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STATE OF WASHINGTON
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NO. 91614-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON
COURT OF APPEALS NO. 31757-9-III

In Re The Estate of:

MARGARET WIMBERLEY,

Deceased.

REPLY OF JAMES WIMBERLEY RE PETITION FOR REVIEW BY
WASHINGTON STATE SUPREME COURT

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ORIGINAL

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Tucker v. Brown, 20 Wn.2d 740, 150 P.2d 604 (1944)3

I. INTRODUCTION

In compliance with RAP 13.4 (d) James Wimberley (hereinafter “Jim”) submits the following Reply to address only the new issues raised by the Respondents in their answers. Specifically, the allegation that the Building Fund Account “never contained more than a few thousand dollars,” and that Jim created the inequitable accounting through his own actions. The remaining arguments of the Respondents do not appear to raise new issues permitted a reply under the court rules.

II. REPLY

A. **Yakima Federal Savings Account Number 1351 Was the “Building Fund Account,” and it is Not Equitable to Refuse to Account for the Misappropriation of Assets Simply Because of Allegations of Non Cooperation.**

Respondents raise for the first time in Answer to Appellant’s Petition for Review that the funds removed from the Yakima Federal Savings Account by Margaret (under the direction of Wes) were not assets of the “Building Fund Account” as described in Margaret’s 2007 Amendment. The Respondents earlier briefs to the Court of Appeals accept that Margaret was referring to all the Yakima Federal Savings accounts when describing the “Building Fund Account.” The 2007 Amendment states:

Further, the entire balance of the building fund account held with Yakima Federal Savings and Loan Association shall be set aside from all of the Trustor's other accounts and investments and be distributed to Jim for the purpose of finishing the ongoing work on the property. Jim shall use this fund at his sole discretion toward finishing the property and the fund shall not be offset against his share of the residual estate.

Clerks Papers (CP) 179.

The Trustee argues for the first time in response to this Petition for Review, that the Building Fund Account never included more than a few thousand dollars. As evidence, the Trustee notes that payments to various contractors were coming from the checking account. What the Trustee fails to note is that the money for making those payments was transferred into the checking account from account #1351. The account the Trustee now describes as the Building Fund Account was simply the checking account portion of the "Building Fund Account" as intended by Margaret.

Margaret considered all of the Accounts at Yakima Federal Savings to be part of the Building Fund Account. The account records contained in the Clerks Papers show that assets were held in account #1351 and transferred through account #5734 to pay for building supplies. CP 183-85; CP 192; CP 247. This would not be an unusual system, as generally individuals will keep the bulk of their assets in one account, then transfer assets to a checking account as needed. Such was the pattern in

this instance. Furthermore, as clearly stated in the 2007 Amendment, Margaret intended the money to be used to finish work on the Fromherz Road Property. It is not reasonable to presume that she intended Jim to have only a few thousand dollars to finish the building of a house.

The refusal of the Trustee to acknowledge Margaret's intent and distribute the assets held in the Building Fund Account (as they were constituted prior to Wes' removal of such assets) is the type of inequitable result that the court was attempting to prevent in *Tucker v. Brown*, 20 Wn.2d 740, 150 P.2d 604 (1944). In this case, Wes was attempting to financially exploit Margaret. Geriatric care manager Kristyan Calhoun, hired by attorney Marcus Fry¹ to provide a report of Margaret's finances, care needs, and vulnerability to exploitation, stated that she was concerned about the strong possibility that Wes would financially exploit Margaret. CP 205 (Wes was not to use Margaret's house keys to access the home); CP 207 (Recommending that Wes only visit Margaret when a caregiver is present); CP 209 ("I recommend that Wes Wimberley not contact financial institutions to access information either with or without his mother.") Ms. Calhoun also recommended that the issue with regard to the withdrawal of the assets from the building fund account should be addressed in a forensic account (CP 204) which she said should go back to January 2002 (CP

¹ Wes introduced Margaret to Mr. Fry so that he could "review her estate planning," CP 321.

