

NO. 70210-6-1

**DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON**

ESTATE OF CALVIN H. EVANS, SR.,

Appellant,

v.

SHARON EADEN, VICKI SANSING, KENNETH EVANS,
LINDSEY EVANS, CORY EVANS, JESSE EVANS
CALVIN EVANS, III,

Respondents.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Following a lengthy trial on the first TEDRA petition filed by Sansing, wherein the trial court upheld the validity of the will but disinherited Sansing's estranged brother, Cal, Jr. as a result of his financial abuse of his father, a second TEDRA petition was filed wherein Sansing unsuccessfully attempted to create an exception to RCW 11.12.110, the state's firmly established anti-lapse statute, in order to transfer into the residuary estate the bequests that would have otherwise passed to Cal, Jr.'s children under the laws of descent and distribution.

Notwithstanding their unsuccessful efforts to disinherit their nieces and nephews by carving out a previously non-existent exception to the anti-lapse statute for cases of financial abuse, the trial court rewarded their efforts by awarding to them their costs and attorneys fees against the Estate. The trial court also awarded costs and attorneys fees to Cal, Jr.'s children for successfully resisting, in tandem with the Estate, Sansing's efforts. Appellant agrees that Cal, Jr.'s children are entitled to such an award but opposes its imposition against the Estate, arguing that, if awarded at all, it should be assessed against Sansing as the non-prevailing party.

Accordingly, the Estate's appeal is focused on review of the trial court's decision against the Estate to award costs and attorneys fees from

the Estate to both Sansing and Cal, Jr.'s children. Although focused on that issue, Appellant's Reply Brief also briefly addresses other issues raised primarily in Sansing's lengthy response brief.

II. ARGUMENT

A. The Estate Has Standing to Seek Review of a Decision Awarding Attorneys Fees to the Beneficiaries from the Estate

Respondent Sansing asks this Court to dismiss Appellant's appeal for lack of standing to seek review of the trial court's decision to require it to pay attorneys fees and costs to each of the two opposing classes of beneficiaries of the Estate of Calvin H. Evans, Sr. Notably, the other class of beneficiaries, Respondent Cal, Jr.'s Children, has not raised the standing issue.

Respondent Sansing relies on a strict interpretation of RAP 3.1's directive that "[o]nly an aggrieved party may seek review by the appellate court." Sansing argues that the Estate is not an aggrieved party because it has no independent interest in the outcome of the dispute between the beneficiaries. That argument fails to recognize that the Estate is an entity charged with certain duties and responsibilities of the testator and the respective rights of the beneficiaries which are carried out by the Personal Representative.

Sansing relies on the case of *Cooper v. City of Tacoma*¹ and its progeny² in support of the proposition that an aggrieved party can only be “one whose proprietary, pecuniary, or personal rights are substantially affected” by the entry of a court order or judgment. However, more recent cases have demonstrated a more liberal interpretation of who may be an aggrieved party. For example, in *State v. Watson*, 155 Wn.2d 574, 577, 578, 122 P.3d 903 (2005), the Supreme Court stated:

RAP 3.1 need not bar our review. RAP 3.1 states “Only an aggrieved party may seek review by the appellate court.” Although the State may not technically be an aggrieved party because it received a favorable disposition from the Court of Appeals, contrary to the dissent’s assessment, we can *and should* still review the Court of Appeals opinion. The RAPs are intended to “be liberally interpreted to promote justice and facilitate the decision of cases on the merits.” RAP 1.2(a). Moreover, we may choose to disregard RAPs if the interests of justice require. (emphasis added).

Id., at 577-578.

