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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

In Re ESTATE OF WILMA RODMAN

BRIEF OF APPELLANT

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A. Introduction

This appeal presents the issue of whether a trial court must hear testimony and consider evidence when a party objects to the final accounting and report of a nonintervention estate. Here, appellant Darrell Rodman filed objections to the final accounting and report proposed by the Personal Representative (PR) of the Estate of Wilma Rodman. The trial court refused to consider evidence or allow testimony from Darrell Rodman in support of his objections. This appeal asks that the matter be remanded to the trial court for a hearing on Darrell Rodman's objections.

B. Assignments of Error

Assignments of Error

1. The trial court erred by refusing to consider documentary evidence offered by Darrell Rodman in support of his objections to the closing of the estate.

2. The trial court erred in refusing to consider live testimony from Darrell Rodman in support of his objections to the closing of the estate.

3. The trial court erred in awarding all the attorney fees sought by the personal representative of the estate.

4. The trial court erred by approving the final accounting and closing of the Estate of Wilma Rodman.

Issues Pertaining to Assignments of Error

1. Was the trial court required to consider evidence at a hearing to consider Darrel Rodman's objections to the PR's actions? (Assignments of Error Nos. 1 and 2)
2. Did the dispute resolution provision of the settlement agreement preclude Darrell Rodman from pursuing his objections to the PR's actions in court? (Assignments of Error Nos. 1 and 2)
3. Was it an abuse of discretion for the trial court to award all the attorney fees sought by the PR? (Assignment of Error No. 3)
4. Is the proper remedy for the trial court's errors in closing the estate a remand to the trial court for a hearing to consider Darrell Rodman's objections? (Assignment of Error No. 4)

C. Statement of the Case

Wilma Rodman died in 1993. CP 230. Her will was admitted to probate that year. *Id.*

One of the assets of the estate was a real estate contract known as the "Schnitzer contract," from which the estate received funds. RP 4. The will provided that funds from the Schnitzer contract be used to pay reasonable expenses for repairs and maintenance of the "homestead property," which was occupied by Darrell Rodman. *Id.*

There was a settlement agreement that reiterated the obligation of the estate to pay for repairs and maintenance. RP 5. The settlement agreement also provided that any disputes be decided by a "third-party mediator," designated as Judge Stone. *Id.*

David Bastian became the PR with nonintervention powers. CP 230.

On May 10, 2010, Darrell Rodman filed a Petition for Accounting. On June 17, 2010, the PR filed a motion to present a final report. CP 228.

On July 15, 2010, Darrell Rodman filed objections to final account. CP 229. Darrell Rodman's objections were as follows:

1. That the request for the personal representative fees is unreasonable and excessive. The declaration of completion submitted before the accounting was for a total of \$22,301. Following this heir's objection and request for an accounting, an additional \$18,000 was added to the request. Moreover, the personal representative charges the same rate for legal services as he does for the administrative duties as personal representative.
2. That the personal representative failed to properly exercise his responsibilities under the will and settlement agreement. In so doing, Darrell Rodman was forced to pay expenses that should have come from the Schnitzer contract. The personal representative paid some expenses but after a point advised Darrell Rodman that the other beneficiaries attorney objected to any future expenses for repair and maintenance and that he would not grant any more requests.
3. The personal representative failed to invest the proceeds of the Schnitzer contract in the highest interest rate in an insured account causing a loss of interest to the estate which should be grounds for reduced fees.

Id.

The hearing to close the estate was held on July 16, 2010. RP 1. Counsel for Darrell Rodman began by requesting a half day hearing, stating as follows:

I have a suggestion Your Honor. We have issues between the two of us [Darrell Rodman and the personal representative] that are going to require longer than a motion calendar hearing. What I would like to do is get a special set hearing, half a day. I think we can resolve it in half a day.

RP 3.

The trial court informed Darrell Rodman's counsel that the court had not received his papers:

THE COURT: I didn't get any papers from you. I don't have anything in from you.

MR. HACKETT: I can hand Your Honor the copy of what I filed in this matter. I was unable to give you this because I was beyond the limit to do that –

THE COURT: I received nothing.

MR. HACKETT: There's more than one issue to be heard.

RP 6.

The PR proceeded to provide argument on the merits of the three issues raised in Darrell Rodman's objections. RP 8-11. The court asked Darrell Rodman's counsel to address the second issue, having to do with paying for maintenance and repair:

THE COURT: Okay. Mr. Hackett, first of all, what I would to know, with regard to Paragraph 2, is how you can now challenge, since you had a settlement agreement and decisions went to Judge Stone, and there have been no decisions since 2006.

