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NO. 64633-8-I ~~and 65132-3-I~~
(consolidated)

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

IN RE THE ESTATE OF LLOYD W. FOSTER
AND ALICE H. FOSTER

REPLY BRIEF OF APPELLANT LAURANCE FOSTER
TO RESPONSE OF SPECIAL REPRESENTATIVE

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FILED
2011 FEB 25 PM 4:51
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA

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I. OPENING

The Special Representative portrays this case as “about the failure of two brothers . . . to properly exercise their duties.” Special Representative’s Response at p. 1. A close look at the facts of the case, however, tells a different story. This is really a case about how one brother, Alan Foster, using his position as personal representative, stole money from the estate of his parents. Efforts by the Special Representative, the Special Administrator, and Alan’s brother Laurance Foster to reclaim the stolen funds were unsuccessful. When it appeared that Alan had either spent or successfully secreted that money and that continued efforts to reclaim the money would be futile, the Special Representative and the Special Administrator looked to Alan’s brother Laurance to reimburse the estate for what Alan had stolen.

The Special Representative has pointed the court to several letters and pleadings authored by Laurance in which Laurance expresses his disapproval with the Special Representative, the Special Administrator, court Commissioners and the legal process. Some of those writings contain inappropriate words or statements. A review of those writings shows that Laurance was very frustrated with the proceedings and felt that there were problems in the administration of the Estate and Trust that were

caused by the Special Representative, the Special Administrator and/or the court. While the writings might tend to put Laurance in a bad light, the court is urged to remember that Laurance is not experienced with the legal system, and therefore not hold those writings against this outspoken individual. A review of the full record will show that such pleadings did not have a significant effect on the proceedings. Instead, they only served to voice Laurance's frustration. The court should look only at the facts in determining whether the court erred in entering the orders appealed from.

II. SUMMARY OF ARGUMENT

The pleadings in this matter are voluminous. The entire record, however, does not need to be reviewed in order to reach a decision in this appeal. Laurance Foster argues that the judgments entered against him on November 23, 2009 and January 17, 2010 should be vacated for the following reasons. First, the court should have set this matter for trial. There are unresolved issues of fact that can only be decided after hearing oral testimony. Instead, the court entered the November 23, 2009 judgments at a review hearing on an accounting. Second, the uncontested facts regarding the money distributed to Laurance Foster do not support the amount of the judgment issued. Third, the fees awarded to the Special

Representative were inappropriately allocated. These issues are discussed in more detail below.

III. ARGUMENT

A. Laurance Foster is Entitled to a Jury Trial.

As early as June 2008, Laurance Foster requested a jury trial. CP 502. The Special Representative argues that because this matter is in the probate court, there is no right to a jury trial. It is clear, however, that jury trials are contemplated in the probate context. RCW 11.96A.170:

If a party is entitled to a trial by jury and a jury is demanded, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice, shall settle and frame the issues to be tried. If a jury is not demanded, the court shall try the issues, and sign and file its findings and decision in writing, as provided for in civil actions.

The cases cited by the Special Representative do not support her position.

In In Re the Estate of Frank S. Shaugnessy, 97 Wn.2d 652, 648, P.2d 427 (1982), the Supreme Court upheld the lower court's denial of a jury trial on the grounds that a will contest is equitable in nature. Id. at 657. This case is not a will contest.

Batten v. Abrams, 28 Wn. App. 737, 626 P.2d 984 (1981), rev. denied, 95 Wn.2d 1033 (1981) involved claims of malicious prosecution, quiet title, prescriptive easement, removal of a "spite fence," slander and

libel and property damage. Id. at 741. The trial court denied a request for a jury trial. The Court of Appeals agreed, citing the rule that a trial court has discretion in granting a jury trial when both law and equity issues exist in a proceeding. Id. at 743.

Laurance Foster does not argue with the rule in the Abrams case, that a trial court has discretion in granting a jury trial when both law and equity issues exist in a proceeding. His position is that the claims made against him are legal in nature and not equitable and that he is therefore entitled to a jury trial.