Other more recent cases have recognized that even a person or entity who was not a formal party to trial court proceedings can qualify

¹ 47 Wn. App. 315, 316, 734 P.2d 541 (1987)

² *State ex. rel. Simeon*, 20 Wn.2d 88, 90, 145 P.2d 1017 (1944); *Sheets v. Benevolent and Protective Order of Keglars*, 34 Wn.2d 851, 855, 210 P.2d 690 (1949); *Thomson v. Weimer*, 1 Wn.2d 145, 150, 95 P.2d 772 (1939); *Estate of Kvande v. Olsen*, 74 Wn. App. 65, 72, 871 P.2d 669 (1974); *In re Estate of Sutton*, 31 Wash. 340, 341, 71 P. 1012 (1903).

as an aggrieved party by an order entered in the course of those proceedings.³ “Aggrieved” has been defined to include the imposition on a party of a burden or obligation. *State v. G.A.H.*, 133 Wn.App. 567, 574, 137 P.3d 66 (2006). See, for example, *Mestrovac v. Department of Labor & Industries of State*, 142 Wn.App. 693, 176 P.3d 536 (2008) where the trial court orders imposed upon the Board a burden and an obligation by holding it liable for Mestrovac's interpreter costs and requiring it to pay thousands of dollars in attorney fees for attempting to intervene. The Board was therefore sufficiently "aggrieved" to assert standing to appeal.

In *Polygon Northwest Co. v. American Nat. Fire Ins. Co.*, 143 Wn. App. 753, 189 P.3d 777 (2008), this Court further clarified its interpretation of an aggrieved party by denying aggrieved status to non-party CUIC, stating that it was more than a matter of simply preferring that the court reach a different outcome and focusing on the lack of effect of the trial court's judgment on any of CUIC's rights:

It does not order CUIC to do anything. It does not order CUIC to pay anything. It does not order CUIC to refrain from doing anything or paying anything.

³ *Mestrovac v. Department of Labor & Industries of State*, 142 Wn.App. 693, 176 P.3d 536 (2008); *State v. G.A.H.*, 133 Wn.App. 567, 137 P.3d 66 (2006)

Id. at 768.

Respondent Sansing incorrectly argues that Appellant has no independent interest in the outcome of this litigation and hints that the reason for its appeal is simply the Personal Representative's hurt feelings or disappointment over the trial court's ruling. The Personal Representative was a party in this litigation and was "obliged to present his position in a probate matter where there is a dispute as to distribution." *Estate of Kvande v. Olsen*, 74 Wash.App. 65, 72, 871 P.2d 669 (1994). Contrary to Sansing's argument, and in accord with the liberal interpretation of "aggrieved party" as espoused in the recent court cases, it is clear that the ruling of the trial court imposed certain burdens and obligations on Appellant, primarily with respect to responsibility for the payment of fees and costs to the other parties, and Appellant is therefore entitled to seek review of the trial court's decision which affected those obligations.

B. The Trial Court Abused Its Discretion in Awarding Attorneys Fees and Costs from the Estate Pursuant to RCW 11.96A.150

There is no argument that the Court has the authority to award reasonable costs and attorney fees in a TEDRA proceeding, that such an award is discretionary with the Court, or that "[d]iscretion is abused

when it is exercised in a manner that is manifestly unreasonable, on untenable grounds, or for untenable reasons.” *In re the Estate of Niehenke*, 117 Wash.2d 631, 647, 818 P.2d 1324 (1991).

The Washington Supreme Court in *T.S. v. Boy Scouts of America*, 157 Wn.2d 416, 138 P.3d 1053 (2006) stated:

A trial court's discretionary decision "is based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Rohrich*, 149 Wash.2d 647, 654, 71 P.3d 638 (2003). A court's exercise of discretion is "manifestly unreasonable" if "the court, despite applying the correct legal standard to the supported facts, adopts a view 'that no reasonable person would take.'". *Id.* (quoting *State v. Lewis*, 115 Wash.2d 294, 298-99, 797 P.2d 1141 (1990)).

Id. at 424.

In the instant case, the trial court abused its discretion by applying the wrong legal standard⁴ and by adopting a view that no reasonable person would take.⁵

The trial court's decision to assess attorneys fees and costs against the Estate in this matter completely ignores the long-established doctrine of the prevailing party.⁶ This was an attempt by one class of

⁴ *Kappelman v. Lutz*, 141 Wn.App. 580, 170 P.3d 1189, 1196 (2007)

⁵ *Olver v. Fowler*, 161 Wn.2d 655, 168 P.3d 348, 353 (2007)

⁶ *Guillen v. Contreras*, 147 Wn.App. 326, 195 P.3d 90 (2008)

beneficiaries to disinherit another class of beneficiaries, first by arguing against application of the anti-lapse statute and then in its petition to determine the rights of the beneficiaries. Sansing lost, and Cal, Jr.'s children won, that battle at the trial court level. In other words, Cal, Jr.'s children were the prevailing parties in both proceedings. The Personal Representative, in keeping with his responsibility, presented his opinion at the trial, which opinion happened to coincide with that of the prevailing parties.

