

No. 39463-4

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

JOHN E. COOK, a married man, Respondent

v.

A. DIANE BRATENG, a widow concerning her interest in
realty subject to partition action, and A. DIANE BRATENG,
as Successor Sole Trustee of the Elmer J. Cook Living Trust,
Appellant

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STATE OF WASHINGTON
BY *W*
DEPUTY

COURT OF APPEALS
DIVISION II

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The Appellant, A. Diane Brateng, files this reply brief in reply to the Respondent's brief.

The Respondent failed to address many of the Assignments of Error presented by the Appellant and further failed to address the Arguments presented in the Appellant's Brief, or the Respondent made categorical statements not supported by citations to statutes or case authority.

To simplify the Court's comparison of the Appellant's Brief and the Respondent's Brief on a point by point basis, the Appellant has prepared two matrixes: (1) Assignments of Error Compared, and (2) Arguments Compared, both of which are attached.

II. ASSIGNMENTS OF ERROR

The format of the Appellant's Brief contains seven Assignments of Error (A. – G.), and seven Summary of Issues which are further condensed and summarized in the Assignments of Error Matrix in the following seven categories:

- A. Deferral of Payment for Services
- B. Duty to Sell/Encumber

C. Non-Disclosure of Value Deferred

D. Repairs to Trust Property

E. Attorneys Fees

F. Travel Expenses/Labor Costs

G. Trust Property/Appraisal

A. Deferral of Payment

The Respondent cites Esmieu v. Schrag, 88 Wn.2d 490, 563 P.2d 203 (1997), to support a claim that the Trustee is obligated to give notice of deferral of payments. The holding in Esmieu deals with failure to give notice of a hearing on a lawsuit to interpret or modify a trust, not that a trustee must give a remainder beneficiary, during the lifetime of the life beneficiary, notice of deferral of payment to a trust creditor or for trustees fees.

A creditor of a trust is not obligated to file a creditors claim against a trust or an estate, where, as in this case, there were no probate assets belonging to the decedent, as the Respondent argues.

B. Duty to Sell or Encumber

The Respondent cites Petrie v. Petrie, 105 Wn.App. 268, 19 P.3d 443 (2001) to support the argument that failure to disclose to a remainder

beneficiary the decision not to sell or encumber trust property was a breach of duty to the remainder beneficiary. The facts in Petrie are totally different and involve a father trustee of his son's assets who used the funds to buy the father a Lincoln car, used commingled trust funds to pay spousal support and credit cards.

C. Non-Disclosure of Value Deferred

The Respondent cites no caselaw to support his claim that the trustee has a duty to disclose to a remainder beneficiary the value of the trustee's services during the life of the lifetime beneficiary.

D. Repairs to Trust Property

The Respondent surprisingly responds in the affirmative to the question of whether there was a breach of trust to repair a water damaged house in support of which, the Respondent cites In Re the Estate of Drinkwater, 22 Wn.App. 26, 587 P.2d 606 (1978) where the court found that a personal representative and devisee under the will breached her duty to the widow in not claiming an award in lieu of homestead, thereby increasing the devise to the personal representative. The facts and rules of law in Drinkwater do not support the trial courts holding that it was inappropriate to make repairs allowed or authorized by the trust and statute.

E. Attorneys Fees

Where the Appellant complains that it was error to deny her attorneys fees and award fees to the Respondent, the Respondent cites only the Petrie case involving the father who stole from his children's custodial accounts in support of the rule that the award of fees is discretionary. What the Respondent fails to advise the court is the holding in In Re the Estate of Marie Ehlers, 80 Wn.App. 751, 911 P.2d 1017 (1996) renders it clear that a trustee of a testamentary trust is only obligated to render an accounting to a remainder beneficiary unless a petition is filed.

F. Travel Expenses/Labor Costs

The Respondent fails to answer the Assignment of Error that none of the Findings of Fact or Conclusions of Law support the trial court's denial of the trustee's travel expense and labor costs.

