DISCERNING INTENT: FOUR RECENT CASES

By Judge Robert A. Lewis

I. Introduction

In order to resolve issues of interpretation of estate planning documents, the courts are often asked to determine the intent of the testator or trustor. "A court's paramount duty in construing a testamentary instrument is to give effect to the maker's intent." *Estate of Bernard*, 182 Wn. App. 692, 697 (2014). In four recent cases, appellate courts have dealt with intent in a variety of contexts – trusts, wills, amendments and codicils,TEDRA agreements and oral contracts and constructive trusts.

These materials summarize the cases and make some general observations about common techniques courts use in discerning and giving effect to intent. The focus is not on the rules of construction, which are laid out in some detail in the cases. Instead, I hope to suggest a few broader trends in the decisions and the role of the attorney in embracing (or avoiding) these trends.

II. The Cases

CASE NO. 1: Estate of Wimberley, 186 Wn. App. 475 (Div III, Jan. 2015):

Facts: The estate planning journey of CW and Margaret Wimberley cannot be easily summarized:

1967 – Standard community property agreement

1999 – Wimberley Family Trust (prepared by unidentified Estate Planning Attorney #1)

- CW and Margaret joint trustees.
- Fully revocable while both alive.
- Upon first death, survivor is sole trustee and must divide the trust into ABC trusts:

    a. Survivor's trust A (survivor's ½ interest):
    This trust is still fully revocable until survivor's death.
    Upon survivor's death, trust is irrevocable and administered by son James:
    Trust assets eventually divided between 2 sons, James and Wes.

    b. Marital share trusts B and C (equal portions of decedent's ½ interest).
    Survivor has sole discretion to select the assets to go into each trust.
    After the trust share is created, these trusts are irrevocable.

Survivor receives income, and may receive principal for some purposes.
Survivor's death: trustee to divide assets equally between James and Wes.

c. Gift/Loan provision: A gift or loan to a son will reduce that son's share, if recorded on Schedule A by the trustees.

- CW and Margaret execute documents to get everything into the trust:

  Pour over wills.
  Deed for residence and real property places title in the trust.
  Letter of intent and declaration of gift states their intentions.

2002 – CW dies. 85 year old Margaret becomes the surviving trustee.

- Margaret never divides and separately funds the ABC trusts.
- Margaret never lists any loans or gifts on Schedule A.
- Margaret, with James or Wes "lurking in the background" attempts a number of changes to her estate plan.

2007 – Margaret (accompanied by James) has Estate Planning Attorney #2 prepare an amendment to the trust:

- Because of changes in the tax laws, Trustee decides not to fund the survivor's (BC). trusts. Trustee retains full control of all assets.
- James receives the primary residence, surrounding property, fixtures and equipment as compensation for time, labor and improvements. Also receives a building fund account. These funds do not offset his equal share of the remaining assets.

2008 -- Margaret has attorney #2 prepare a second amendment to the trust:

- Trust is declared irrevocable.
- Attorney #2 is named "Trust Protector" with authority to amend the trust when needed to effect the Trustee's initial intent and to appoint Trustees as needed.
- James is appointed trustee, and can only be removed by the Trust Protector for violation of a fiduciary duty.

2009 -- (September) Margaret has attorney #2 prepare a quit claim deed for immediate transfer of the residence to James. Attorney #2, concerned Margaret is not "thinking as clearly" prepares the deed, but holds it in his files without recording it.

2009 -- (December) Margaret (accompanied by Wes) withdraws $306,000 from trust accounts.

$26,000 given to Wes as an "annual gift."
$280,000 is deposited in a non-trust account.

2010 – (January) Margaret (accompanied by James) tell attorney #2 of the money transfer.
Attorney #2 begins correspondence with attorney #3, representing Wes.

2010 – (April) Margaret (accompanied by Wes) visits with Estate Planning Attorney #4.
Attorney #4 believes the 2007 and 2008 amendments would result in an increase of more than $200,000 in estate taxes and expose Margaret to a lawsuit.
Margaret instructed attorney #4 to discharge attorney #2, revoke a DPA held by James, and agreed to hire a geriatric care manager to assess her situation.

2010 – (April, 3 days later) James delivers a handwritten note from Margaret to attorney #4.
The note tells attorney #4 to reinstate James as DPA and but everything back the way it was before her visit to attorney #4 – immediately! Margaret also leaves a voicemail message to the same effect.

