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

In the Matter of the Estate of	)	No. 63761-4-I
	)	(consolidated with
	)	No. 63762-2-I
WILLIAM ROSS TAYLOR,	)	No. 63763-1-I)
	)	
Deceased.	)	
	)	
	)	
In the Matter of the Estate of	)	No. 63462-3-I
	)	
	)	
WILLIAM ROSS TAYLOR,	)	UNPUBLISHED OPINION
	)	
Deceased.	)	FILED: December 20, 2010
	)	

Ellington, J. — William Ross Taylor died unexpectedly when his only child, A.C.T., was three years old. This appeal arises from two linked cases regarding disputes about William's assets: rulings in the probate, and rulings in an action filed by A.C.T.'s mother, Patricia Caiarelli, under the Trust and Estate Dispute Resolution Act, chapter 11.96A RCW (TEDRA).

In the probate, the trial court granted partial summary judgment in favor of William Taylor's brother, Charles Taylor, and his father, Reuben Taylor, regarding ownership of certain retirement accounts and life insurance benefits. Caiarelli and the Estate appeal. On this issue, we reverse and remand for trial.

In the TEDRA case, the court granted partial summary judgment in favor of

A.C.T's guardian ad litem regarding the ownership of one of William Taylor's retirement accounts. Charles Taylor appeals. Here we reverse and remand for entry of summary judgment in favor of Charles Taylor as a matter of law.

BACKGROUND

William Taylor married Patricia Caiarelli in November 2001. Their son, A.C.T., was born in May 2002. William[1] and Caiarelli separated in April 2003. A bitterly contested dissolution action followed. During this time, William was the subject of a guardianship proceeding initiated by his mother, Emily. The guardianship was resolved in the fall of 2003 by an agreed order requiring William to execute a power of attorney in favor of his father, Reuben, which William did in late 2003.

On March 2, 2004, while divorce proceedings were still underway, William executed a will prepared by his attorney, Craig Coombs. Coombs advised Taylor that the will was a stop-gap measure and that he needed to return after the dissolution was finalized to update it. William never did so.

In the will, William makes two small bequests to Stanford University and the University of Illinois, and gives the residue of the estate to his son:

> 2.3 Remainder of Estate. I give the rest, residue and remainder of my estate, including any real and personal property, to my son [A.C.T.].[2]

The will then lists specific assets to be distributed to a trust for A.C.T.:

> 2.5 The Trust shall consist of The Sablewood house located at 4711 117th Place N.E., Kirkland, WA, 98033-8749, or its proceeds after sale. In addition, the Trust shall include all my monies and properties of Tailorized Industries, Inc. and Tailorized Properties, LLC, and from my Charles Schwab accounts (Schwab IRA's, Schwab One, etc.), my Fidelity

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[1] We use the Taylor parties' first names for clarity. No disrespect is intended.

[2] Clerk's Papers (CP) at 422.

> accounts (401K, ESPP, etc.) and all other checking and savings accounts under my name.[3]

Paragraph 7.3 describes how to proceed if the dissolution action was still pending at the time of death:

> If Dissolution Action Pending At Time of My Death. In the event the dissolution action between Patricia J. Caiarelli and I has not been finalized at the time of my death, I specifically authorize and direct my Personal Representative and Trustee to retain my current dissolution attorney . . . or other appropriate attorney, at Estate or Trust expense, to represent my son [A.C.T.] and make sure all of my separate and community property is placed in a trust in his behalf until he reaches the age of twenty-five (25).[4]

William named his brother Charles to serve as his personal representative and trustee, with his father Reuben as an alternate.

The divorce was finalized in February 2005. Assets distributed to William included five Northwestern Mutual life insurance policies. These had been purchased by his father over many years, beginning when William was in third grade and continuing until he was 34 years old. The named beneficiaries on those policies were William's parents, Reuben and Emily. William was also awarded a Schwab IRA account he started in 1990.