G. Trust Property – Appraisal

Here, where the proceeding by the remainder beneficiary for removal of the trustee and denial of fees resulted in mediation, arbitration, and trial and the resulting elapse of time, the trustee argued she was entitled to have the appraised value at the time of death applied, not those

valued of the two houses eight years later, where the Respondent had exclusive control of the house held as tenants-in-common by the Appellant and Respondent and where during that time, the Respondent allowed the house to deteriorate. The only answer by the Respondent is that it was an equitable issue, and cites Drinkwater, a probate case holding that a devisee who was a personal representative failed to protect the interest of a widow by failing to make an award in lieu of homestead.

III. ARGUMENT

The Appellant's Brief details seven separate arguments of law (A. – G.) commencing on page 21, most of which the Respondent avoids as discussed below, and summarized in the matrix entitled Arguments Compared.

A. Standard of Review.

The Respondent does not address the de novo standard of review cited by the Appellant.

B. Neither Elmer Cook's Trust Agreement Nor Statute Require an Accounting to John Cook (remainder beneficiary).

The Respondent does not address the issues raised in this section by the Appellant.

C. Trustee's Duty to Account – Only Life Beneficiaries are Entitled to Notice

The Respondent does not address the issues raised in this section by the Appellant. The Respondent merely argues that RCW 11.106.020 does not replace a common law duty, for which no citation is provided, that a trustee is somehow required to account to a remainder beneficiary.

Even if an accounting had been made during the lifetime of Elmer Cook, nothing would have come of it because the trial court approved the trustee's accounting as faithful, accurate and complete.

D. Value of Services Provided

The Respondent fails to counter the statutory right to reasonable compensation authorized by RCW 11.98.070(26), but argues, without authority, that a trustee has a duty to advise remainder beneficiaries that the trustee has conserved trust assets by deferring payment of compensation and reimbursement.

E. Right to Repair and Maintain Trust Property

The Respondent fails to address the Appellant's argument and citation to RCW 11.98.070(19) and trust provision allowing repairs; but instead presents an unsupported argument that repairing a trust asset which

would benefit all remainder beneficiaries (in this case, the Appellant and Respondent) is inappropriate.

F. Attorneys Fees of Beneficiary– No Harm or Benefit Shown

The Respondent fails to discuss or counter the cases and statutes cited by the Appellant concerning attorneys fees.

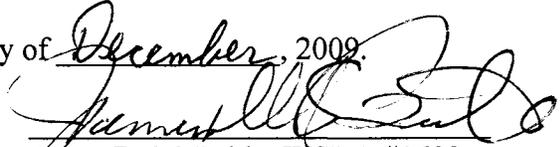
G. The Trust Agreement and Finding of Fact 21 are Reviewed De Novo.

The Respondent failed to address the Appellant’s position that Finding of Fact 21 is actually a conclusion of law, reviewable by the Court of Appeals de novo, that the Trustor expected the Trustee to encumber the house in the trust to pay for current expenses.

IV. CONCLUSION

The Respondent has failed to provide statutory or common law citations to support the trial court’s decision assigned as errors in the Appellant’s Brief.

Respectfully Submitted this 3 day of December, 2009.


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Brateng- Arguments Compared

	Issue	Sub-Issue	Appellant's Argument Presented	Respondent's Argument Presented	Appellant's Reply
A.	Standard of Review	Findings of Fact	Substantial Evidence Standard- a quantum of evidence to persuade a rational fair-minded person the premise is true	No Objection	No Objection; thus No Reply
		Conclusions of Law	De Novo	No Objection	No Objection; thus No Reply
		Interpretation of Trust Agreement	De Novo	No Objection	No Objection; thus No Reply
B.	Accounting Provided	Timely and Complete	Trust does not require accounting; Def. never requested accounting- if no duty is created, no duty to breach (Ehlers)	No Objection	No Objection; thus No Reply
		No Objection to Non-Sale	Def. lived next door for 27 months, knowing house was not sold without objection	No Objection	No Objection; thus No Reply
		No Loss to Beneficiary	When accounting made, beneficiary was not at a loss	No Objection	No Objection; thus No Reply
C.	No Duty to Account to Remaindermen	Duty to Account to Income Beneficiaries Only	Duty to account applies to income beneficiaries only (RCW 11.106.020)- Trustee to account "to each adult income trust beneficiary"	RCW 11.106.020 does not supplant the common law duty that the Trustee act in good faith and inform the Beneficiary of her plan to protect his interest (<u>Esmieu</u> and <u>Petrie</u> - Duty of Good faith).	Trustee informed the Lifetime Beneficiary of all activities undertaken as trustee
		Def. Remainderman	Def. not "income trust beneficiary"	No Objection	No Objection; thus No Reply