2010 – Margaret does not take any further action with regard to her estate.
Attorneys 2, 3, and 4 confer and correspond.
Margaret dies August 2, 2010; James is named personal representative of her estate.
Litigation ensues. The trial court eventually ordered James to repay over $250,000 to the trust and estate.

The questions before the court: In considering the many issues raised in the appeal, which "intent" should be honored? The original intent expressed in CW and Margaret's comprehensive estate plan? Or Margaret's later intention to modify the trust, to not fund trusts B and C, and to give James the residence free of any offset for Wes?

Decision: The court repeatedly returned to the provisions of the 1999 comprehensive plan, and the intentions it expressed, in deciding the issues on appeal. The court proceeded as if the B and C trusts were funded; ignored the suggestion that the residence and building fund should pass to James, and did not offset either son's share of gifts or loans. Except for one minor item, the trial court was affirmed.

CASE NO. 2: Estate of Hayes, 185 Wn. App. 567 (Division III, Jan. 2015)

Facts: Lloyd and Elma Hayes farmed 1,225 acres near Hartline. They raised four children, but the litigation in this proceeding primarily involves brothers James and Jerry.

Lloyd died in 1991. Prior to his death, the farm had experienced 3 crop failures in five years. Following another crop failure in 1992, Elma was $123,000 in debt.

Elma called a family meeting. James suggested she sell the farm. Elma wanted one of the three boys to work the farm and assume the debt. Jerry and John were not interested. "James reluctantly accepted farm responsibilities and its debt."

Elma and James entered into a "sweetheart deal" lease. James agreed to pay $5/acre/year for 25 years. This fixed rate can be substantially less than the crop share lease arrangements for dryland wheat property which prevail in the area. James also agreed to assume the debt and farm the entire property as one unit. Elma also gifted James over $50,000 in farm equipment.

James paid the debt and farmed the land as required. Times and crops apparently improved. During the twenty years between the execution of the lease and Elma's death in 2012, James saved approximately $480,000 in prevailing area rents with the favorable lease terms.

In 2003, Elma executed a new will. She told her attorney that her previous plan (keeping the farm as one unit in the hands of all four children) was not a good idea. The farm consisted of four "detached" parcels, and Elma specifically bequeathed each child one of the parcels. The parcels were not of equal fair market value, the court found that James received the most valuable parcel). The residue of the estate was divided equally between the four children.

After Elma's death in 2012, the personal representatives distribute the parcels as directed in the will. James sold his parcel. James then insisted that he still held a leasehold interest on the remaining parcels, and was entitled to farm them with minimal rent for another five years. Jerry told James that sale of his parcel terminated the lease, and sent James a formal notice of termination. "James politely responded to his brother, "Jerry, you are full of crap…I categorically reject your termination….See you in court.""

The question before the court: Did Elma intend to partition the lease into four separate agreements when she partitioned the farmland in her will? If the answer is yes, then James takes his parcel free of the lease under the doctrine of merger, and can sell his parcel without affecting the other leases. If the answer is no, then Jerry is not full of crap. The lease requires James to farm the four parcels as one unit, and his sale of his parcel terminates the lease.

Decision: The lease was not divided with the parcels. Elma intended that the lease pass as a whole to the four children under the residuary clause. Since James did not keep the parcels together, the purpose of the arrangement is ended and the lease is terminated.

CASE NO. 3: Estate of Bernard, (Division I, Dec. 2014):

Facts: In 2008, James Bernard filed a petition for guardianship of his father, Tom. The petition alleged that dementia and short-term memory loss affected Tom's reasoning and judgment. No action was taken and no findings were made in these proceedings.

On March 25, 2009, Tom executed a will and revocable living trust. The trust agreement provided that the residue of Tom's estate would pass to James or his issue. If James predeceased Tom and left no issue, the estate would pass to Tom's nieces and nephews (the Lingers) and to various organizations. Tom retained the right to revoke or modify the will and trust, but "subject to" a Non-Judicial TEDRA agreement between James and Tom.

The TEDRA agreement was effective on March 27, 2009 (the same day the guardianship proceeding was dismissed). James promised not to seek guardianship so long as the trust was in effect. Tom agreed that he would not modify the will or trust without (1) filing a petition in court, detailing his modification proposal; (2) provide James with a timely summons; and (3) obtain, as the result of a hearing, a court order approving the exercise of some or all of his proposed modification powers. A memorandum of the agreement was filed in June, 2009.

