

February 6, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Estate of

ANNE M. HEINZINGER,

Deceased

CATHERINE BLOOM, MARGARET
HEINZINGER,

Respondents,

v.

JOHN CHARLES HEINZINGER and
KELLEY HEINZINGER,

Appellants,

NICKLAUS C. HEINZINGER,

Defendant.

No. 49771-9-II

UNPUBLISHED OPINION

SUTTON, J. — John Heinzinger and Kelley Heinzinger appeal the superior court’s order granting John’s¹ sisters’ motion for summary judgment on their Trust and Estate Dispute Resolution Act (TEDRA), ch. 11.96A RCW, petition regarding their mother’s estate. John argues that the superior court erred by (1) deciding his sisters’ motion for summary judgment because he

¹ We refer to the parties by their first names for clarity. We intend no disrespect.

had invoked mandatory arbitration under TEDRA; (2) granting the summary judgment motion because there are genuine issues of material fact related to his alleged defenses of unclean hands, laches, ratification, and waiver; and (3) denying his motion to disqualify his sisters' attorney. We hold that the superior court (1) did not err by deciding the motion for summary judgment, (2) did not err by granting the motion for summary judgment, and (3) did not err by denying John's motion to disqualify his sisters' attorney. Accordingly, we affirm.

FACTS

In 1993, Anne and Lee Heinzinger executed mutual wills. The mutual wills provided that upon the death of the first spouse, the deceased's estate would be placed in a credit trust for the benefit of the surviving spouse. Upon the death of the second spouse, the estate would be divided equally between the couple's three children: John, Catherine Bloom, and Margaret Heinzinger. Anne designated Lee as the sole executor of her estate. However, if Lee predeceased her, Anne designated her children as co-executors of her estate.

In 1995, Lee died. Anne admitted Lee's will to probate and Lee's estate was distributed consistently with the terms of the 1993 mutual will. Lee's estate included a piece of property located at 81 Heinzinger Road.

In 2001, Anne created the "Heinzinger Road Trust" (Trust). Anne deeded the 81 Heinzinger Road property to the Trust and named John's son, Nicklaus Heinzinger, as the beneficiary of the Trust. In the original Trust, Margaret was named the life beneficiary of the Trust. Margaret was also named the successor trustee to be appointed after Anne's death. In 2006, Anne amended the Trust. The 2006 amendment to the Trust designated John as both the life beneficiary and the successor trustee of the Trust.

Anne died in 2013. The siblings disputed who should be appointed as personal representative of Anne's estate. Margaret and Catherine wanted Catherine to be appointed sole personal representative of the estate, but John disagreed and argued that all three siblings should be appointed as co-personal representatives of the estate. During this time, John was represented by his attorney, Mario Bianchi, and Catherine was represented by her own attorney, Suzanne Howle. Eventually, the siblings agreed to submit Anne's 1993 mutual will to probate with all three siblings appointed as co-personal representatives.

Margaret and Catherine retained Ted Knauss to prepare the documents and to submit Anne's will to probate. The will was submitted to probate in Jefferson County on March 28, 2014. All three siblings were named co-personal representatives of the estate.

On October 1, Margaret and Catherine, through attorney Knauss, filed a TEDRA petition against John as the trustee of the Trust. The petition stated that the Trust must be reformed to comport with the terms of Anne's and Lee's mutual wills. The petition requested that the Trust be reformed to name Catherine, Margaret, and John as co-trustees with the direction to distribute the property in the Trust equally between the three siblings consistent with the terms of the mutual wills. The TEDRA petition was consolidated with the probate of Anne's will. John, represented by attorney Bianchi, responded to the petition alleging the affirmative defenses of unclean hands, laches, ratification, and waiver.²

² John also asserted estoppel, assumption of risk, and statute of limitations; however, John appears to have abandoned these claims on appeal.

A. MEDIATION AND ARBITRATION

The parties agreed to mediation under TEDRA. However, the mediation was unsuccessful. On March 17, 2015, John submitted a demand for arbitration under TEDRA. On April 6, Margaret and Catherine responded with their proposed list of arbitrators. The parties did not agree to an arbitrator and neither party filed a petition with the court to appoint an arbitrator under the TEDRA provision in RCW 11.96A.310.