Under those circumstances, the award of any attorneys fees and costs to Sansing in the first place was an abuse of discretion because the court failed to apply the prevailing party doctrine, the correct legal standard, to the outcome. To add insult to injury, the court assessed those fees against the Estate which had argued on the side of the prevailing party. Finally, by rewarding the losing party, and penalizing a party on the prevailing side of the issue, the trial court's decision was not a position that a reasonable person could be expected to take.

As the prevailing party in the proceedings at the trial court level, Cal, Jr.'s children were properly awarded attorneys fees and costs. However, the trial court again unreasonably applied the incorrect legal standard by assessing the award against the Estate. The trial court erred

in denying the request of Cal, Jr.'s children to assess the fees against Sansing as the non-prevailing party. This Court should reverse that ruling of the trial court.

Both Respondents erroneously argue that the award was properly assessed against the Estate because the Estate received a benefit from the trial court's decision in that the competing interests of the beneficiaries were resolved. Their position relies heavily on the case of *In re Estate of Black*, 116 Wash. App. 476, 66 P.3d 670 (2003) which is distinguishable because it involved the beneficiaries of two competing wills, with completely opposing attributes, and the determination of which will controlled was arguably of benefit to the Estate.

However, "[r]ecent Washington cases suggest that it is inappropriate to assess fees against an estate when the litigation could result in no substantial benefit to the estate; we agree. One authority, 4 W. Bowe & D. Parker, Page on Wills § 31.13, at 218 (1961), notes that it has been held that where the services of the attorneys are rendered solely for the benefit of certain parties and are not for the benefit of the estate, attorneys' fees should not be awarded out of the estate, even though the estate is incidentally benefitted by having adverse claims

decided.” *Matter of Estate of Niehenke*, 117 Wn.2d 631, 648, 818 P.2d 1324 (1991) (footnote omitted) (emphasis added).

In *In re Estate of Moi*, 136 Wn.App. 823, 151 P.3d 995 (2006), the court, espousing the test as requiring a “substantial benefit to the estate,” held that a party’s attempt to take a larger share of the estate did not benefit the estate and declined to award him attorneys fees. The present case is similar in that it is essentially an attempt by Sansing to take a larger share of the estate. This Court should similarly hold that this did not benefit the Estate and should reverse the trial court’s award of costs and attorneys’ fees to Sansing.

C. The Trial Court Did Not Abuse Its Discretion in Holding That the Anti-Lapse Statute Applies in Financial Abuse Cases

Sansing aptly points out that the question of whether Washington’s anti-lapse statute applies to a person determined to be a financial abuser of the testator is one of first impression in this state and, throughout the country, is subject to a “quagmire of conflicting goals and fact-specific decisions . . . that provide little guidance or direction to future decision makers.”, *see*, Brief of Sharon Eaden, Vicki Sansing and Kenneth Evans at 33.

Sansing’s appeal is essentially an attempt to get this Court to create an exception to Washington’s anti-lapse statute, RCW 11.12.110,

raising a number of policy and equity-based arguments. Notwithstanding the possible merit, or lack of merit, of any of the specific arguments, the creation of new law is not the function of the courts. *Washington State Motorcycle Dealers Ass'n. v. State*, 111 Wn.2d 667, 763 P.2d 442, (1988). “The cornerstone of constitutional checks and balances is separation of powers. ‘[T]he legislature makes, the executive executes, and the judiciary construes the law.’” *Washington State Labor Council v. Reed*, 149 Wn.2d 48, 61, 65 P.3d 1203 (2003). As the court explained in *Snider v. Board of County Com'rs. of Walla Walla County, Wash.*, 85 Wn.App. 371, 932 P.2d 704 (1997):

. . . the legislative branch functions to decide policy and then legislate by enacting law. The executive branch functions to execute the law as determined by the Legislature by bringing the matter to the courts. The courts administer the law by applying the law established by the Legislature to the facts presented. (emphasis added).

