial portion of malpractice suits filed.

> Attorneys frequently have been sued concerning posttrial procedures or appeals. . . The nature of alleged errors is as varied as the posttrial procedures available to the client. These include failing to make posttrial motions; improperly made posttrial motions; advising against taking an appeal; failing to advise of an appeal; failing to take preliminary steps necessary to appeal, such as moving for a new trial; *failing to file notice of appeal timely;* failing to file required records, transcripts, and factual statements necessary to perfect the appeal; and negligence in presenting the client's intentions.

Legal Malpractice, 2012 Edition (West), Mallen & Smith, Vol. 4, sec. 33:43, pp. 924, 925 {emphasis added), including seven pages of footnotes with citations.

In *Chicoine v. Bignall,122* Idaho 482, 835 P.2d 1293 (1992), the client stated a cause of action

against his attorney for filing an untimely motion for new trial.

Dismissed appeal and proximate causation: The Court of Appeals recently affirmed the district court's decision, sitting as an appellate court, that defendant Fleenor had failed to timely file an appeal from the magistrate decision. See *In the Matter of the Estate of Lanham,* ___ Idaho 369 P.3d 307 (App. 2016). That is, it is undisputed that defendant Fleenor filed an untimely notice of appeal. See Judgment (R. p. 48) and Notice of Appeal (R.p. 51). By the failed appeal, plaintiff lost his claim to being intestate beneficiary to the real property in the Lanham Estate (R. p. 75).

CONCLUSION

Proximate causation: From one standpoint, this action is a relatively straight-forward case of professional negligence, i.e., failure to file a timely notice of appeal. However, .imbedded in the negligence analysis is the question whether a timely appeal would have reversed the magistrate decision. The law is clear that, for two reasons, a timely appeal would have reversed the magistrate and the real property would have passed to the plaintiffs by intestate succession: (1) the Will did not devise the real property; and (2) there was no residuary clause i.e., "a testamentary clause that disposes of any estate property remaining after the satisfaction of specific bequests and devises.

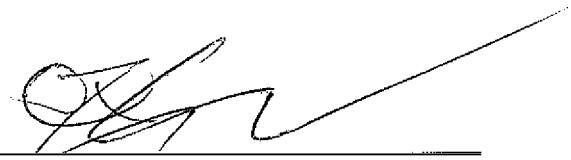
Where a claim is based upon a late notice of appeal, it is incumbent upon the trial court to opine whether or not the appeal would have been successful. In determining that the appeal would not have been successful, the district court erroneously concluded that the Will clothed the personal representative with a "power of appointment". The district court reached this conclusion by *inferring* a "power of appointment" from the *expressed* "power of attorney" which, in turn, cured the perceived intestacy. That is, according to the district court, the plaintiff/client did not have the status of an intestate heir from the get-go, rendering the untimely appeal moot.

The district court's conclusion that the Will included a power of appointment is erroneous for several reasons: (1) the plain language of the Will; (2) the untenable instruments created by treating the Will's power of attorney as including a power of appointment; (3) in the event ambiguity is perceived by the Will's reference to "power of attorney", the intent of the testator is clarified by extrinsic evidence, i.e, the affidavit of Judd Lanham which references an omitted devise and the reliance of the testator on an inter-vivo s conveyance which foundered due to a defective deed. That is, the testator was not, in fact, relying on a so-called "power of appointment"; rather, he was relying on a pre-death conveyance by a defective deed and a testamentary devise which he failed to make.

Finally, the district court improperly speculated that testator's reference in the Will to a "power of attorney" was intended to include a "power of appointment". Idaho common law makes it clear that, although the law disfavors intestacy, it is error for the court to engage in speculation in order to cure the intestacy.

The plaintiff/appellant (client) respectfully requests that the summary judgment be vacated and the matter remanded for a trial on the merits.

Submitted this 12th day of March, 2018.



Allen 13. Ellis
Attorney for plaintiff/appellant Thomas E. Lanham

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 12th day of March, 2018, I caused to be served two true and correct copies of the Appellant's Brief by the method indicated below, and addressed to the following:

Richard L. Stubbs
Carey Perkins, LLP
P.O. Box 519
Boise, Idaho 83701

_____ U.S. Mail, postage prepaid
X Hand delivery
_____ Overnight delivery
_____ Facsimile {345-8660)

Allen B. Ellis

ADDENDUM A

Last Will and Testament

My name is Gordon Thomas Lanham at 3555 Butte Road, Emmett, Idaho 83617. My birthday is 7/2$^{9}/_{1}$944. As of sound mind, I am recording my Last Will and Testament. This is November 16, 2010.