On November 16, Margaret and Catherine filed a motion for summary judgment. John filed a motion to strike the motion for summary judgment and filed a petition for appointment of an arbitrator under TEDRA provision RCW 11.96A.310. A superior court commissioner granted the motion to strike because the motion for summary judgment was untimely, but the commissioner ruled that the motion for summary judgment could be refiled.

John then filed a motion to revise the commissioner's ruling arguing that summary judgment was inappropriate because arbitration had been invoked under TEDRA. The superior court concluded that TEDRA allowed it to decide a motion for summary judgment at any time, even after arbitration had been commenced under TEDRA. Accordingly, the superior court denied John's motion to revise.

B. SUMMARY JUDGMENT

In his response to summary judgment, John argued that there were genuine issues of material fact as to his defenses. He asserted that Margaret went with her mother to the attorney who established the Trust. John also presented the early versions of the Trust which designated Margaret as the trustee and life beneficiary of the Trust. He also asserted that Margaret told Catherine about the creation of the Trust in 2004.

Margaret filed her own declaration refuting John's allegations. Margaret agreed that she drove her mother to the office of the attorney who created the Trust. However, Margaret also declared that she did not know the attorney nor did she have any involvement in the decision to create the Trust. Margaret also stated that Anne never shared any of her legal plans with her. Margaret also never saw a copy of the Trust. She also denied telling Catherine about the existence or terms of the Trust.

The superior court concluded that the creation of the Trust conflicted with the terms of Anne's 1993 mutual will, and thus the Trust was invalid. The superior court granted Margaret and Catherine's motion for summary judgment. The superior court ordered that the property titled in the Trust be returned to Anne's estate and distributed under the terms of Anne's 1993 mutual will.

C. MOTION TO DISQUALIFY

John also filed a motion to disqualify Margaret and Catherine's attorney, Knauss, based on an alleged conflict of interest. In support of his motion, John filed a declaration in which he alleged that he believed that Knauss was representing him, along with his sisters, in the probate of Anne's will. John stated that he believed that Knauss had been retained as the attorney for all the siblings, representing them as the co-personal representatives of Anne's estate for the probate of Anne's will. He also stated that he had a phone conversation with Knauss in which Knauss assured John that he would keep John informed of all the proceedings related to the probate of Anne's will.

Knauss filed a declaration in response to John's motion to disqualify. Knauss stated that he was retained to represent Margaret and Catherine and never intended to represent John. Knauss also stated that he believed John was represented by attorney Bianchi in all matters. Knauss agreed that he had a single conversation with John after he began representing Margaret and Catherine in

the probate of Anne's estate. He stated that during the phone conversation, he told John that John would receive any documents filed during the probate of Anne's estate but he did not tell John that he was representing him.

The superior court found that John had not presented any credible evidence supporting his assertion that he believed Knauss was representing him. The superior court found that Knauss's declaration was credible. Based on Knauss's declaration, the superior court found that no attorney-client relationship existed between John and Knauss. Because there was no attorney-client relationship, the superior court concluded that there was no conflict of interest and denied John's motion to disqualify.

John appeals the superior court's order granting Margaret and Catherine's motion for summary judgment and the superior court's order denying his motion to disqualify.

ANALYSIS

I. SUMMARY JUDGMENT DURING TEDRA ARBITRATION

John argues that the superior court erred by deciding the sisters' motion for summary judgment because the parties had commenced TEDRA arbitration at the time of the summary judgment motion. Specifically, John argues that RCW 11.96A.280 prohibits summary judgment while TEDRA arbitration is pending. However, both RCW 11.96A.100 and the Mandatory Arbitration Rules (MAR) provide the superior court with the authority to decide motions for summary judgment at any time under TEDRA, including after arbitration under TEDRA has been commenced. Accordingly, the superior court did not err by deciding the sisters' motion for summary judgment.

A. LEGAL PRINCIPLES

Statutory interpretation is a question of law, which we review de novo. *In re Estate of Jones*, 152 Wn.2d 1, 8-9, 93 P.3d 147 (2004). When interpreting statutes, we determine and give effect to the legislature’s intent. *In re Estate of Mower*, 193 Wn. App. 706, 713, 374 P.3d 180, review denied, 186 Wn.2d 1031 (2016). We first look to the plain language of the statute. *Mower*, 193 Wn. App. at 713. When the plain language of the statute is unambiguous, we apply that plain meaning. *In re Estate of Burton*, 189 Wn. App. 630, 635, 358 P.3d 1222 (2015). We assess the plain meaning of the statute within the context of the statute and related provisions. *Mower*, 193 Wn. App. at 713. In cases of statutory inconsistencies, the later and more specific statute controls over the earlier and more general one. *Anderson v. Dussault*, 181 Wn.2d 360, 371, 333 P.3d 395 (2014).