The Special Representative sought a money judgment against Laurance Foster, individually. She did not seek a judgment in favor of the Trust, but in favor of the beneficiaries, individually. Such a request is legal in nature. Allard v. Pacific Nat'l Bank, 99 Wn.2d 394, 663 P.2d 104 (1983). In Allard, beneficiaries of a trust alleged that the bank improperly depleted the trust corpus by selling trust owned real property for less than fair market value. None of the beneficiaries had a present right to receive distributions from the trust corpus. Their only remedy was to seek restoration of the corpus from the trustee. Such an action is equitable in nature and the trial court's denial of a request for a jury trial was upheld on appeal. Id. at 400-01. The court compared that action with one in

which beneficiaries seek recovery for themselves personally, which action is legal in nature. Id. at 400. Here, the Special Representative sought a money judgment in favor of the beneficiaries personally, not a judgment for the trust. As in Allard, this action is legal rather than equitable.

The basis for the judgment sought by the Special Representative is an allegation of breach of fiduciary duty. Such a claim is not by its nature one in equity. Kelly v. Foster, 62 Wn.App. 150, 813 P.2d 598 (1991). In Kelly, the beneficiary of an estate sought damages for legal malpractice and breach of fiduciary duty from attorneys for the executor of the estate. The issue was whether attorney fees were recoverable as a litigation cost in a malpractice action. Id. at 152. The court found that Kelly's claim for breach of fiduciary duty was legal in nature as she sought to recover damages for herself, "a traditional legal remedy." Id. at 154.

Here, the Special Representative sought a money judgment for the beneficiaries individually based upon an alleged breach of fiduciary duty. The action is therefore legal in nature and Laurance Foster is entitled to a jury trial. Because court Commissioners may not hear jury trials, this matter should have been referred to Superior Court.

B. The Court Improperly Entered Judgment at a Review Hearing on an Accounting.

Laurance Foster argues that proper and adequate procedures were not followed to allow him to defend against the Special Representative's claims. Beside the fact that he was denied a jury trial, he was denied a hearing at which he could present oral testimony from himself and other witnesses. The judgment was entered at a review hearing on an accounting.

The Special Representative takes the position that because Laurance Foster knew from previous pleadings that she sought a judgment against him for the entire amount owed to the minor beneficiaries, he cannot claim inadequate notice or process relating to the November 23, 2009 hearing. However, Laurance had consistently denied the Special Representative's claims, had raised affirmative defenses and requested a jury trial. The Special Representative renewed her request for a judgment against Laurance in her response to the accounting, filed only six days before the hearing. CP 776. The court had the November 23, 2009 hearing without taking any oral testimony. It failed to provide Laurance Foster a proper proceeding in which to contest the Special Representative's claims. A judgment should not have been entered

against Laurance Foster absent either a summary judgment motion or a trial.

The Special Representative points out that Laurance Foster never asked the court to certify the matter for trial. However, Laurance Foster demanded a jury trial in June 2008. CP 502. The Commissioner should have made that certification himself because there were issues of material fact that could not be resolved without oral testimony and the determination of the credibility of witnesses.

It was not until the judgment was entered against him on November 23, 2009 that it became appropriate for him to appeal any of the court's rulings.

C. There are Material Facts at Issue that Require a Trial.

The Special Representative argues that there are no material facts at issue that would require a trial. This is not true. The material facts that are not in controversy are:

1. On January 23, 2004, Laurance Foster received \$129,000 in the form of a check deposited by Alan Foster into Laurance Foster's bank account. Those funds came from the Estate.
2. In May 2005, a distribution from the Trust, in the amount of \$40,900 was made to Laurance Foster.

The Special Representative argues that those facts alone, when looked at through the lens of the law that applies to trustees as fiduciaries, make it clear that the judgment that was entered was proper. The Special Representative is basically saying that she is entitled to a summary judgment based on those facts alone. (However, no such motion was ever filed, so Laurance Foster had no motion to respond to.)

There are facts in controversy, however, that need to be resolved before any judgment can be rendered. There is a question of fact with regard to what capacity Laurance Foster was acting in when he accepted the \$129,000 distribution from Alan. The Special Representative claims that Laurance Foster received the \$129,000 in his capacity as a trustee. Laurance Foster's position is that Alan Foster made that distribution to him, and that he accepted the distribution, in his individual capacity as beneficiary, not as trustee.

Laurance says that he accepted these funds as a beneficiary, believing that all the beneficiaries were receiving their shares and without any knowledge that Alan was going to steal the minor beneficiaries' money. This raises an issue of fact with regard to whether any fiduciary duty was breached.