...

THE COURT: I guess I don't understand why there's a need for a hearing at this point. Are we not –

MR. HACKETT: The attorneys –
THE COURT: This is very late in the game, isn't it? ...

I didn't get your materials in order to study them.

...

MR. HACKETT: I just have objections. The point is, it's going to take longer to resolve. I didn't say we were going to prevail. I just said that's what we are going to attempt to do.

RP 11-12.

The trial court refused to consider Darrell Rodman's objections to maintenance and repair decisions in the prior three years:

MR. HACKETT: We're not trying to challenge things that were made back in 1997 or 1996.

THE COURT: I'm asking, what are you trying to challenge? Is it anything that occurred in the last two years?

MR. HACKETT: I think it's – we're going back about two or three, about all the time this stopped.

THE COURT: We're not going to go back. We're not going to go back. The court is not going to go back. You have a settlement agreement in place. There was a mechanism for doing that. We're not going to go back and revisit old decisions. That's not going to happen.

RP 13-14.

The PR sought \$38,230 in attorney fees. CP 232.

The trial court approved the final report and accounting and all the attorney's fees requested by the personal representative. RP 15. The court refused to allow any further hearing. *Id.*

The trial court entered the Order re Final Accounting on July 16, 2010. CP 230. Darrel Rodman timely filed a Notice of Appeal. CP 235.

D. Summary of Argument

Darrell Rodman was a beneficiary of Wilma Rodman's estate. He timely objected to certain actions by the PR, which he contended diminished his inheritance. The court failed to consider his objections. The trial court based its decision on a dispute resolution clause in a settlement agreement, when the parties by their actions waived the provision, and on counsel's failure to deliver papers to the court.

Darrell Rodman also objected to the attorney fees to be paid to the PR. The trial court abused its discretion in awarding the fees by not considering whether some work was non-legal.

E. Argument

1. The trial court wrongly refused to hold a hearing to consider evidence to support Rodman's objections to closing the estate.

The trial court wrongly refused to hold a hearing to consider evidence that would support Darrell Rodman's objections to closing the estate; specifically that the PR failed to follow the instructions in the will and settlement agreement to pay certain expenses, and that the PR failed to properly invest estate funds. "Upon hearing of the petition" after a request by a beneficiary, the trial court may order the PR to provide a report on "the affairs of the estate." RCW 11.68.065.

Here, Bastian was appointed PR with non-intervention powers. This gave him wide latitude in handling the affairs of the estate without court supervision. A PR with non-intervention powers has all the powers of a PR under RCW 11.76, but is not obligated to comply with the duties imposed under that chapter. RCW 11.68.090. RCW 11.76 governs estates under court supervision.

Still, the PR has the duty to settle the estate “as rapidly and as quickly as possible, without sacrifice to the probate and nonprobate estate.” RCW 11.48.010. In managing real property, the PR “shall keep in tenantable repair all houses, buildings and fixtures thereon, which are under his or her control.” RCW 11.48.020.

Even with non-intervention powers, a PR is obligated to carry out testamentary directions of the testator and follow the general laws of administration. *In re Eberle’s Estate*, 4 Wn.App. 638, 643, 484 P.2d 478 (1971).

One of the few checks on the PR’s performance of his duties is any beneficiary’s right to request a report from the PR on the affairs of the estate under RCW 11.68.065. Darrell Rodman exercised that right by requesting an accounting. He also presented objections to the final report.

Darrell Rodman’s objections were based on the PR allegedly not complying with the terms of the will and the settlement agreement out of

which he was appointed. Both of those documents required the PR to pay expenses of the homestead property out of estate funds, prior to distributing the proceeds to beneficiaries. Instead, Darrell Rodman paid these expenses himself, instead of the estate paying them out of estate funds.

In addition, Darrell Rodman had objected that the PR had not properly invested funds of the estate to earn the maximum amount of interest. It would be in the estate's and beneficiaries' best interest to earn the maximum amount. A PR has a duty to act in the best interests of the estate and beneficiaries. RCW 11.68.090. If a PR fails to exercise his duties in any respect, that is a basis for reducing the compensation to a PR. RCW 11.48.210.

Darrell Rodman's objections, if substantiated, would result in a different net distribution to him, as the estate might have paid less to the PR and more to heirs, and more expenses of the homestead property would be paid by the estate, with Darrell Rodman paying nothing out of his own pocket. There is no way for this court to determine if Darrell Rodman would have prevailed, as the trial court never considered his evidence or allowed his testimony.