RCW 11.96A.280 provides that when a TEDRA action is submitted to arbitration under RCW 11.96A.260-.320, that “judicial resolution of the matter . . . is available only by complying with the . . . arbitration provisions” of those statutes. However, RCW 11.96A.100(9) states, “Any party may move the court for an order relating to a procedural matter, including . . . summary judgment, in the original petition, answer, response, or reply, or in a separate motion, or at any other time.”

Under RCW 11.96A.310(5)(a), the MARs apply to all arbitrations under TEDRA. MAR 1.3(a) states,

A case filed in the superior court remains under the jurisdiction of the superior court in all stages of the proceeding, including arbitration. Except for the authority expressly given to the arbitrator by these rules, all issues shall be determined by the court.

MAR 3.2(b)(1) provides that the superior court shall decide motions for summary judgment.

B. SUPERIOR COURT HAD THE AUTHORITY TO DECIDE THE MOTION FOR SUMMARY JUDGMENT

John argues that the plain language of RCW 11.96A.280 prohibits the superior court from deciding a motion for summary judgment after the parties have commenced arbitration under TEDRA. However, when RCW 11.96A.280 is read within the context of all the other relevant statutes, John's argument fails.

RCW 11.96A.100's plain language states that a party may move for summary judgment at any time. And there is no conflict between RCW 11.96A.100 and RCW 11.96A.280 because the MARs also provide for the superior court to decide motions for summary judgment while arbitration is pending. Because the MARs reserve the authority to decide summary judgment motions to the superior court and explicitly state that the superior court retains jurisdiction while arbitration is pending, the MARs allow the superior court to decide summary judgment motions even while arbitration is pending under TEDRA. And because arbitration under TEDRA is governed by the MARs, the superior court may decide summary judgment motions after arbitration is commenced under TEDRA.

Because TEDRA and the MARs provide authority for the superior court to decide motions for summary judgment at any time, the superior court did not err by deciding the motion for summary judgment even after arbitration had commenced.

II. SUMMARY JUDGMENT DEFENSES

John argues that the superior court erred by granting Margaret and Catherine's motion for summary judgment because there were genuine issues of material fact as to the following defenses: (1) unclean hands, (2) laches, (3) ratification, and (4) waiver. The superior court properly concluded that Lee's and Anne's mutual wills governed the distribution of the property at 81

Heinzinger Road and the Trust violated the terms of the mutual wills. And John's affirmative defenses do not defeat summary judgment. Accordingly, we affirm the superior court's order granting Margaret and Catherine's motion for summary judgment.

Mutual wills reflect an agreement by the testators as to how their estates are to be distributed after both have died. *Newell v. Ayers*, 23 Wn. App. 767, 769, 598 P.2d 3 (1979). When a party takes under a mutual will, that party becomes bound by the terms of the agreement made in the mutual will. *Tacoma Sav. & Loan Ass'n v. Nadham*, 14 Wn.2d 576, 596-97, 128 P.2d 982 (1942). Because Anne took Lee's estate under the mutual wills, she was bound by the mutual wills' terms to distribute the entire estate equally between their surviving children. The Trust violated the mutual wills' terms by distributing estate property to Nicklaus rather than Margaret, Catherine, and John. John concedes that the Trust violates the mutual wills. Therefore, the Trust was invalid and the superior court properly granted summary judgment.

John asserts that his alleged affirmative defenses defeat summary judgment. But John has not provided any authority to support the proposition that the affirmative defenses he raises can bar an action to enforce a mutual will. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none."). Therefore, we are not persuaded to reverse the superior court's otherwise proper order granting the sisters' motion for summary judgment.