After the divorce, William apparently continued to be fearful that his former wife would be able to access his financial assets. During the summer of 2005, William started working for a new company. In July, he made significant changes to two financial assets left to his son in his will: on July 5, 2005, he assigned to Reuben his Northwestern Mutual Life Insurance policies, which had a combined death benefit of

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[3] CP at 422.

[4] CP at 424.

$204,000; on July 22, he named Charles as primary beneficiary and Reuben as secondary beneficiary on a Fidelity rollover IRA valued at approximately $158,000. Then on July 25, William took out three AIG life insurance policies obtained through his new employer and designated Charles as primary beneficiary and Reuben as contingent beneficiary. These policies had a combined value of $692,000.

On September 11, 2005, less than two months after making these changes to his accounts, William drowned in a boating accident. His will was admitted to probate and Charles was appointed as personal representative. Charles identified the Schwab IRA, the Fidelity IRA, and one of the AIG life insurance policies as nonprobate assets.

In March 2006, Caiarelli brought a TEDRA action seeking an order declaring that A.C.T. was entitled to the proceeds of all probate and nonprobate assets identified in the will and owned by William at the time of his death. Caiarelli's attorneys withdrew, and a stipulation was entered in the probate and the TEDRA actions appointing attorney Bruce Moen as guardian ad litem (GAL) for A.C.T. The GAL filed a motion for partial summary judgment seeking to have A.C.T.'s trust declared the beneficiary of William's Schwab IRA. Charles opposed the motion. Both parties agreed there were no issues of material fact and that the determination was a matter of law. On November 19, 2008, the trial court granted the motion, ruling that the Schwab IRA should be distributed to Charles in his capacity as trustee of the testamentary trust for A.C.T.

On December 4, 2008, Caiarelli retained new counsel. On February 25, 2009, the trial court consolidated the probate and TEDRA actions and continued trial to April 20, 2009.

Caiarelli's new attorney then conducted discovery, which revealed extensive mishandling of the Estate by Charles. During the course of the probate, Charles and Reuben submitted personal claims against the Estate totaling approximately $260,000, which Charles accepted without court approval; the inventory submitted by Charles did not include several significant assets, including AIG life insurance policies, Northwestern life insurance policies, and two valuable cars; and Charles failed to provide an accounting during his three years as personal representative.

On March 4, 2009, the court removed Charles as personal representative and denied all Taylor family members the right to serve as alternate representatives, but refused to change the April 20, 2009 trial date. On March 9, 2009, the court appointed Michael Longyear as estate administrator.

On March 13, 2009, Charles filed two motions for summary judgment. Hearings were held on April 3, 2009 over Caiarelli's objection. On April 10, 2009, the court granted both motions and held that Reuben was the personal owner of the five Northwestern Mutual life insurance policies and Charles was the personal beneficiary of the AIG policies and the Fidelity account.

Caiarelli appeals these summary judgment orders, and Charles appeals the previous summary judgment order placing the Schwab IRA in A.C.T.'s trust. We apply the usual standard of review for summary judgment.[5]

[5] The standard of review on summary judgment is de novo, with the court engaging in the same inquiry as the trial court. TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc., 134 Wn. App. 819, 825, 142 P.3d 209 (2006). Summary judgment is proper if the pleadings, affidavits, depositions, and admissions on file demonstrate that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c).

DISCUSSION

Summary Judgment—Schwab IRA

William's Schwab IRA named his brother Charles and his sister Betsy as beneficiaries. In his will, however, William specified that the Schwab IRA should pass to the trust for his son created by the will.

The will does not automatically operate to transfer the IRA to the trust because the nonprobate assets statute does not apply. RCW 11.11.020(1) provides that "[s]ubject to community property rights, upon the death of an owner the owner's interest in any nonprobate asset specifically referred to in the owner's will belongs to the testamentary beneficiary named to receive the nonprobate asset, notwithstanding the rights of any beneficiary designated before the date of the will." Under RCW 11.11.010(7)(a)(iv), however, IRAs are excluded from the definition of nonprobate assets. Caiarelli therefore relies upon equitable doctrines.

