

No. 41285-3-II

FILED TO COURT
BY: 

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JENNIFER LINTH,)	
)	
Appellant,)	BRIEF OF RESPONDENT
)	NORTH OLYMPIC LAND
v.)	TRUST
)	
EVELYN PLANT TRUST, et al.)	
)	
Respondents.)	

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STATEMENT OF THE CASE

The appellant, Jennifer Linth as trustee of the Evelyn Plant Trust and Estate (hereinafter “Trustee”) filed a Motion to Vacate the Order Approving a Nonjudicial Dispute Resolution Agreement on September 23, 2009 under Clallam County Superior Court Cause No. 08-2-00095-1. CP 140. The motion was brought both in Jennifer Linth’s capacity as the Trustee and individually.¹ When the original motion was filed, no specific court rule was cited as to the basis for the motion. Instead the motion referred to various declarations of individuals which were simultaneously filed with the motion. The Brief of Jennifer Linth in Support of Motion to Vacate the Order Approving the Nonjudicial Dispute Resolution Agreement cited as legal authority CR 1, CR 60(b)4 and (11), and CR 60(c). CP 278. The brief then listed various common law doctrines including failure of consideration, mutual mistake, impossibility, frustration of purpose, failure to include indispensable party, duress, coercion and lack of free will. CP 278 and 281. The arguments presented in that brief were not based on claims the original trustee, Dan Doran, suffered from any duress, coercion or lack of free will. Instead they were

¹ The Court should take note that the Notice of Appeal was only filed by Jennifer Linth as a Trustee. CP 5. No appeal has been taken in her individual capacity as a beneficiary of the estate. The 30 day time limit to perfect an appeal has expired. RAP 5.2(g).

based on Jennifer Linth as an individual beneficiary claiming she was the subject of those claimed wrongful acts or conditions. CP 278 and 281.

An (Amended) Brief of Jennifer Linth in Support of Motion to Vacate the Order Approving the Nonjudicial Dispute Resolution Agreement, CP 213, was later filed on April 6, 2010. For the most part, the amended brief merely recited the same CR 60 basis for the motion along with the previously cited doctrines of failure of consideration, mutual mistake of fact, impossibility of performance, misrepresentations, duress and “such other principles as may apply given the facts as they develop.” CP 216.

Following argument and review of the file by Judge Verser, a Memorandum Opinion and Order, CP 19, was filed on July 30, 2010 denying the motion. Following a Request for Reconsideration, CP 17, an Order Denying the Motion for Reconsideration was filed on September 16, 2010. CP 16. This appeal by only the Trustee followed on October 5, 2010. CP 5.

The initial suit was filed over ten years ago on November 14, 2001 under Clallam County Superior Court Cause No. 01-2-00918-7. The suit started with a Petition for Declaration of Rights Under the Decedent’s Trust and Seeking the Removal of the Trustee, CP 309, brought by Jennifer Linth and Carolyn Linth, Jennifer Linth’s mother, through their

attorney William Olsen of Aiken, St. Louis & Siljeg, P.S. Based on alleged defects in a trust amendment document which failed to have a foundation plan attached, numerous beneficiary interests were impacted. A separate legal analysis of a likely outcome obtained by the attorney who drafted the amendment, Carl Gay, suggested the amendment would fail. CP 115.

Following a mediation effort in June of 2002, CP 265, the parties worked on a settlement agreement for over two years, reaching agreement in late 2004. CP 167. Jennifer Linth met in a church in Port Angeles with her attorney, William Olsen, and a second attorney, Romney Brain, of Tousley Brain Stephens, on December 20, 2004 to review and discuss the written settlement. Present at the meeting were Jennifer Linth's pastor, John Dodge, two friends of hers from the community and her two brothers, John and David Linth. CP 167. After considering the matter for three days following that meeting, Jennifer signed the settlement on December 23, 2004. CP 167.

Court approval of the settlement was sought with the first hearing set for May 27, 2005, some five months after Jennifer Linth signed. CP 167. Prior to the hearing, Jennifer Linth signed a statement recognizing the settlement was necessary despite her personal beliefs about the contested trust amendment. CP 264 and 270. At the time of the first

hearing, the North Olympic Land Trust intervened to object to the form of a proposed conservation easement attached to the settlement agreement. CP 232. After working out the terms of the conservation easement and adding the North Olympic Land Trust as a party to the agreement, an amendment to the agreement was circulated for signatures with the final settlement approved by the court at a hearing on October 13, 2005. CP 167, 168 and 232. No one objected to the order approving the settlement. CP 168.