November 18, Thursday, 2010: 1 had a wife and two sons and grandsons and a couple of great grandsons and great granddaughters and I want to make this clear what I am going to do for my estate. I am going to make my friend and cousin Judd Max Lanham executor to my estate and give him Power of Attorney over all my personal and real property. I am also going to clear what I am going to leave my son Thomas Everett Lanham and Keith Colby Lanham and my grandchildren.

I have two sons, Thomas Everett Lanham and Keith Colby Lanham. I want to state in my Will what they receive. I have 6 living grandsons and two great grandchildren... one boy and one girl...Mason and MclCinley. I have a ranch with 120 acres. I have two separate deeds, I have $50,000 mortgage on the deed on the house and 34 acres to Linda Louise Andrews Lanham. I have some equipment, some personal items, some furniture and some personal effects according. I have a little bit of livestock, a horse and some cattle.

This is another day...it is November 19th and I want to state in here that the executor of my Will is Judd MaxLanham and I am giving his a`Power of Attorney for full control now and even after I am dead. I want him to be able to distribute my property and my personal effects in any way that he sees fit and I will try and put all the wording about the personal effects. I alto have a 47-acre of property in Big-Creek Idaho, Valley county and I will try to describe about how I want that admhilatered, etc. I am gonna stop now.

This is a new day. It's the 29Th November, 2010. Thanksgiving is over and I just wanted to add to this program that my son, Thomas Everett Lanham, 48 years old, has already been given all he needs to have and that I am going to leave $1 more dollar against whatever is legal to him and then he is going to be on his own. As far as my son, Keith Colby Lanham, he is currently in jail. I will have to work on what I am going to do with the police process of what he can own, etc. What comes under his record. Anyway, that is all for now and I will start again later.

It's a new day and it's snowing. It's December 2010. It's the first snow out back. I am not really looking forward to it...but anyway, I want to go on about my son, Keith Colby Lanham and his wife, Amy Lanham, that I am going to try to write it down or leave it in this recording that, what I leave them is going to be $1 because in my estate I don't want him to be able to sell and profit off of his alcoholism or drugs ever since his car wreck he has been on pain pills and ever since his son rode in the rodeos and got himself into a domestic violence case and went to prison, now his father is in the same way. Anyway, I will going on in the next session about my grandchildren, his children will not receive anything either. I am not trying to be mean but I am still trying to deal with all the drugs and alcohol. I have drunk for 45 years and I know that the effects of alcohol are mind altering and the way that they think now is not good. Anyway, I will go for another session tomorrow. It's is snowing out and it gonna be a beautiful winter and Christmas.

It's Thursday afternoon on the 9th December, 2010: All is well. I was just going to record in here that I need to do a lot of thinking about what I am going to do with my personal effects and property. I sold my steer and heifer at the sale and my grandson came down with tonsillitis so I am gonna have to baby sit him for a while it looks like. Anyway, I wanted to comment on all the furniture in this house. Some of it belongs to me and some of it belongs to Linda Louise Andrews Lanham. The old Pine couch and two chairs furniture, dresser with a mirror and a stand up dresser in the bedroom belongs to her and a corner cabinet belongs to her and an old antique rocking chair she got from Nebraska belongs to her. The rest of the furniture was given to me by my Mother and my Father and the corner cabinet in the foyer, this big room out here where the heating stove is belongs to Linda or her son Todd and my Mother gave me a lot of this stuff but I haven't decided where to disperse of it lately. The old antique coffee grinder, lamp and radio... it's an antique radio that belongs to Linda but the lamp belongs to me and my Locust coffee table came from Glenn's Ferry - King Hill, Idaho belongs to me. The rungs and all the antique Navajo Indian rugs belong to me and I am gonna try and disburse of some of those before my passing. But anyway this is another day and another time. Catch ya later...bye

Its Sunday Morning, 12th December, 2010: The neighbor just came over and put some wood in for me I the stove...its foggy and pretty cold up here. I don't know what it