In August, 2009, James and Tom signed another agreement. This second agreement allowed an amendment to the trust and a codicil to the will. The effect of the changes was to substantially reduce the contingent shares of the Lingers, and to provide for distribution to new additional contingent beneficiaries (the Karps). Tom signed the agreement, the amendment and the codicil. A memorandum of the agreement was filed in February, 2010. Tom and James did not follow the specific procedures for modification described in the TEDRA agreement.

James died in 2010, leaving no issue. Tom died in 2011. The Lingers challenged the validity of the August, 2009 amendment. The trial court concluded that the amendment was null and void.

The issue before the court: Did Tom intend to incorporate the TEDRA agreement, and its formal procedures for modification, into his will and trust? If yes, the procedures must be followed and the amendments are void. On the other hand, if the will and trust are conditionally "subject to" the agreement, then the only parties to the agreement (Tom and James) can make alternate arrangements that they agree substantially comply with its terms.

Decision: Tom and James did not intend that the procedures from the TEDRA agreement be incorporated in the will and trust. The only two parties to the TEDRA agreement could reach a new non-judicial agreement, and this result is actually favored by the courts. The contingent beneficiaries did not have standing to challenge the amendment, because they did not have a vested property interest at the time of the second agreement. The trial court was reversed, and the case remanded to address the issues of (1) Tom's capacity to enter any of the documents, and (2) whether any of the documents were the result of undue influence.

CASE NO. 4: Ames v Ames, 184 Wn. App. 826 (Division III, Dec. 2014)

Facts: Roy and Rubye Ames owned a quarter-section of farm and timberland in Stevens County. They lived on the property, and logged portions of it on an occasional basis. These proceeds and Social Security became their only income in retirement.

In 1997, Roy and Rubye needed to supplement their income. They agreed to sell the property to two of their sons, Stan and Wes, for $216,000. Terms of payment: no interest, $600/month for 30 years. If Roy and Rubye died before full payment, the monthly payments would go to the other three children. Title would not pass until full payment was made. In the meantime, Roy and Rubye retained a life estate, "defined as including full possession, management, and control of the real property, improvements, timber, and farm equipment."

No one saw a need to reduce this contract to writing. In 2009, the terms of the agreement were restated in two emails, which everyone apparently agreed were accurate. Stan and Wes made the payments required.

In 2006, Roy and Rubye deeded the property to Wes and to "Ames Development Corporation," (owned and managed by Stan). The consideration listed was love and affection, and the real estate excise tax affidavit described the transaction as a gift. The Ames family agreed that this conveyance was intended to insulate the property from the State, as a creditor for future medical care. No life estate was reserved. Stan and Wes continued to make the payments under the 1997 contract.

Another son, Randy, moved onto the property to help his parents. Stan and Wes began to enter the property, and to interfere with Roy and Rubye's full use of its resources, especially the timber. They were concerned that logging was helping Randy, rather than funding Roy and Rubye's retirement. The parents resented the intrusions.

Roy and Rubye sued to either (1) reacquire title to the property, with an equitable lien to Stan and Wes for payments made or (2) affirm their right to total control of the property during the life estate. They later dropped alternative (2). Wes and Stan counterclaimed for the establishment of a life estate for their parents, through imposition of a constructive trust, with restrictions on their ability to harvest timber above a certain amount.

The trial court declared the life estate, and imposed some restrictions on the timber harvest. Stan and Wes did not think the logging restrictions were sufficient and appealed. Roy and Rubye did not cross-appeal.

The issues before the court: Did the parties to the oral contract intend to place any restrictions on the right of the life tenants to harvest the timber on the property? Even if no restrictions are contemplated, are they implied from the circumstances of the agreement? Or are they required by the equities of imposing a constructive trust against the legal owners of the property, Wes and Stan?

Decision: The "impetus" of the oral contract was to provide financial security for Roy and Rubye. The court could take this original intent into account in recreating the life estate through a constructive trust. In establishing the terms of this trust, the court could consider the current financial circumstances of the parents by allowing more logging than the "remaindermen" would like. The trial court's rulings were affirmed.

III. Trends Suggested by the Cases

A. Greater Turmoil = Older Intent

When a party argues that a person's intent has changed from an original estate plan or agreement, courts are less likely to adopt this later intent if it arises during a period of conflict. Quarreling siblings, multiple changes over a brief period of time, a deterioration of the relationship between the testator and a previously favored heir – all of these will make it less likely that the court will accept that a change of intention has occurred. The extreme example is the Wimberley case, where the court almost completely ignored Margaret's expressions of her intentions after CW's death.