Even if we accepted John's proposition that affirmative defenses could bar the enforcement of mutual wills, the affirmative defenses that he raises in this case are legally inapplicable. John argues that the equitable doctrines of unclean hands and laches apply. However, it is unclear how,

even if Margaret has come before the court with unclean hands, Catherine would be barred from bringing the action or that Margaret's or Catherine's prior knowledge of the Trust would prevent Anne's estate from enforcing the terms of her mutual will.

Moreover, John has not established the elements of either unclean hands or laches. "It is well settled that a party with unclean hands cannot recover in equity." *Miller v. Paul M. Wolff Co.*, 178 Wn. App. 957, 965, 316 P.3d 1113 (2014). Here, John's alleged facts about Margaret's involvement in the creation of the Trust do not rise to the level of unclean hands.

Laches is considered an implied waiver resulting from knowledge of conditions and acquiescing to them. *Lopp v. Peninsula Sch. Dist. No. 401*, 90 Wn.2d 754, 759, 585 P.2d 801 (1978). The elements of laches are (1) knowledge or reasonable opportunity to discover the cause of action, (2) an unreasonable delay in commencing the cause of action, and (3) damage resulting from the unreasonable delay. *Lopp*, 90 Wn.2d at 759. John alleges that the sisters both knew about the creation of the Trust by 2004 and could have brought an action to invalidate the Trust at any time. However, John has not alleged any facts that establish damages as a result of the failure to bring an action to invalidate the Trust earlier. Therefore, John's alleged facts do not establish laches.

John also claims that the contract defenses of waiver and ratification apply. However, the contract formed under mutual wills is between the creators of the mutual wills—in this case, Lee and Anne. The only person who could ratify or waive a challenge to the change to the distribution of Anne's estate contrary to the terms of the mutual wills was Lee, and Lee was deceased. Therefore, no contract-based defenses can be asserted against Margaret and Catherine.

III. MOTION TO DISQUALIFY ATTORNEY

Finally, John argues that the superior court abused its discretion by denying his motion to disqualify the sisters' attorney for a conflict of interest. We disagree with John and hold that the superior court did not err in denying John's motion to disqualify counsel.

We review the superior court's decision on a motion to disqualify counsel for an abuse of discretion. *See Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co.*, 124 Wn.2d 789, 811-12, 881 P.2d 1020 (1994). A superior court abuses its discretion when its decision is based on untenable grounds or reasons. *Union Bank, N.A. v. Vanderhoek Assocs., LLC*, 191 Wn. App. 836, 842, 365 P.3d 223 (2015).

John argues that the superior court erred by denying the motion to disqualify counsel because there was a current conflict of interest based on the alleged attorney-client relationship between the sisters' attorney and John as co-personal representative of Anne's estate. Whether an attorney-client relationship exists is a question of fact. *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). We review a superior court's findings of fact to determine whether they are supported by substantial evidence. *In re Estate of Miller*, 134 Wn. App. 885, 890, 143 P.3d 315 (2006). We do not review the superior court's credibility determinations. *Kim v. Lakeside Adult Family Home*, 185 Wn.2d 532, 551, 374 P.3d 121 (2016).

Here, the superior court found that attorney Knauss's declaration was credible. Knauss's declaration provides substantial evidence for the superior court's finding that there was no attorney-client relationship between John and Knauss because Knauss stated that he never agreed to represent John, and Knauss never made any assurances to John that Knauss was representing John's interests. Therefore, the superior court did not abuse its discretion by denying John's

motion to disqualify Knauss. Accordingly, we affirm the superior court's order denying John's motion to disqualify Knauss.

IV. ATTORNEY FEES AND COSTS ON APPEAL

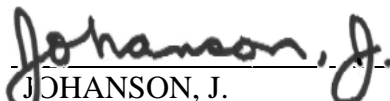
Margaret and Catherine request that we award them attorney fees and costs on appeal under RAP 18.1 and RCW 11.96A.150. Under RCW 11.96A.150, we may order costs, including reasonable attorney fees, as we determine to be equitable. Under RAP 18.1 and RCW 11.96A.150, we award reasonable attorney fees and costs to Margaret and Catherine in an amount to be determined by a commissioner of this court.

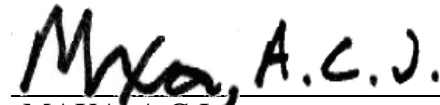
We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


SUTTON, J.

We concur:


JOHANSON, J.


MAXA, A.C.J.