	Issue	Sub-Issue	Appellant's Argument Presented	Respondent's Argument Presented	Appellant's Reply
C.	No Duty to Account to Remaindermen (Cont.)	Only Duty to Account for Receipts and Disbursements	The duty to account only refers to receipts and disbursements	No Objection	No Objection; thus No Reply
D.	Value of Services	Payment Authorized	Payment of "reasonable compensation" to the trustee is authorized (RCW 11.98.070(26))	No Objection	No Objection; thus No Reply
		No Notice to Beneficiaries		Trustee provided no notice to beneficiary of deferred claim, thus, he had no opportunity to avoid costs to preserve the trust estate	No Duty to Give Notice of Value of Services
		Failure to File Claim		Trustee not entitled to deferred compensation due to her failure to file a claim against the Trust Estate. (RCW 11.40.140)	<u>Reply:</u> This argument is a "Straw Man"- this action is not about an estate, but a trust- there were no assets in an estate
E.	Right to Repair and Maintain Trust Property	Authorized by statute?	Trustee is authorized "to make ordinary or extraordinary repairs..." (RCW 11.98.070(19))	No Objection	No Objection; thus No Reply
		Authorized by Trust?	Trustee is authorized to retain non-income producing assets and repair the same (Art. 14, sec (3)(u))	No Objection	No Objection; thus No Reply

	Issue	Sub-Issue	Appellant's Argument Presented	Respondent's Argument Presented	Appellant's Reply
E.	Right to Repair and Maintain Trust Property (Cont.)	Unauthorized by Fiduciary Duty?		Trustee breached fiduciary duty by using trust funds to remodel a trust asset which would no longer benefit the trust beneficiary.	No breach of fiduciary duty because Trustee used the funds to remodel an asset the beneficiary often returned to and would <u>benefit all remainder beneficiaries</u> , not just the Trustee as remainder beneficiary
		Unauthorized Profit by Trustee?		Trustee breached fiduciary duty by using trust funds to remodel a trust asset she would ultimately inherit by failing to inform the beneficiaries of the need and scope of remodel.	No duty to Inform Remainder Beneficiaries of Repair to Trust Asset
F.	Attorneys Fees to Defendant/ Respondent	Trustees Accounting Complete and Accurate	Although accounting was complete and accurate, award allowed against Trustee for fees	No Objection	No Objection; thus No Reply
		Justice Does Not Require It?	A trustee may be required to pay fees and costs if "justice requires it", but there are no facts to support the COL awarding attorneys fees awarding to the Def. and denying to the Plaintiff. (RCW 11.96A.150(1))	No Objection	No Objection; thus No Reply

	Issue	Sub-Issue	Appellant's Argument Presented	Respondent's Argument Presented	Appellant's Reply
F.	Attorneys Fees to Defendant/ Respondent (Cont.)	Standard of Review?	Award of Attorneys fees is left to the discretion of the court, will not be overturned absent a clear showing of abuse of discretion	Award of attorneys fees is discretionary, see RCW 11.96A.150.	No Breach of Duties by Trustee thus, abuse of discretion to award only 50% to Trustee
		Substantial Benefit to Estate?	Caselaw states that it is inappropriate to award fees against an estate when litigation could result in no substantial benefit to the estate.	Litigation benefitted the estate by: (1) disallowing trustee's claim for services , (2) disallowing \$10K remodel costs; (3) disallowing claim of travel and labor, and (4) finding the Trustee breached her fiduciary duty	The current position of the litigation may benefit the estate in the manner argued by the Respondent, but any benefit is a result of an improper ruling by the trial court, which should be overturned
		Untenable basis for Award of Fees	Abuse of discretion to award or deny fees if the basis is untenable	No Objection	No Objection; thus No Reply
G.	Finding of Fact #21	Conclusion of Law	FOF #21 interprets the plain meaning of the trust document	No Objection	No Objection; thus No Reply
		Not supported by Trust	No aspect of the Trust Agreement, read on its own or as a whole, supports mixed FOF/COL that Trustor expected Trustee to encumber house by borrowing against it	No Objection	No Objection; thus No Reply