"Washington permits courts, acting in equity, to enforce attempted changes in beneficiaries."[6] Thus, the issue is whether William's attempt to change the beneficiary of the Schwab IRA from his brother and sister to his son can be given effect. The rule requires that there be an attempt to make the change:

> "The general rule in this jurisdiction and elsewhere as to attempted changes of beneficiaries on an insurance policy is that courts of equity will give effect to the intention of the insured *when the insured has substantially complied with the provisions of the policy regarding that change*."[7]

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[6] In re Estate of Freeberg, 130 Wn. App. 202, 205, 122 P.3d 741 (2005).

[7] Id. (emphasis added) (quoting Allen v. Abramson, 12 Wn. App. 103, 105, 529 P.2d 469 (1974)).

"Substantial compliance requires that the insured has manifested an intent to change beneficiaries and done everything reasonably possible to make that change."[8] This rule applies to IRAs.

Several cases inform our analysis. In Estate of Freeberg, the unmarried decedent named his children as beneficiaries of his IRA.[9] He subsequently remarried and sought to change the beneficiary of the IRA from his children to his wife. Freeberg personally went to the Edward Jones office and directed that his wife be designated as beneficiary on all his accounts, including the IRA. After Freeberg died, his widow discovered the change had never been made. An Edward Jones employee did not know that this happened, but remembered that Freeberg intended to designate his wife as beneficiary. This court affirmed the trial court's determination that Freeberg's wife was entitled to the IRA proceeds because he had done everything reasonably possible to change the beneficiary.[10]

In Allen v. Abramson, the decedent purchased life insurance and named his girlfriend as beneficiary.[11] The insurance contract required the insured to submit a written request to change beneficiaries. He later delivered the insurance certificates to his parents and told them he was going to change the beneficiary designation to them. He died six weeks later without having tendered a written request to change beneficiaries or having contacted the insurance company or his employer about making a change. The court rejected the parents' claim, stating that Allen "never even

[8] Id. at 205–06.

[9] Id. at 204.

[10] Id. at 207.

[11] 12 Wn. App. at 104.

attempted to comply with the policy requirement of written notification."[12]

In Rice v. Life Insurance Company of North America, the decedent owned a life insurance policy naming his mother, brother, and sister as beneficiaries.[13] He later submitted a form supplied by his employer entitled "Request for Voluntary Accident Insurance" in which he named his fiancée as beneficiary. He died three days later. The court held that the evidence, including the form and the fiancée's testimony, clearly established the decedent's intent to make her the beneficiary.[14]

In Sun Life Assurance Company v. Sutter, the decedent sent an unsigned letter to the insurance company requesting a change of beneficiary. The insurance company sent him the required forms to effect a change in beneficiary.[15] He died without submitting the forms. The court held the decedent's letter constituted sufficient evidence of intent to change beneficiaries.

Charles argues William's actions do not meet the test for substantial compliance because he took no steps to comply with the account requirements for a change of beneficiary. The IRA application stated that a change in beneficiary must be tendered to Schwab in writing. The only action William took to effect a change in beneficiaries was his 2004 will. In 2005, he contacted Schwab to confirm his beneficiary designations, and would presumably have known that he had made no change of beneficiary. Several weeks before he died, he contacted Schwab with investment instructions related to his account. Yet there is no evidence that he attempted to obtain

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[12] Id. at 108.

[13] 25 Wn. App. 479, 480, 609 P.2d 1387 (1980).

[14] Id. at 481.

[15] 1 Wn.2d 285, 289, 95 P.2d 1014 (1939).

a change of beneficiary form or even sent a copy of his will to Schwab.

Caiarelli and the personal representative contend that just as in Freeberg, Sun Life, and Rice, William memorialized his intent to change beneficiaries in writing, specifically through his will. They argue that Allen is distinguishable because there, the decedent made no written statement of his intent to change beneficiaries.