But why should the courts take this approach? The trial courts in these cases did not make a finding that any of the people involved lacked the capacity to execute any of the estate planning documents or contracts in question. In some cases they had not considered the question; in others, the judge expressly ruled that the person was capable of changing what he or she intended. Similarly, none of the decisions are based on a finding of undue influence.

A revocable trust allows a person to revoke it, modify its terms, and remove property from its protection. Absent a binding contract, a will can be modified or revoked at any time prior to death. If people can change their minds, you would expect that the latest intent would be the most often honored. In these cases, the opposite is generally true.

I would suggest that conflict raises the fear of undue influence and duress, even if the court does not make an express finding on these subjects. Whether that is right or wrong, the practitioner who advises a person on changing an estate plan needs to bear it in mind. In those cases, you should consider preserving or creating evidence of the client's capacity, the clearly stated reasons for the change, and the lack of improper influence.

B. Judges assume that what they think is fair is what was intended

In theory, what the judge thinks is the fairest way to divide the estate should have nothing to do with the decision he or she make concerning your intent. If you want to stiff your son and give the family farm to a trust for your cow, that's your business (assuming you're competent and not being unduly influenced by the cow). But in each of these

opinions, the involved judges made it clear which result was the "fair" one, and concluded that the testator intended to be "fair" in dividing his or her estate.

Hayes is the clearest example: "Elma Hayes' will shows a desire to treat all her children fairly….Under James Hayes' plan, he may sell his parcel to a neighbor … while he can extort his siblings by demanding a lease buyout before each sibling may sell his or her parcel. James Hayes' scheme does not treat each child fairly." 185 Wn. App. at 610.

Is it really that clear that "fairness," which seems to be identified with equal treatment in the court's decision, was Elma's intention? She expressed her opinion that joint ownership related to the family farm and its operation was a bad idea. She gave James the prime section of land, and the least valuable pieces to the other children. And she initially agreed to the lease for James, which was only a "sweetheart deal" in hindsight. When it was agreed to, the crops had failed in four out of six years, the farm was over $120,000 in debt, and no other sibling wanted to touch the place.

The *Wimberley* decision contains similar language. "…Margaret Wimberley did not intend for James Wimberley to take such a large portion of the trust assets. . .[which] were to be divided 50-50." 186 Wn. App. at 511. Yet multiple documents indicate that Margaret wanted an unequal division, at least where the house and improvement accounts were concerned. The opinion portrays James as a lurking wrongdoer for suggesting such a scheme.

Ames is certainly based on equitable considerations, although it is couched in the language of upholding the oral agreement's primary intent. None of the parties to the sale agreement contracted for the detailed restrictions on logging contained in the trial court's order. As part of the need to uphold the "impetus" to protect Roy and Rubye, the judge disregarded both the original terms of the agreement and the subsequent deed.

The opinions express a pretty traditional concept of fairness – an equal division of property between all the children, substantial protection for parents while they are alive. So an attorney who is asked to assist a client in adopting a different estate plan, with an unequal or unusual division, should take extra precautions to make sure the plan and its bases are clearly expressed. Any ambiguity will give the court the opening to return to its standard definition of fairness.

C. <u>Involved attorneys are lousy witnesses to intent.</u>

In several cases, declarations and testimony were offered from the attorneys involved in drafting the documents the courts were called on to interpret. This evidence described the client's demeanor and attitude, and whether the attorney believed he or she was competent, unduly influenced or "thinking as clearly." These declarations, at least with regard to the client's intent, were almost universally rejected or minimized by the court.

The only exception was the testimony of the drafting attorney in *Bernard*. That makes sense under the circumstances, because the attorney in that case did not have a client left in the fight. Tom and James were dead, and the dispute was between two opposing factions of beneficiaries. The opinions of the drafting attorney were also supported by an outside expert from the UW Law School.

Courts may conclude that an attorney who failed to properly draft documents, or to determine whether a client was able to sign them, has a motive to testify in a manner that makes his or her own actions appear professional and competent. So the best way to weigh in on questions of intent is when the documents are being drafted (for example, Attorney #1 in *Wimberley*) or through the use of "expert" attorneys with no other interest in the issues of the case.

IV. Conclusion

I hope you found my comments interesting. Thank you for the invitation to speak to your group.