Brateng- Assignments of Error Compared

Issue	Assignment of Error	Response	Respondent's Authority	
A.	Defferral of Payment for Services	Does Trustee have Duty to Disclose to Remaindermen whether Payment is being deferred?	Trial Court correctly denied Trustee's request for payment for services	<u>Esmieu v. Schrag</u> - failure to inform beneficiaries re: hearing; <u>Estate of Suddreth</u> - failure to file claim in estate
B.	Duty to Sell/ Encumber	Does Trustee have fiduciary duty to disclose to Remaindermen the decision not to Encumber/Sell Trust Property?	Trial Court correctly held that Trustee breached common law fiduciary duty by not disclosing decision to charge remainder estate rather than sell trust property	<u>Petrie v. Petrie</u> - duty of good faith
		Does Trustee's decision not to encumber/sell trust property conflict with Trustor's Intent that Def. receive 9/20ths of Estate?		None
C.	Non-Disclosure of Value Deferred	Does a Trustee have a duty to Disclose to Remainderman the value of services provided by Trustee?	Trial Court correctly held that Def. post-death claim for services was in direct conflict with Trustor's express intent.	None
D.	Repairs to Trust Property	Did Trustee breach fiduciary duty by repairing and maintaining trust property to justify \$20K charge against the Trustee?	Trial Court correctly disallowed \$10K for house remodel expenses related ot the purchase of kitchen cabinets where no water damage, and Trustor w/ no reasonable expectation to return	<u>Petrie v. Petrie</u> - duty of good faith; <u>Estate of Drinkwater</u> - trustee not permitted to make profit from trust
E.	Attorneys Fees	Is it Reversible Error to Award Attorneys Fees where no harm shown nor any benefit gained by Trust by lawsuit?	Trial Court did not abuse its discretion in awarding Remainderman all of his claimed attorneys fees and Trustee 1/2 of hers	<u>Petrie v. Petrie</u> - fees are discretionary
		Is it Reversible Error to require Trustee to bear 3/4 of her own attorneys fees in defending breach of trust claims when accounting found to be complete and accurate		None
		Does the law support the mixed FOF and COL that a Remainderman is entitled to an award of attorneys fees and trustee only entitled to 1/4?		None

	Issue	Assignment of Error	Response	Respondent's Authority
F.	Travel Expenses/ Labor Costs	Do any of the FOF and COL support denial of Trustee's travel expenses and labor costs?	Trial Court correctly held that travel expenses and labor costs are not "fiduciary" costs as allowed in the Trust	None
G.	Trust Property-Appraisal	Is a Trustee deleterious in not pursuing mediation.. On appeal for trial de novo when Trustee already provided complete and accurate accounting which delay justified applying the appraised value at time of trial, not death?	Trial Court correctly used its powers in equity to use the 2007 appraisal value of the estate property and the partition property	<u>Estate v. Drinkwater</u> -probate court is a court of equity

Brateng- Assignments of Error Compared

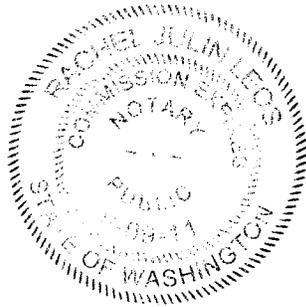
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Dated this 4th day of December, 2009. Raemi M. Lucas
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SUBSCRIBED TO AND SWORN before me this 4th day of December,
2009.



Rachel Julin Leos
Printed Name: Rachel Julin Leos
Notary Public in and for the State of WA
Residing at Kirkland, WA
My Commission Expires 9/9/2011