Following the settlement, several actions took place based on the executed and approved settlement agreement. The original trustee, Dan Doran, resigned and a new trustee, Glenn Smith, was appointed. Cash distributions of \$400,000 were made to residuary beneficiaries, various relatives of Jennifer Linth and to a church, all as provided for in the settlement. The land which is the subject of this dispute was appraised and surveyed using trust funds to pay the expenses. The Land Trust paid over \$200,000 to the Evelyn Plant Trust for the conservation easement, which transaction closed in September of 2006. Cash advances of nearly \$30,000 were paid to Jennifer Linth and her mother following the easement purchase based on the assumption the land would eventually be sold. CP 233. The Land Trust was required to assign rights under the easement to the Salmon Recovery Funding Board of the state of

Washington pursuant to the terms of the grant that paid for the easement. CP 186. The assignment required the Land Trust to enforce the easement otherwise the state of Washington had the right to do so. CP 186 and 197.

ARGUMENT

Pursuant to RCW 11.96A.240, approval by a court of a TEDRA settlement agreement is only authorized if the court determines “the interests of the represented parties have been adequately represented and protected.” Nearly four years after the settlement was approved by the judge in Clallam County Superior Court Cause No. 01-2-00918-7, the motion to vacate was filed under a new cause number 08-2-00095-1. The two cases had been consolidated earlier on July 17, 2008. CP 287. In order to set aside such a court order, and potentially the settlement agreement approved by the court order, the Trustee must follow both proper procedural and substantive rules. CR 1, cited in Trustee’s brief, CP 278, addresses the scope of the civil rules in superior court. These rules govern the procedures in civil actions. CR 60 is the procedural rule which must be utilized an order to obtain relief from a judgment or court order. The rule itself sets forth the legal basis upon which such a motion can be founded, covering several of the individually listed legal doctrines argued by the Trustee.

In this case, the Trustee in her brief supporting her motion did finally refer to CR 60(b). Specifically the Trustee claimed the order should be set aside under CR 60(b)(4) (fraud) and CR 60(b)(11) (any other reason justifying relief). By suggestion in the Trustee's assigned error No. 5 in this appeal (mutual mistake), the Trustee would presumably also invoke CR 60(b)(1) (mistakes in obtaining a judgment or order).

CR 60(b) does have time constraints. In general, "the motion shall be made within a reasonable time and for reasons (1), (2) or (3) not more than one year after the judgment, order or proceeding was entered or taken." It is the Land Trust's position this motion, filed four years after the order was entered, is too late under both the specific time limit of one year for a "mistake" under CR 60(b)(1) and "within a reasonable time" for the fraud, duress and coercion assertions.

The Trustee lists five assignments of error. In each, there is a claim the trial court abused its discretion in some fashion:

Abuse of discretion means that the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable. *Coggle v. Snow*, 56 Wash. App. 499, 507, 784 P.2d 554 (1990). If the trial court's decision is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld. *Lindgren v. Lindgren*, 58 Wash. App. 588, 595, 794 P.2d 526 (1990).

Boss Logger, Inc. v. Aetna Cas. & Surety Co., 93 Wash. App. 682, 685, 970 P.2d 755 (1998).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

Bay v. Jensen, 147 Wash. App. 641, 651, 196 P.3d 753 (2008).

With these court rules and review standards in mind, the five assignments of error will be addressed. It should also be noted that for most of the five assignments of error, the documents, declarations and arguments presented all concern Jennifer Linth in her individual capacity. The original trustee, Dan Doran, signed the original settlement agreement. That agreement is now binding on the successor trustee as provided in Paragraph 8(iv) of the agreement. CP 297. No claim has been made the original trustee had any of the concerns now expressed in Jennifer Linth's declarations as to the wisdom of the terms of the final settlement. As pointed out in the beginning of this brief, the appeal was filed by Jennifer Linth only in her capacity as a successor trustee, not as an individual. It is questionable whether she as Trustee has standing² to

² "The litigant may have standing if (1) the litigant has suffered an injury-in-fact, giving him a sufficiently concrete interest in the outcome of the disputed issue; (2) the litigant has a close relationship to the third party; and (3) there exists some hindrance to the third

utilize the concerns of a single beneficiary litigant (Jennifer Linth as an individual) as the grounds to appeal an adverse ruling against the trust without also providing some evidence the original trustee was also suffering from similar duress or misunderstandings or that the trust itself has suffered some loss. While the successor trustee under RCW 11.98.039(5)(b), was not barred from pursuing possible claims against the previous trustee, no such claims have been brought by the successor trustee.³

1. Assignment of Error No. 1. The first assignment of error claims the court failed to follow the intent of the deceased. In the argument section of Trustee's brief, the Trustee cites cases discussing the construction of wills. While the current case started out as a declaratory action to construe a trust, the court-approved TEDRA agreement brought that action to an end. The current matter is a motion to set aside a court order under CR 60(b). The court's function under

party's ability to protect his or her own interests. *Mearns*, 103 Wash.App., at 512, 12 P.3d 1048." *Ludwig v. Washington State Dept. of Retirement Systems*, 131 Wash. App. 379,385, 177 P.3d 781 (2006). In *Ludwig* the court determined the litigant did not have standing to act on behalf of a third party to challenge a statute. In the current case, the trust has no standing to act on behalf of Jennifer Linth as an individual beneficiary. The trust claims no loss or injury. The Trustee's responsibility under the settlement is to sell the property and divide the proceeds. Only Jennifer Linth individually has claimed a loss and she failed to timely appeal.