Laurance also points to the fact that while he had been appointed a co-trustee on January 13, 2004, that order was later vacated, so he was not a trustee on January 23, 2004. The Special Representative argues that Laurance was a de facto trustee, relying on In Re Irrevocable Trust of McKean, 144 Wn. App. 333, 183 P.3d 317 (2008). That is a case of first impression in Washington, dealing with the issue of whether Washington would recognize a de facto trustee. The court adopted the concept of a de facto trustee, approving the rationale that a person is a de facto trustee if he (1) assumes the office of trustee under a color of right or title and (2) exercises the duties of office. Id. at 341. The result of being a de facto trustee is that the trustee's good faith actions are binding on third persons. Id.

In McKean, the court ruled that a trustee who had been previously appointed, but whose appointment became void pursuant to subsequent court order, was a de facto trustee and had standing to bring a declaration of rights. The status of de facto trustee was upheld because the trustee had acted in good faith in taking action as a trustee.

Allen Trust co. v. Cowlitz Bank, 210 Or. App. 648, 152 P.3d 974, adhered to on recons., 212 Or. App. 572, 159 P.3d 319 (2007), a case relied upon by the McKean court, found that a successor trustee should be

found to be a de facto trustee because she asserted “an authority that was derived from an election or appointment”, even though the appointment was irregular. Id., 210 Or. App. At 657 (citing In Re Bankers Trust, 403 F.2d 16, 20 (7th Cir. 1968)).

Here, Laurance Foster was not asserting any authority as trustee when he accepted the \$129,000 from Alan. He was acting in his capacity as beneficiary. Because he was not acting in the capacity of a trustee, he should not be considered a de facto trustee. At the least, there is a question of fact regarding this issue.

In her petition, the Special Representative also asserts that Laurance Foster breached fiduciary duties to the minor beneficiaries by agreeing that the Estate could withhold the minors’ share “for no known legitimate reason,” for deliberately failing to disclose his knowledge of the administration of the Estate to the court and by a “general failure to protect the financial interests of the minors.” CP 866-67. Laurance Foster has denied all those claims. Those denials create issues of fact that can only be resolved at trial.

D. The Findings of Fact Are Not Supported By Substantial Evidence.

There is no evidence that Laurance Foster agreed that Alan Foster could withhold any money that belonged to the minors, and Laurance

Foster denies that allegation. There is no evidence that Laurance Foster “allowed” his adult children to accept funds. (It is unclear how Laurance Foster could “allow” his adult children to accept funds. His children are adults and control their own actions.) There is no evidence that Laurance Foster agreed to a holdback. He did not have control of Estate funds. Alan was the personal representative. Laurance Foster wanted and expected his brother Alan to use those funds to pay the minors their fair share of the inheritance.

The court appears to have relied only on declarations and argument from the Special Representative and Special Administrator in order to enter the findings of fact. The court did not evaluate any evidence from Laurance Foster, or any witnesses Laurance Foster might call, because of the nature of the proceeding at which the judgment was entered.

In her response to this argument, the Special Representative points to remarks of the Commissioner at the November 23, 2009 hearing that the money Laurance Foster did receive was in the nature of a constructive trust. (Special Representative Response at p. 27 citing VRP2, p. 18, ll. 17-20.

Actually, the Commissioner made no such “determination.” In fact, constructive trust as a remedy was never asserted by the Special

Representative or the Special Administrator. The Commissioner's analogy breaks down because Laurance Foster, as a beneficiary of the trust, was entitled to the funds he received (or at least a large portion of them) – unlike the person in the Commissioner's example who finds an extra million dollars in his bank account.

E. The Judgment Amounts Are Not Supported By the Facts.

In his opening brief, Laurance Foster argued that even if he is found to have breached a fiduciary duty by accepting the \$129,000 and/or the \$40,000 distribution from the estate/trust, the minor beneficiaries were only damaged to the extent of 20% of that amount (Appellant's Brief at p. 21). There is no rule of law that allows Laurance Foster to have a judgment entered against him simply because the minor beneficiaries did not get their full share, even if a breach of fiduciary duty were to be found. It was Alan Foster's theft of the minor beneficiaries' funds that caused the damage. Laurance Foster never intended to deprive them of funds. He believed the money he was getting was rightfully his. He had no way of knowing his brother would not provide for the minor beneficiaries.

The Special Representative's response to that argument is that Laurance Foster received money, and the minor beneficiaries did not. The Special Representative cites RCW 11.96A.020 for authority supporting a

judgment against Laurance Foster for the full amount the minor beneficiaries would have received if the trust was fully funded. RCW 11.96A.020 gives the court authority to provide process for cases where none is specified. It does not give the court unfettered discretion to assess damages simply in order to make plaintiffs whole, where there is no proximate cause.

