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Lanham v. Fleenor Appellant's Reply 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 REPLY BRIEF

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

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Comes now plaintiff/appellant, through his attorney of record, and submits the herein Reply Brief:

WHILE SUBSTANTIALLY ACCURATE AS TO THE FACTS AND COURSE OF PROCEEDINGS, RESPONDENT'S BRIEF REQUIRES CERTAIN CLARIFICATION.

Statement of facts: Respondent Fleenor's "Statement of Facts" strays into areas relevant only to Mr. Fleenor's alleged negligence in filing a late appeal in the underlying probate matter. The issue of his negligence, or lack thereof, is not in play here.

The herein appeal is only focused on whether the magistrate correctly ruled that the Lanham Will disposed of the entirety of the decedent's estate and, accordingly, no intestate distribution was required. Respondent's Brief improperly injects into the factual picture Fleenor's assertion that the dilatory filing of the underlying appeal is the fault of appellant and intestate heir, Thomas Lanham.

> Due to concerns over cost, Thomas Lanham instructed Mr. Fleenor to wait while he decided whether he wanted to pursue an appeal and to only proceed if and when Thomas Lanham gave him approval. *Id.* After the deadline passed, Thomas Lanahm informed Mr. Fleenor that he wanted to proceed with the appeal.

Respondent's Brief, p. 12.

This so-called factual presentation has an argumentative style and seeks to minimize the importance of the herein appeal by implying an absence of professional negligence. That issue cannot be dealt with in this appeal.

Course of proceedings below: In his argument, defendant attorney asserts that the magistrate judge "found that the Lanham Will unambiguously created a power of appointment" (Respondent's Brief, p. 17). In fact, the term "power of appointment" was not referenced in the magistrate's summary judgment decision (R. pp. 43 - 47).

IDAHO CASE LAW RECOGNIZES THAT THE CLEAR INTENT OF A TESTATOR MAY BE FRUSTRATED BY A DRAFTING ERROR IN THE CREATION OF THE WILL.

Respondent attorney argues that probate courts must slavishly adhere to the expressed intent of the testator, apparently irrespective of a defect in the Will which, from a legal standpoint, frustrates such intent. Here the district court sought to avoid intestacy by his speculation that reference to a "power of attorney" actually created a power of appointment. In doing so, the district court improperly allowed the testator's intended disinheritance of the plaintiff to trump the common law.

The district court speculated that the testator's "power of attorney" was tantamount to a power of appointment, thereby avoiding intestacy. This conclusion is erroneous for three independent reasons:

(1) While construing a will so as to avoid intestacy is favored, judicial speculation to reach such result is not permitted. *In re Corwin's Estate,* 86 Idaho 1, 6, 383 P.2d 339 (1963). The district court, recognizing that the authorities are split, cited a case to the effect that a power of appointment can "never" be created by "implication", i.e., *Holzbach v. United Virginia Bank,* 210 S.E.2d 868, 870 (Va. 1975) (R. p. 256).

(2) Again, the district court itself concluded, quoting *In re Bayles' Estate,* 113 N.Y.S.2d 39 (1952), that, absent a residuary clause, disinheritance can only be effectuated by an actual devise of the subject asset to a named beneficiary, i.e., "mere words of disinheritance are insufficient".

> 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 effect such purpose.

Id 113 N.Y.S. at 40. (R. p. 255). Also see *In re Corwin's Estate,* 86 Idaho at 342.

(3) In the will drafting context, the Supreme Court has noted that, notwithstanding clear testamentary intent expressed in the document, attorney error can thwart that intent, causing the testamentary gift to fail:

> If, as a proximate result of the attorney's professional negligence, the testator's intent as expressed in the testamentary instruments is frustrated in whole or in part and the beneficiary's interest in the estate is either lost, diminished, or unrealized, the attorney would be liable to the beneficiary harmed . . .

Estate of Becker v. Callahan, 140 Idaho 522, 96 P.3d 623, 627, (2004), quoting *Harrigfeld v. Hancock,* 140 Idaho 134, 90 P.3d 884, 889 (2004).

Just as an attorney's drafting error can cause a testamentary gift to fail, a testator with a self-drafted will is vulnerable to error, resulting in his intentions being unmet, i.e., by the testator's inadvertence (or lack of legal training), requiring that his estate be distributed contrary to the provisions of the Will. As the district court observed in hypothetical fashion: "This would not be the first time that a person the testator sought to disinherit succeeded in obtaining some of the decedent's property" (R. p. 255).