207). Ms. Calhoun, having been hired by Mr. Fry but having found Wes to be the real threat to Margaret, is the most reliable neutral party having first-hand knowledge of the circumstances of this case. She recommended that the accounting consider the invalid transfer of funds by Wes, but her recommendations were simply ignored, leading to an accounting that was neither accurate nor equitable.

Finally, the Respondents allege that Jim brought all of this on himself and is therefore not entitled to an equitable accounting. First, the same could be said for Wes. Had he not orchestrated the withdrawal of \$306,000 from the building fund account in 2009, Jim would not be here asking the Trustee to account for that invalid transfer. Second, the Trustee's contention that Jim is not entitled to an equitable accounting because he did not turn over records lacks merit. The Trustee had access to all of the financial records of the trust as soon as he was appointed as trustee. All he had to do was ask the bank for records. These records would have been more than sufficient to produce an accounting going back as long as the banks kept records, likely at least seven years. Jim's confusion in responding to the requests of the Trustee to provide records is not surprising given this fact. To the extent that Jim had any records, they were likely the same records that the Trustee already had access to. It is not equitable to refuse to conduct an accounting, and award Wes the

Building Fund Account, under these circumstances.

III. CONCLUSION

Margaret's intent is clear, and for whatever reason (be it animosity between the Trustee and Jim due to Jim's alleged non-cooperation, or simply an oversight) Margaret's intent has been ignored. Justice has not been done. If the decision of the Court of Appeals is allowed to stand, it will uphold a draconian interpretation of the law governing living trusts that will significantly limit the individual right of citizens to control the disposition of their own assets.


In this case, Margaret had the intent and the authority to devise property as directed in her 2007 Amendment. She sought the advice of counsel to achieve her purposes and followed such advice. Despite the fact that Margaret's intent could be upheld without affecting C.W. Wimberley's equivalent rights, the Court of Appeals ruled that strict compliance to the terms of the trust was required, and the 2007 Amendment was invalid because it did not meet these standards.

Compounding this issue is the Trustee's refusal to account for the invalid transfer of assets out of the Building Fund Account, which will result in a windfall to the very person who, through undue influence and financial exploitation, convinced Margaret to go with him to the bank and remove those funds. The law requires an equitable and accurate

accounting, and for the Courts to make every effort within the bounds of the law to effect the intent of the Testator. Neither of these principals is upheld by the decision of the Court of Appeals in this case, and the Supreme Court should therefore accept review.

Respectfully submitted this 14th day of July, 2015.

HELSELL FETTERMAN LLP

By: 
Kameron L. Kirkevold, WSBA No. 40829
Michael L. Olver, WSBA No. 7031
Attorney's for Petitioner

CERTIFICATE OF SERVICE

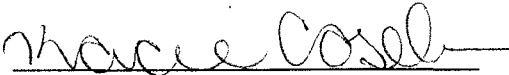
I, Kacie Coselman, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of Helsell Fetterman LLP, 1001 4th Avenue, Suite 4200, Seattle, WA, 98154; and did on the date listed below (1) cause to be filed with this court; (2) and cause to be delivered via U.S. Mail to Linda Sellers and Sara Watkins, Halverson Northwest Law Group P. C., P.O. Box 22550, Yakima, WA 98907-2550, and via U.S. Mail to Cam McGillivray, P.O. Box 18969, Spokane, WA 99228-0969, the Reply of James Wimberley Re Petition for Review by Washington State Supreme Court.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: July 14, 2015, at Seattle, Washington.


Kacie Coselman, Legal Assistant

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Good morning:

Please file the attached Reply in Case No. 91614-4, In Re the Estate of Margaret Wimberley.

The attorney filing the attached document is Kameron L. Kirkevold of Helsell Fetterman LLP, address below, WSBA No. 40829.

Thank you,

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