F. There Was An Improper Allocation of Attorney Fees.

As expected, the Special Representative raises numerous instances in the record in which the court expresses frustration with both Alan and Laurance Foster during these proceedings. The Special Representative claims that “[t]he activities of Alan and Laurance were so intertwined that it was perfectly reasonable for the lower court to allocate fees and costs against them, jointly and severally.” (Special Representative’s Response at p. 34)

Laurance Foster suggests that the frustration felt by the Special Representative, the Special Administrator and/or the court with regard to the inability to collect a judgment for fees from Alan affected their judgment with regard to seeking judgment against Laurance. It is clear that a portion of the fees for which judgment was entered was attributable

only to actions related to Alan, not Laurance, and judgment for those fees was therefore originally sought only from Alan.

In her petition that resulted in the August 23, 2006 judgment for fees against Alan Foster, the Special Representative stated that:

...all of the time incurred was a direct result of Lloyd Alan Foster's failure to provide information concerning his activities as Personal Representative, failure to comply with court orders and lack of candor to the court . . .

CP 26, ll. 20-23 (emphasis added). At the hearing on that petition and the Special Administrator's fee request, the court stated:

The benefits that have been provided by [the Special Representative and the Special Administrator] have been both to the trust and the probate and have been caused by Lloyd Alan Foster's intransigence and his failure to fulfill his professional duties.

VRP1, p. 39, ll. 6-9. The court also stated that:

[Laurance] Foster has complied. I don't know of anything else he could do. I haven't been presented with any evidence that tells me that he's withholding a shred of information or evidence. He's in compliance with the citation and order.

VRP1, p. 36, ll. 9-11.

The court made the same finding in January 2006:

Mr. Alan Foster is responsible for his complete failure to fulfill the administration of this estate . . .

It is Alan Foster's responsibility here, and he's ordered to pay [the Special Representative's] fees for this motion and for having to come to court on this.

RP 1/18/06, p. 18, ll. 7-19.

Given that it was clear that the fees incurred were entirely the fault of Alan, the August 2006 judgment should not have been amended to add Laurance as a judgment debtor for the fees of the Special Representative, and a judgment against Laurance for fees incurred by the Special Administrator through August 2006 should not have been entered. Those orders were manifestly unreasonable, and they appear to be in the nature of a penalty rather than a thoughtful allocation of what fees, if any, are actually attributable to Laurence.

With regard to the fees incurred by the Special Representative and the Special Administrator after August 23, 2006, including the judgments entered on January 27, 2010 for fees incurred in 2009, it was unreasonable for the Special Representative and the Special Administrator to ask for an award of all their fees against Laurance, rather than to make an allocation of such fees. A portion of those fees had nothing to do with Laurance. There are extensive time entries for both the Special Representative and the Special Administrator that clearly do not involve Laurance in any way. CP 227-230, 577-586, 117-119, 665-668. The court's granting of

judgments for the entire amount of fees, without requiring an allocation between Alan and Laurance was therefore based on untenable grounds.

Laurance Foster requests that the court vacate the November 23, 2009 and January 17, 2010 orders and remand this case with instructions to set the matter for trial on the civil calendar. The issue of attorneys' fees can then be decided based upon the results of that trial.

G. Laurance Foster Renews His Request For Attorney Fees For This Appeal.

Laurance Foster renews his request for fees on appeal and requests that the court deny the Special Representative's request for fees. RCW 11.96A.150(1)(a); RAP 18.1.

IV. CONCLUSION

For the reasons set forth above, the court should vacate the November 23, 2009 and the January 17, 2010 orders and remand this matter to the trial court with instructions to have the matter set on the civil trial schedule.

DATED this 25th day of February, 2011.

LAW OFFICE OF B. JEFFREY CARL



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Attorney for Appellant Laurance Foster

CERTIFICATE OF SERVICE

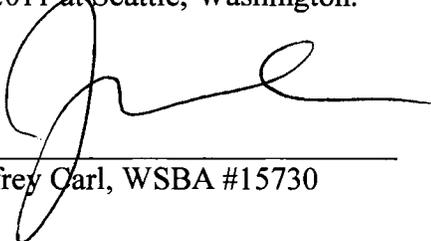
I certify that on the 25th day of February, 2011, I caused a true and correct copy of this Reply Brief of Appellant Laurance Foster to be served on the following via First Class U.S. Mail, postage prepaid:

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 25th day of February, 2011 at Seattle, Washington.



B. Jeffrey Carl, WSBA #15730