AT THE VERY LEAST, IN GIVING HIS "EXECUTOR" A "POWER OF ATTORNEY" IN THE WILL, THE TESTATOR CREATED AN AMBIGUITY SUBJECT TO CLARIFICATION BY EXTRINSIC EVIDENCE.

The ambiguous Will: The district court has acknowledged that ambiguities in a Will are subject to clarification by resort to extrinsic evidence (R. p. 257). However, the district court ruled, "read in isolation", the reference to "power of attorney" is ambiguous, but "read as a whole" the ambiguity is clarified, and extrinsic evidence is not permitted *(Id).* Boiled down to its essence, the district court's reasoning is that an ambiguity is clarified when repeated. This conclusion is

appropriate *only* where disparate ambiguities complement and clarify one another. Repeated reference to "power of attorney for full control now" is not such clarification.

The district court does not explain the logic behind his reasoning. Nor does he explain how a power devised in a testamentary document can be characterized as a testamentary power of appointment when the Will purports to endow the Executor with *immediate* power, i.e., " power of attorney for full control now". That is, in the testamentary setting, a power of appointment is a prospective power not exercisable "now".

Unlike a power of appointment, a power of attorney does not contemplate that the grantor of the power, i.e., the principal, has ceded away his power of ownership. Rather, a power of attorney may be created merely to allow an agent to execute documents in transactions authorized by his principal. For example, in the case at bench, the executor Judd Lanham was taking *"instructions"* from the testator prior to the testator's death. By the power of attorney, Judd would be able to follow the testator's pre-death instructions by utilizing the power of attorney (R. pp. 216 - 221).

The Will is a riddle of ambiguities which can be resolved by resort to extrinsic evidence.

Resort to extrinsic evidence confirms that the testator failed to devise his real property. Plaintiff's opening brief (Appellant's Brief, pp. 17 -19) identifies the evidence which confirms that the testator *failed to devise and did not intend to devise* his real property either through a power of appointment or the Will itself. That evidence may be summarized as follows:

1. Will and inter-vivos deed: The Will does not devise the 120 acre ranch property, and the testator sought to convey it away by deed just prior to his death (R. p. 21),

2. Post-Will, pre-death instructions to Executor are not consistent with a power of appointment: As to the Valley County property ("Big Creek"), the Will recites that the testator

wanted to "think about" how to dispose of that property. (Addendum A, p. 3).

In his affidavit in the probate proceedings, the executor Judd Lanham testified that the testator (referred to as "Tom") gave him a "specific instruction" as to the distribution of the Big Creek property, i.e., how Torn "wanted" the property to be distributed (R. p. 220). These instructions were given a month after the Will was executed *(Id).*

Instructions from the testator may be consistent with the power of attorney held by Judd. However, under a testamentary power of appointment, the holder of the power exercises it in favor of whomsoever he chooses, unburdened by pre-death instructions from the testator. Whatever power was given Judd by the Will, it was not a power of appointment.

Black's Law Dictionary defines a "general power of appointment": "A power of appointment by which the donee can appoint — that is, dispose of the donor's property — in favor of anyone the donee chooses". *(Id.,* Seventh Edition, p. 1190). As Judd's affidavit reflects, he was given no discretion in the selection of beneficiaries of the so-called power of appointment.

BASED UPON THE ABOVE AUTHORITIES, THIS APPEAL HAS NOT BEEN BROUGHT FRIVOLOUSLY AND DEFENDANT IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES.

Notably, defendant, in Respondent's Brief, has failed to cite authorities which oppose plaintiff/client's authorities which require an intestate distribution when certain conditions exist, e.g., absence of a residuary clause and testamentary language of disinheritance but failure to devise the entire estate. Rather, defendant's argument consists solely of the sweeping statement that an intestate heir is entitled to nothing where the will seeks to disinherit him or her.

Plaintiff has a sound argument that treating the testator's reference to a "power of attorney" as including a power of appointment is impermissible judicial speculation. There is a second

argument that, a fortiori, requiring such speculation bespeaks an ambiguity which, in turn, permits clarification by resort to extrinsic evidence. The evidence in this case supports plaintiff's argument that a power of appointment was not intended.

In his argument for attorney fees, defendant's incorrectly observes that plaintiff's argument "has been rejected by two judges". First, the underlying magistrate opinion is devoid of legal analysis respecting the Will and its construction. His sole reference to the word "intent" was referenced only in the "Conclusions of Law". The "Findings of Fact", apparently drafted by the PR's attorney, contains no analysis of the testator's "intent" and fails to mention the word.