is in the valley but...anyway, I wanted to add to the situation that a lot of the antiques that I have to be clarified as personal property and lots of them belonged to my...that my mother gave me, belonged to my sister Kathy and some of her family and she can disburse of them with help from my cousin Judd. The plates, the china plates, the coffee grinding machine, the tables and the sewing machines and the old antique kitchen stove and the old antique oak tables and etc., she can decide where she wants them to go or whatever. And I want...there is all kinds of books, etc. in the living room cabinet....some of those belong to Lizzy's mother and lots of them belonged to my Dad and they were all given to me as gifts and they can sort thru some of that stuff however they want. There is antique table and chairs, small set that was my Mother's. There is an antique rocker; I might have mentioned that, it belongs to Lizzy. There is an antique radio, And as far as my guns are concerned I am gonna have to try and decide on how that goes...there is a wooden bed in the big bedroom that my Dad had built at Cabin Creek, that belongs to my son, Keith. And the smaller one in the other bedroom belongs to my son, Tom, which my Dad built. Anyway, there is also some sand painting that belongs to Lizzy and I gotta $3,000 sheep head that Judd can hang up in his cabin if he wants to. And, there is all kinds of stuff that I'll discuss with him. But anyway, there is all kinds of stuff in my safe that will be his to disperse of how ever he wants. Catch ya later....bye.

Well, it's the shortest day of the year tomorrow...it snowed 5 or 6 inches the last couple of days. I haven't talked into this very much. I just been doing a lot of thinking and I want to think about that 47 acres in Big Creek, Idaho, Plot 35. I am going to administer ½ to one person and Y2 to another. I am going to go over this message about my stuff that is in this safe. There is a whole bunch of pictures in there of all this furniture and household goods for the insurance companies and taxes and etc. I have always paid up. I owe $1,500 on that Linda Louise Andrews mortgage for the year 2010. She is supposed to send me a receipt that it is paid up from 2006 thru 2010. When I get that I'll put that in the safe. There is some cashiers checks, cash, and coins, in that safe. And an antique gun that is worth a lot of money...a 40-60 Winchester and a brand new replica. There is a 308 lever action rifle. There will be a22 marlin lever action rifle. A 30-30, and old browning 5 shot automatic 12 gauge and there is about a $6,000 1933

browning over and under silver engraved with a 4 digit serial number 9929. Anyway, it's the 19th day of December 2010.

It's a New Year...this is January 7, 2011: My uncle John died Tuesday, my Dad has been dead for 30 years, Anyway, I just wanted to say that I got a receipt in the mail for paying all the money owed on my $50,000 mortgage thru 2010. It is now 2;00 Friday the 7th and I wanted to mention about my guns. I wanted to mention that they can be sold for enough money to pay part of the mortgage off and what have you. I have antique 6 or 8 thousand dollar 1933 browning double trigger, silver engraved, over and under with a 4 digit serial number. I also have an old 308 60 year old rifle with a scope. I have a antique 40-60 Winchester and a new replica copy. I have a browning 5 shut automatic that's a 1952 model. I have a 375 H and H magnum that belonged to my Father. I have a 30-30 rifle. I also have a 454 Rueger Kruse' pistol. I have a 22 magnum pistol. I have a 380 automatic pistol and I have a antique 40-60 Winchester that came from Vinegar Ridge in the back country off of Cabin Creek that could be worth as much as 8: or 10 thousand dollars.

(The above was transcribed on 1-19-11 by Rebecca Cliii.)

I want to state in here again that the executor of my Will is Judd Max Lanham and Iiun giving'hinla'PowcfbrAttornel'for full control now and even

after I am dead. I want him to be able to di 'tribute my property 4td lady peNonal as stated in my Last Will and Testament. 6— *ti,werl*

STATEMENT OF WITNESSES

I declare under penalty of perjury under the laws of Idaho that the person who signed or acknowledged this document is personally known to me (or proved to me on the basis of convincing evidence) to be the principal, that the principal signed or acknowledged this Last Will and Testament in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, that I am not the person appointed as executor by this document,.

Signature: Signature:

PrintingItige4/4i P ant Same:: WILLIAM A. WALLACE

Date: ~ rq-ii DateL 2-19-11

Address: i C 370

further declare under penalty of pe4iity.undertlie taws of Idaho that I am not related to the principal by blood, marriage, or adoption, and, to the best of my knowledge, I am not entitled to any part of the estate of:the principal upon the death of the principal under a will)" w existing or by operation of.law.

Signature: Signature:

State of Idaho)
) ss.
County of Ada)

On this L day of _____, 2011, before me personally appeared Gordon ThOmas Lanham to me known (or proved to me on basis of satisfactory evidence) to be the person whose name is subscribed to this instrument, and acknowledged that he/she executed it. I declare under penalty of perjury that the person who„ae.. a'rne is subscribed to this instrument appears to be of sound mind and under no diress aud or undue influence.

Notary Public for Idaho,
Residing in Eagle, Idaho
My Commission Expires: _____

REBECCA J. CLIFT
NOTARY PUBLIC
STATE OF IDAHO