There certainly is strong evidence of William's intent to leave the Schwab IRA to his son. In addition to the will itself, his attorney testified that William loved his son but disliked his ex-wife and was anxious to make sure she did not get anything. The will indicates his intent to leave all his assets to his son. It appears likely that William believed his will would accomplish this goal, and that he trusted his brother and father to ensure his intent was carried out. Unfortunately, in the absence of an actual effort to change the named beneficiary on the IRA, the will alone does not meet the substantial compliance test.

Caiarelli further argues that William's will meets the substantial compliance test because Schwab failed to provide an adequate procedure for changing beneficiary designations. She also argues for the first time on appeal that William might not have read or understood the terms of the agreement because the Schwab application form presented the beneficiary designation requirements in fine print. She acknowledges that William signed a beneficiary statement providing that any change or revocation in the beneficiary designation "must be tendered in writing as specified in the Disclosure Statement."[16] However, because the Taylors failed to produce the disclosure statement, Caiarelli contends that William should not be subject to this requirement.

[16] Resp't Caiarelli's Response Br. at 10.

These arguments are unpersuasive. William signed the beneficiary statement, the change of beneficiary procedure was not unclear or misleading, and we must assume that he read and understood it.

Although it does not change the result, we note that Jack Borland, who represented the Estate in the TEDRA action, simultaneously represented Charles and Reuben in their personal capacities and argued *against* the interests of the Estate. This clear conflict of interest is especially problematic in light of the fact that Charles was not

acting properly in the interest of the Estate and was later removed as personal representative. But given that A.C.T. prevailed on the only summary judgment motion in which this conflict was present, there appears to have been no prejudice to the Estate resulting from the conflict.

We reverse the order awarding the IRA to Charles as trustee for A.C.T., and remand for an order awarding the IRA to Charles in his personal capacity.

Summary Judgment——Life Insurance Policies and Fidelity IRA

Caiarelli and the personal representative argue that the trial court erred in granting Charles and Reuben partial summary judgment and ruling that (a) Reuben was the beneficiary of the Northwestern Mutual life insurance policies and (b) Charles was the beneficiary of the AIG life insurance policies and the Fidelity Rollover IRA.

Substantively, the issue here is similar to that discussed above regarding the Schwab IRA, with one significant difference. With the Schwab IRA, there was no attempt to change beneficiary status to conform to the will. In contrast, William made his father the beneficiary of the Northwestern policies and his brother the beneficiary of the AIG policies and the Fidelity IRA after his will was executed. Under RCW 11.11.020(4), "[i]f the owner designates a beneficiary for a nonprobate asset after the date of the will, the specific provisions in the will that attempt to control the disposition of that asset do not govern the disposition of that nonprobate asset, even if the subsequent beneficiary designation is later revoked."

Therefore, Caiarelli does not argue that William's will amounts to substantial compliance with the procedures for changing beneficiaries. Rather, she notes that there is a conflict between the names he placed on the change of beneficiary forms and

his words and actions indicating his intent to provide for his son. According to Caiarelli, it is unclear whether William intended for Charles to be the beneficiary in his personal capacity or as trustee for A.C.T. Thus, she argues that summary judgment was improper because there is a material issue of fact regarding William's intent in designating his brother as beneficiary. Similarly, Caiarelli argues that there is a material issue of fact regarding William's intent in transferring his Northwestern life insurance policies to his father, given that his words and actions indicated his true intent to provide for his son. She also contends there is an issue of fact regarding whether the beneficiary designations were validly made by William.

We agree. A jury could conclude that William intended to leave these assets to his son by entrusting them to his father and brother in a representative capacity.

Further, the trial court's disposition of these summary judgment motions, which were heard several months after the motion concerning the Schwab IRA, suffers from serious procedural irregularities.