Secondly, the arguments advanced by the plaintiff in these appellate proceedings were not presented by defendant attorney to the underlying magistrate prior to his entry of the summary judgment.

CONCLUSION

Unrefuted points of law support plaintiff's status as an intestate heir entitled to any intestate portion of testator's estate: Respondent's Brief fails to challenge the following points of law which the district court recognized as valid;

(1) Plaintiff/client is an intestate heir under Idaho law (R. p. 254);

(2) The Will does not "dispose" of the estate real property *(Id.);*

(3) The Will does not contain a residuary clause *(Id.);*

(4) Where estate property is not devised in the Will and there is no residuary clause, the subject property passes by intestate succession *(Id.);* and

(5) A testator's intent to disinherit cannot, by itself, thwart the laws of intestacy where the Will fails to devise certain assets of the estate (R. p. 255).

Notwithstanding his concession to the above points of law, Respondent argues that, (1) because the Will is valid and (2) because the testator' s intention is clear, the testator was to receive nothing as an intestate heir. The appellate record is replete with cases wherein a drafting error in an otherwise valid will has frustrated clear testamentary intention, legal phenomena recognized by the district court (R. p. 255) and the Idaho Supreme Court.

The Will fails to convey a power of appointment as to the undevised real property: The Will conveys a power of attorney to Judd the Executor "for full control now and even after I am dead". The nature of the power conferred is merely a conventional power of attorney. This fact is corroborated by the Will itself which references "for full control now", not a feature of a testamentary power of appointment. Also, as to the Big Creek property, the Will itself recites that the testator wants to "think about" its disposition, confirming its exclusion as subject to a power of appointment.

Under the Uniform Power of Attorney Act (Idaho Code § 15-12-110(1)(a)), a power of attorney is terminated by the death of the principal. As noted by the district court, the authorities are split whether a power of appointment can be created by "implication" (R. p. 256, fn. 2). The testator's creation of a "power of attorney" (a legal term with a specific, freighted meaning) hijacks any notion that a power of appointment was intended.

Plaintiff/client Lanham acknowledges that the testator endowed the Executor with a "power of attorney "even after I am dead". However, as noted above (p. 6), the Executor treated this power of attorney as viable, intending to cleave to the testator's pre-death instructions on property disposition (R, p. 220). Apparently neither the testator nor his Executor were aware that a power of attorney does not survive the death of the principal. *Smith v. Treasure Valley Seed Co.,* 161

Idaho 107, 383 P.3d 1277, 1279 (2016). The real property (ranch and Big Creek property) were not conveyed away prior to the testator's death. See Estate Inventory (R. p. 74).

Alternatively, the Will can be viewed as ambiguous, and extrinsic evidence confirms that the real property was not subject to a power of appointment, Prior to his death, the testator attempted to convey the ranch property to a grandson (R. p. 21). This ineffective deed confirms that the ranch was not intended to be disposed of through a testamentary power of appointment. As to the Big Creek property, the affidavit of Judd Lanham describes his pre-death instructions from the testator as to its disposition. This testimony corroborates the language in the Will that, at the time of its execution, he needed to "think about" Big Creek.

Absent a frivolous appeal, the prevailing party in this matter is not entitled to an award of attorney fees: Defendant Fleenor sees Appellant's Brief as frivolously dismissive of the testator's intent and, at base, an example of inferior advocacy. In his analysis of things, Mr. Fleenor pays zero attention to the common law which, as in the circumstances presented here, consigns to the dustbin a portion of the testator's intent.

Notably, the Honorable Richard Greenwood recognizes inadvertent intestacy as a recurring anomaly in probate law: "This would not be the first time that a person the testator sought to disinherit succeeded in obtaining some of the decedent's property" (R. p. 255).

Plaintiff requests the Court to vacate the summary judgment and remand the matter for trial on the merits.

Submitted this 2n^{d} day of May, 2018.

Allen B. Ellis
Attorney for plaintiff/appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 2n[d] day of May, 2018, I caused to be served two true and correct copies of the Appellant's Reply Brief by the method indicated below, and addressed to the following:

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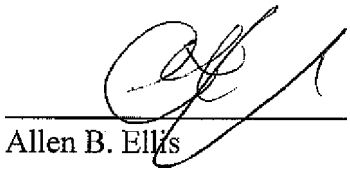

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