An apparent basis for the trial court's refusal to consider Darrell Rodman's evidence was that his attorney did not provide it to the court, as

required by local rule.¹ It was provided to the PR the day before the hearing. RP 6-7. That is in compliance with the civil rules. CR 6(d) requires only that affidavits opposing a motion be served one day prior to the hearing.

The failure to provide papers to the court is not a basis for the court to refuse to consider the papers. Courts are permitted to make local rules that do not conflict with the civil rules. CR 83. A local rule that purports to allow a court to refuse to consider papers that were not provided to the court conflicts with the civil rules, by imposing sanctions without process of notice and a hearing, and is unenforceable. *Hessler Constr. Co. v. Looney*, 52 Wn.App. 110, 757 P.2d 988 (1988). The trial court improperly refused to consider Darrell Rodman's papers for the failure to provide them to the court.

Another improper basis for the court's refusal to consider Darrell Rodman's objections was that they were to be determined by Judge Stone under the dispute resolution provision of the settlement agreement. The parties waived that provision.

¹ The trial court did not mention a local rule, but that is the implication from the transcript.

2. The personal representative waived its right to have Rodman's objections heard by the arbitrator.

The PR waived any requirement that disputes arising out of the handling of the estate be submitted to Judge Stone. The dispute resolution provision was an agreement to arbitrate. Parties by their conduct can waive a requirement to arbitrate disputes. *Shoreline School Dist. No. 412 v. Shoreline Ass'n of Edu. Office Employees*, 29 Wn.App. 956, 958, 631 P.2d 996 (1981).

As a beneficiary, Darrell Rodman had a right to object to the PR's handling of the estate and whether the PR was following the terms of the will. He arguably was required to present those claims to Judge Stone under the settlement agreement. However, for reasons irrelevant in this appeal, he chose to present his objections to the court instead.

The PR did not assert that Darrell Rodman could not present his objections in court. Instead, he addressed their merits. That is conduct inconsistent with a requirement to arbitrate. A waiver of a right to arbitrate is based on conduct inconsistent with any other intention but to forego that right. *Id.*

The PR wanted to address Darrell Rodman's objections in court. By doing so, he waived the arbitration requirement. The trial court was then required to adjudicate the objections.

3. The trial court abused its discretion by awarding all the attorney fees sought by the PR.

The trial court abused its discretion by awarding the PR all the attorney fees he sought. The proper standard for abuse of discretion “is whether discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion.” *Coggle v. Snow*, 56 Wn.App. 499, 507, 784 P.2d 554 (1990).

Here, the PR was a licensed, practicing attorney. He sought fees for all his work on the estate based on his normal hourly attorney rate of \$200. The trial court awarded 100% of his requested fees, without making any findings that the hours were necessary, or that the work was legal work, rather than clerical or administrative. When a PR is a lawyer, and work on the estate included legal, along with clerical and administrative work, the trial court properly reduced the PR's fees for hours expended on clerical and administrative work. *Estate of Mathwig*, 68 Wn.App. 472, 843 P.2d 1112 (1993). A lawyer is not entitled to compensation at legal rates for services which could have been performed by staff. *In re Larson's Estate*, 103 Wn.2d 517, 531, 694 P.2d 1052 (1985).

A PR is entitled to reasonable compensation for legal services. RCW 11.48.210. A trial court is required to determine the reasonableness of those fees. RCW 11.68.100. The trial court failed to properly exercise

its discretion to determine the reasonableness of the PR's requested fees. The trial court did not attempt to determine if the time spent by the PR was for legal work, or for clerical, administrative, or other non-legal work. Merely rubberstamping the PR's request is not exercising discretion on tenable grounds or tenable reasons.

4. The proper remedy for the trial court's errors in closing the estate is a remand to the trial court for a hearing.

The proper remedy for the trial court's errors is remand to the trial court for a hearing on Darrell Rodman's objections. The issues raised by Darrell Rodman's objections will require the exercise of the trial court's discretion, and consideration of evidence not before this court.

The errors by the trial court necessitate vacating The Findings and Report Upon the Report and Accounting of the Personal Representative, closing the estate.

F. Conclusion

The estate in this matter was opened in 1993. It is understandable the trial court wanted to close it. The duration of the estate is not a reason to not permit Darrell Rodman a hearing on his objections to the closing of the estate. Washington probate law requires a remand for a hearing on Darrell Rodman's objections.

DATED this 15th day of February, 2011.

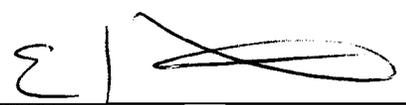
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been served by mail, properly addressed and prepaid, on the 15th day of February, 2011, to:

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