Id., at 379 (fn 3).

Justice Dore, in a dissenting opinion, said “[t]he separation of powers doctrine is a cornerstone of American jurisprudence. That which has been left to the Legislature should not be usurped by the judiciary.” *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 654, 733 P.2d 182 (1987).

Chief Justice Hale, in another dissenting opinion, probably expressed it best when he stated:

A basic tenet of the separation of powers proposition is that legislators shall enact the laws and judges shall interpret, apply and enforce them. In brief, legislators should legislate and judges should adjudicate and neither ought do the other. There is a practical as well as constitutional basis for this idea, I think, because, no matter how great the temptation nor exalted the claimed purpose, when courts legislate they usually do a bad job of it.

State v. Williams, 85 Wn.2d 29, 34, 530 P.2d 225 (1975).

In the present case, the trial court properly applied the state's anti-lapse statute, as it presently exists, to the facts presented to it. RCW 11.12.110 states that:

Unless otherwise provided, when any property shall be given under a will . . . to any issue of a grandparent of the decedent and that issue dies before the decedent, . . . leaving descendents who survive the decedent, those descendents shall take that property as the predeceased issue would have done if the predeceased issue had survived the decedent.

The trial court determined that Cal, Jr. was a financial abuser under the state's slayer/financial abuser statute and then applied that statute to the facts of the case by holding that, as a financial abuser of the testator, he was therefore deemed to have predeceased the testator. The court then properly applied the anti-lapse statute and ruled that because Cal, Jr. was

deemed to have predeceased the testator, the share of the estate that would otherwise have been distributed to him, would therefore pass to his issue. In doing so, the trial court followed the clear mandate of the statute.

Sansing arguments would suggest that the legislature should possibly consider amending the anti-lapse statute to include exceptions such other considerations as the possibility of assistance to the abuser from his issue. Inasmuch as the creation of such exceptions could have significant consequences, such as the disinheritance of innocent issue of the abuser, they should be created through the legislative process and not created in a potentially inconsistent manner by various court decisions necessarily applied to widely differing factual situations.

In any event, the answer to the question before this Court is that, given the present statutory framework, the trial court's ruling that, Cal, Jr. as a financial abuser, was deemed to have predeceased the testator and was therefore not entitled to inherit at all and that, under the anti-lapse statute, his share of the estate, including specific bequests and his share of the residuary estate, passed instead to his issue, was reasonable, based on tenable grounds and for tenable reasons. Accordingly, the trial court did

not abuse its discretion in holding that the anti-lapse statute applies in financial abuse cases.

D. Sansing is Not Entitled to an Award of Attorneys Fees and Costs on Appeal

As stated above, the Court has discretion to award costs and fees to any party in a TEDRA proceeding. In the exercise of that discretion, the Court has a duty to carefully examine the equities of the situation and the positions of the parties. Assuming Sansing is unsuccessful in its appeal, it is difficult to imagine a sound basis for awarding attorneys fees. Even if Sansing were to prevail, it is equally difficult to imagine that the Estate was substantially benefitted thereby. In either case, the Court should exercise its discretion and deny Sansing's request for costs and attorneys fees.

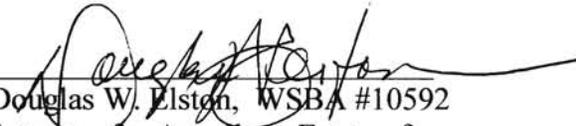
III. CONCLUSION

The Estate has standing to appeal the trial court's award of attorneys fees against it and in favor of Sansing and Cal, Jr.'s children. Appellant's appeal should not be dismissed and the attorneys fees award to Sansing should be reversed. The attorneys fees award to Cal, Jr.'s Children should be reversed, at least to the extent that it was assessed

against the Estate. The trial court's application of the anti-lapse statute to the facts of this case should be upheld and all bequests to Cal, Jr. under the testator's will should pass to his issue under that statute. Finally, The Court should exercise its discretion and not award reasonable costs and attorneys fees to Sansing on appeal.

Respectfully submitted this 31st day of October, 2013.

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