³ Jennifer Linth individually and not as the successor trustee of the trust has sued the original trustee, Dan Doran, in a separate Clallam County case, Cause No. 09-2-01359-7 for claimed damages as a beneficiary of the trust. That case is still pending at the time of filing this brief.

that rule is not to construe a trust whose terms were strongly contested and ultimately compromised in a settlement, but rather to determine if there were sufficient grounds under CR 60(b)(4) and/or (11) to vacate the judgment approving the settlement from four year previous to the filing of the motion. The court reviewed the voluminous files, including the surrounding circumstances of the change in various parties' positions over the intervening four years, and found there was not a sufficient basis from the multiple legal theories argued to vacate the order. The court's carefully considered decision after weighing the Trustee's arguments and submitted supporting materials can hardly be said to be manifestly unreasonable. There was more than sufficient reason to leave the order, and as a consequence the settlement, in place.

2. **Assignment of Error No. 2.** The second assignment of error is a claim the court failed to weigh relevant legal principals when disregarding the acknowledged intent of the deceased. The arguments presented in the Trustee's brief for this claimed error have been merged with the will construction arguments presented in the first claimed error. The Land Trust's position with respect to this second assignment of error includes the same arguments presented above in response to the first assignment of error concerning not following the testator's intent. The judge was not asked to construe the will and determine intent. The

judge was asked to set aside a judgment entered four years previous to the motion based on fraud, mistake, failure of consideration, impossibility of performance, duress, coercion and lack of free will. The arguments presented by the Trustee and the allegations presented in an attempt to support these legal theories all relate to Jennifer Linth individually and to her participation in the settlement. Most settlements involve a compromise. It is not unusual for some party to later regret agreeing to a settlement. Waiting four years to finally bring these regrets to the court's attention after many parties have made changes based on the court approved settlement is not timely. The court did not abuse its discretion when weighing the argued legal principals by denying the motion to vacate.

3. **Assignment of Error No. 3.** The third assignment of error relates to failing to find the agreement was signed under duress. This assignment appears to be based on the CR 60(b)(4) fraud allegation, although nowhere in the Trustee's appellant brief is CR 60(b) even mentioned. The Trustee's brief uses the words "coercion" and "duress" which would appear to fall under CR 60(b)(4) (fraud).⁴ If these concepts are outside the realm of fraud as contemplated in this section of CR 60(b), the other option is to consider if there is a basis under CR

⁴ "(4) Fraud (whether heretofore dominated intrinsic or extrinsic) misrepresentation, or other misconduct of an adverse party;"

60(b)(11) which considers “any other reason justifying relief from the operation of the judgment.”

The court in its original opinion and order dismissed fraud out of hand. CP 22. Upon reviewing the declarations and briefing submitted to support the motion, the reason for discounting the fraud claim is obvious. The Trustee never briefed or argued fraud in any of the pleadings after referring to CR 60(b)(4) in both their original brief and amended brief. CP 278 and 216.

If the argument is based on CR 60(b)(11), the Trustee has to establish some extraordinary circumstances not already covered in the rest of CR 60(b). A good summary of the use of this section is contained in Volume 4, Washington Practice, CR 60. In that volume, Karl Tegland states:

The last ground for vacation, CR 60(b)(11), is a catch-all provision authorizing judgments to be vacated for any other reason justifying relief.

The use of the catch-all provision ‘is confined to situations involving extraordinary circumstances not covered by any other section of the rule.’ *Summers v. The Department of Revenue*, 104 Wn.App. 87, 14 P.3d 902 (2001); *In re Marriage of Tang*, 57 Wn.App. 648, 789 P.2d 118 (1990) (Ground 11 is to be ‘confined to situations involving extraordinary circumstances not covered by any other section of the rule.’).

Thus, for example, if a case falls within one of the provisions having a one year time limit for filing the motion, the time limit cannot be avoided by arguing that the case falls within the catch-all provision instead. *Friebe v. Supancheck*, 98 Wn.App. 260, 992 P.2d 1014 (1999).

