

Gov. Little should correct Supreme Court's bushwhacking

Dear Gov. Brad Little:

Most Idahoans believe that a will is a private document and that they are free to amend their wills if they choose, as long as they are alive and have the capacity to do so.

This common understanding was true until 2020 when the Idaho Supreme Court changed things in a case called *Ferguson v. Ferguson*. In that case, the Supreme Court said a widow owed fiduciary duties to the person she named to inherit, namely her son, from the moment she signed her will.

The Supreme Court conflated her role as a testator (one who signs a will) with her role as trustee of her half of her and her deceased husband's trust. The court misapprehended the basic mechanics of what is called in trust planning a "power of appointment." This power is just a fancy way to gift one's trust assets to a third party by adding special language to one's will.

The court incorrectly assumed the son was the widow's "future" beneficiary under her will that made a gift using an "appointment." The son could thus sue her while she was alive to account

for the assets he expected to inherit from her trust.

The court never reconciled this with the obvious fact that she was free to change her will anytime to "appoint" (gift) her assets to someone else.

In short, she lost some of her freedom, privacy and property rights as soon as she signed her will.

Ferguson involved a widow and her son, but the rules announced in that case logically apply to all Idaho wills and all named beneficiaries — family members, friends, charities, whoever.

These were new rules. They shocked estate planning lawyers in Idaho and nationwide. Western law has for centuries followed the familiar rule that beneficiaries under a will gain rights only when the testator dies, only under the latest version of the will and only if the will is validated in probate court.

The justices in *Ferguson* ignored a respected judge's warning that a ruling like theirs "would stand centuries of probate law on its head, bestowing upon children the legal right to dictate" their parents' spending "to



COMMENTARY: OPINION OF

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assure themselves an adequate inheritance. Such a result is neither compelled nor even suggested by any known precedent or statute."

I did not represent any of the parties in *Ferguson*, but I submitted a proposed amicus ("friend of the court") brief after the court's initial ruling, urging the court to reconsider its ruling before finalizing it.

I pointed out that both parties had argued extreme positions and urged the court to request briefing or to hear argument from third parties before issuing a final ruling.

The court had the power and a responsibility to do so.

My arguments fell on

deaf ears. The court's hasty final opinion adopted the extreme position of one of the parties. In doing so, the court abandoned its long-standing rule that a person named in a will or trust has no property right in his or her future inheritance, but only a "mere expectancy."

This went far beyond what was necessary to give the son a fair remedy under existing Idaho law: a proper and fair inventory and accounting of his mother's trust funding and estate's expenses. This kind of bushwhacking was surprising coming from a court normally viewed as conservative.

Now I can only counsel my Idaho clients in private about the ramifications of *Ferguson*, and advocate in public, as best I can, for the case to be overturned.

You, Gov. Little, can help fix this problem by proposing legislation to take *Ferguson* off the books. But the Legislature should not need to fix this error. The quoted language above is correct that no statute or precedent, much less common sense, required the court's sweeping rulings.

More immediately, you can address this issue directly when interviewing and choosing a replacement for retiring Chief Justice G. Richard Bevan of the Idaho Supreme Court.

You and the new justice could openly invite appeals that would ask the court to overrule all but one of its holdings in *Ferguson*. (The court properly applied to trust contests a rule already applicable to will contests. A contestant must have "probable cause" to contest a will or trust or else the document can revoke the person's inheritance.)

My invitation to you sounds provocative, but encouraging a new justice to right so blatant a wrong that affects all Idahoans with wills is precisely what the givers of wisdom should do. Many other good lawyers and I are here to help if you are interested.

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