First, and most significantly, the trial court allowed the Taylors to file preemptive summary judgment motions during a time when the Estate was not represented. Charles was removed as personal representative on March 5, 2009. The motions were filed on March 13 and Michael Longyear was not appointed until March 27— after the Estate's responses were due.

Allowing litigation to proceed while the Estate had no representative was highly prejudicial. The personal representative is an interested party under TEDRA.[17] Prior to final distribution, the personal representative has an affirmative statutory duty to locate

[17] RCW 11.96A.110(5), (6).

and protect the assets of the estate.[18] Thus, the personal representative is obligated to become involved in litigation when necessary to carry out these duties. Here, although the new personal representative's appointment became effective before the court ruled on the motions, the Estate was not properly served with the motions and was deprived of notice and a full opportunity to be heard. Longyear's appointment as personal representative became effective only seven days before the hearing and only 14 days before the court ruled on the motions.[19]

Second, the trial court considered and granted Reuben's motion for summary judgment with respect to the Northwestern Mutual life insurance policies even though Reuben was not yet a party in the TEDRA action. CR 24 requires that a prospective intervenor file a motion to intervene before becoming a party to the proceedings. A nonparty has no standing to seek relief before intervention is granted.[20] Although Reuben was eventually added as a party by stipulation of the parties, this occurred after the trial court heard the summary judgment motion. Further, the motion was premature. The TEDRA petition did not lay claim to the Northwestern policies, and the parties had not yet directed discovery toward the question of whether they were estate assets.

Third, the trial court scheduled the summary judgment hearing only 20 days after the motion was filed. CR 56(c) provides that a motion for summary judgment must be

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[18] RCW 11.48.010.

[19] According to the Estate's brief, the new personal representative did not even have access to the Estate's files until nearly two weeks after the hearing.

[20] See River Park Square, LLC v. Miggins, 143 Wn.2d 68, 80, 17 P.3d 1178 (2001) (holding that nonparty lacked standing to move for change of judge).

served and filed "not later than 28 days before the calendar hearing." Charles filed his motion on March 13, 2009, noting a hearing date of April 10, 2009. Due to vacation scheduling, the trial court moved the hearing to April 3, 2009, which was only 20 days after the motion was filed.

A trial court may shorten the 28-day period for a summary judgment motion as long as there is ample notice and time to prepare.[21] Its decision is reviewed for manifest abuse of discretion.[22] The opposing party must demonstrate prejudice by showing "a lack of actual notice, a lack of time to prepare for the motion, and no opportunity to submit case authority or provide countervailing oral argument."[23] Although Caiarelli had an opportunity to submit authority and present arguments, the Estate did not. The shortened time schedule simply added to the other procedural irregularities.[24]

We reverse the orders awarding the Northwestern Mutual life insurance policies to Reuben and the AIG insurance policy and Fidelity IRA to Charles, and remand for trial.

Attorney Fees and Costs

Both the personal representative of the Estate and Charles and Reuben Taylor

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[21] State ex rel. Citizens Against Tolls v. Murphy, 151 Wn.2d 226, 236, 88 P.3d 375 (2004).

[22] Id.

[23] Id. at 236–37.

[24] Caiarelli, who obtained a 90-day continuance after retaining new counsel on December 6, 2008, argues that the trial court should have granted a longer continuance to allow new counsel to investigate numerous oversights and irregularities discovered during that 90-day period. Caiarelli did not, however, seek another continuance when this need became apparent. Nevertheless, it appears that neither Caiarelli nor the Estate had adequate time to prepare.

request fees and costs for expenses incurred on appeal pursuant to RCW 11.96A.150 and RAP 18.1(a). RAP 18.1(a) permits fees on appeal "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses on review." RCW 11.96A.150 provides that the court "may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to [the personal representative]." We decline to award fees and costs at this stage, and leave to the trial court on remand whether to award costs or fees in this appeal.

Ellington, J.

WE CONCUR:

Cox, J.

Becker, J.