In this case, the trial court devoted a considerable portion of the opinion to addressing the duress, coercion and lack of free will arguments. CP 24. The court considered all of Jennifer Linth's former legal counsel's declarations outlining the time spent explaining the settlement agreement, the multiple individuals Jennifer Linth had to support her during the discussions and the time spent before she actually signed the settlement agreement. She also had to sign an amended version five months later after the conservation easement was modified. Under those circumstances, and with all of the time she had to consider the terms of the agreement, it can hardly be argued the court abused its discretion in deciding she was not coerced into signing the agreement. As previously stated, all of this argument relates to Jennifer Linth as an individual, who has chosen not to appeal the decision. There is no claim the trustee, Dan Doran, suffered from any coercion or duress when he executed the document.

4. **Assignment of Error No. 4.** The fourth assignment of error concerns impossibility of performance. The Trustee combined her argument for this assignment of error with the mutual mistake assignment of error in her brief. The trial court addressed the impossibility of performance and mistake issues in a combined section of his opinion and

order. CP 22 and 23. In nearly one and a half pages of the opinion, the judge discusses his review of the materials that were submitted and weighs the opinions given by various experts. The court concluded there was not sufficient clear and convincing evidence presented to establish that it would be impossible to perform. This was weighed against the consequences of possibly setting aside a complicated and already partially performed settlement agreement. While not addressed by the judge, this issue only involved Jennifer Linth individually. There was no claim any trustee believed it would be impossible to perform the agreement, and in fact much of the agreement has already been performed with the exception of the sale of the property.

The court also did not address the issue of whether this particular argument falls under CR 60(b)(1) concerning mistakes. Any motion under that rule is limited to one year after the judgment. If on the other hand the impossibility argument is treated as falling under CR 60(b)(11) concerning any other reason, there is still a reasonable time requirement. As with the various other arguments used to challenge the order, waiting for four years after the final judgment and partial performance by many parties constitutes an unreasonable delay.

5. **Assignment of Error No. 5.** The last assignment concerns mutual mistake. This appears to be more clearly covered under CR

60(b)(1) which is limited to one year from the date of entry of the order. The judge did not address that issue in his opinion, but this court could certainly uphold the court's decision on any other reasonable ground.

If the type of mistake that is alleged is not found to be within CR 60(b)(1), then it would still at best fall under CR 60(b)(11). The Land Trust's response would be the same as addressed in the response to Assignment of Error No. 4 above. It would be necessary to show extraordinary circumstance and the motion must be brought within a reasonable time. As stated above, the judge carefully considered and weighed the evidence regarding the alleged mistake and did not find the evidence to be sufficiently clear, cogent and convincing to set aside the order approving the settlement. This decision was not manifestly unreasonable.

One additional consideration that has not been addressed in the Trustee's brief is what affect the setting aside of the order approving the settlement agreement would have. Approval of the settlement agreement was done in a court hearing pursuant to RCW 11.96A.240. As stated earlier in this brief, the trial court had to decide if the parties had been adequately represented and protected. If under the statute, the court had determined they were not, then the agreement would have had no effect. In this case, however, setting aside the previous order approving the

agreement would not automatically cancel the agreement, but would open it up for a new hearing on whether the parties' interests were adequately represented and protected. I bring this to the court's attention only because the Trustee's briefing appears to assume that vacation of the original court order approving the settlement would automatically terminate the agreement.

CONCLUSION

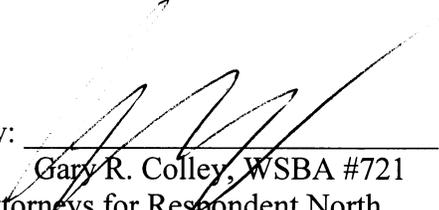
While this court does not have the voluminous entire file considered by the trial court judge, you have been provided with declarations and briefing that focus on the core of the Trustee's contention as to why an order approving a complicated estate dispute settlement should be set aside. The settlement was approved by all parties including the original trustee and beneficiary Jennifer Linth. The only party claiming to have been subject to duress and having made a mistake is the individual beneficiary Jennifer Linth, who did not appeal the decision denying the motion to vacate. The current Trustee did not challenge or allege any concern about the original trustee's participation in the settlement.

The Trustee has to establish the trial court abused its discretion in not setting aside the order approving the settlement four years after the order was entered and after many parties changed positions based on the

court approved agreement. Not only are adequate grounds lacking as determined by the trial court judge, but the motion was not brought in a reasonable time. The trial court did not abuse its discretion denying this motion. The North Olympic Land Trust requests the trial court's decision be affirmed.

RESPECTFULLY submitted this 8 day of February, 2012.

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JENNIFER LINTH,)	
)	
Appellant,)	CERTIFICATE OF MAILING
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v.)	
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EVELYN PLANT TRUST, et al.)	
)	
Respondents.)	

I am a resident of the state of Washington and over the age of 18 years. On the 9th day of February, 2012, I deposited in the United States Mail a properly stamped and addressed envelope containing a copy of *Brief of Respondent North Olympic Land Trust* to the following:

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