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NO. 50708-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ESTATE OF SANDRA WESTALL, Deceased.

APPELLANT'S REPLY BRIEF

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I. ANALYSIS

There are two errors in this matter that Paul Westall asks this Court to remedy: (1) denying Paul's¹ motion to approve his purchase of the Estate's undivided, fractional interest in his home, and (2) requiring that the entire, undivided interest in the Property² be listed for sale.

A. The trial court erred in denying Paul's motion to approve his purchase of the Community Property Estate's one-half interest in the Property.

Approving one of Paul's offers to buy the Community Property Estate's interest in the Property was in the best interests of the Estate and the Trust. Paul offered more than a fair value for the Property and all parties agree that the Trust would be better off with cash than an undivided, fractional interest in the Property.

As an initial matter, the Trustee repeatedly suggests that Paul's attempt to buy the Community Property Estate's interest in the Property was improper because that interest belonged to the Trust.³ However, it's important to note that (1) all parties agree the interest that Sandra bequeathed to the Trust should be sold,⁴ and (2) Paul did not sell that interest

¹ Paul refers to the Westalls by their first names for clarity and intends no disrespect.

² The Trustee and LGAL have taken to calling Paul's home the "Commercial Property," but it is, in fact, his home. The parties are not dealing with a piece of investment property, but Paul's home, a home he had hoped to share with his daughter.

³ The LGAL joins in the Trustee's arguments outlined in his Respondent's Brief, so all references to the Trustee's arguments in this Reply also incorporate the LGAL's position as well. Brief of Litigation Guardian ad Litem at 1.

⁴ CP at 538 (LGAL agrees that Destiny is better off with "cash" than the Property).

to himself, but rather sought court approval to avoid any suggestion of self-dealing, and then only after efforts to negotiate with the LGAL and Trustee stalled. If all parties agree that it is in the Trust's, and thus Destiny's, best interest to sell, it begs the question why Paul is being attacked for trying to do so.

Neither the LGAL nor the Trustee have made any effort to explain why approving Paul's motion to purchase the Property was not in the Estate's best interest. Both have made vague statements that they hope to obtain more money for the Estate's interest in the Property. However, neither have addressed the many underlying problems with this strategy that Paul outlined in his Opening Brief, including the length of time probate has languished, the waste of Trust and Estate assets, and the highly speculative nature of their desire to sell the Property to a developer, which would require rezoning and convincing Gig Harbor to amend its Comprehensive Plan. The zoning problems were raised by the Trustee's appraiser, not by Paul or anyone he hired.⁵ The Trustee's appraiser noted that "to date no one has even done a conference with the Planning Department to see what might be feasible."⁶ They have also failed to explain how a purchaser of that

⁵ CP at 522.

⁶ CP at 522.

undivided, fractional interest could develop or obtain financing to develop the Property while sharing ownership with Paul.

Assuming the Trustee's disingenuous statements that he is not trying to force Paul to sell his separate one-half interest in the Property are true,⁷ the parties are ignoring that they have not valued the interest the Estate actually has to sell – an undivided, fractional interest. They have not addressed the significantly different value a purchaser of the Estate's one-half interest would place on that one-half interest than Paul.⁸ The Trust doesn't have a full, undivided interest in the Property to sell to a developer, only a one-half interest, which is significantly less valuable. The trial court did not order the parties to list the undivided, fractional interest on the open market, but the entire, undivided ownership interest in the Property.

Paul has made multiple offers to buy the Community Property Estate's interest in his home after Destiny rejected his offer to live together at the home. Paul's two offers have been based on market values obtained by the LGAL and Trustee, not Paul. In fact, the first offer Paul made was on the same terms as the Trustee's offer to buy Paul's interest in the

⁷ The Trustee makes this statement on the one hand, and threatens to bring a partition action on the other. *See* Respondent's Brief of Bill Preacher at 11. In addition, the LGAL has already brought a motion to compel the sale of the Property that did not separate selling Paul's one-half interest from the Estate's one-half interest. CP at 244 – 46, 249.

⁸ *See In re Estate of Ehlers*, 80 Wn. App. 751, 760, 911 P.2d 1017 (1996) (affirming order denying request to remove trustee when trustee discounted the value of each beneficiary's undivided, fractional interest in the trust's real property by 25 percent "in light of the difficulty in finding a 'willing buyer' for an undivided fractional interest in real property.").

Property, minus the Property costs Paul had fronted for the Trust. The Trustee has never explained why the Trust's offer to Paul was a fair value, yet Paul's is an alleged breach of his fiduciary duties. All of Paul's offers were for one-half of the full appraised or market value of the Property, minus costs the Trust owes the Estate, without any discount for the fractional, undivided interest being purchased.⁹ Despite Paul's efforts to make a fair offer for his home in a timely fashion, well above what a disinterested third party would offer, he has been repeatedly attacked and accused of trying to cheat his daughter.

The Trustee appears to argue that a nonintervention personal representative can sell real property only to satisfy estate debts, expenses of administration, or other enumerated items.¹⁰ However, that argument conflicts with other sections of Title 11 RCW that grant a nonintervention personal representative much broader powers. For instance, RCW 11.68.090(1) grants a nonintervention personal representative broad authority to "mortgage, encumber, lease, sell, exchange, [or] convey . . . the assets of the estate, both real and personal" There is no precondition

⁹ Although this is not an intervention estate, if it had been, Paul's offers were presumptively reasonable. *See* RCW 11.56.090 (allowing sale of real property by negotiation in full intervention estate when offer is for at least 90 percent of the appraised value).

¹⁰ Brief of Respondent Bill Preacher at 14 – 16 (citing RCW 11.04.250). The arguments about the nonintervention personal representative's rights are irrelevant to this Court's resolution of this appeal. Paul did not sell the Estate's one-half interest in the Property to himself. While the parties dispute whether he could have done so, this issue is not relevant to this Court's determination.

on this broad grant of authority that real property be sold only to pay debts or administration expenses. In addition, RCW 11.98.070(15) gives a trustee, and thus a non-intervention personal representative, the right to “[s]elect any part of the trust estate in satisfaction of any partition or distribution, in kind, in money or both.”¹¹ The Trustee’s argument would render multiple sections of Title 11 RCW superfluous.¹²

The Trustee’s arguments about whether he could ask the trial court to partition the Property at the close of probate should be disregarded.¹³ This Estate is not at that stage and no one asked the trial court to partition the Property, nor has the Trust been titled with an interest in the Property. However, the suggestion that the Trustee would pursue a partition action is representative of the Trustee’s constant threat of additional litigation at Destiny’s expense. On paper, the parties all agree that selling the Community Property Estate’s one-half interest in the Property is in Destiny’s best interests, yet the continued litigation strategy that is actually being carried out belies these statements.

¹¹ See *In re Estate of Jones*, 152 Wn.2d 1, 13, 93 P.3d 147 (2004) (holding that even though title to real property vested in all four beneficiaries at the decedent’s death, a personal representative may distribute the property to himself alone so long as the remaining beneficiaries receive their fair market share of the property).

¹² *State v. J.A.*, 105 Wn. App. 879, 558, 20 P.3d 487 (2001) (Courts must give effect to all language within a statute so that no portion is rendered meaningless or superfluous).

¹³ Brief of Respondent Bill Preacher at 25 – 27.

The LGAL argues that under RCW 11.76.050, the Court had authority to appoint an independent attorney to list the Property.¹⁴ This argument should fail for multiple reasons. First, RCW 11.76.050 applies to a hearing on the final report and petition for distribution. This statute is inapplicable since no final report or petition for distribution has been filed.

Second, even if RCW 11.76.050 applied, it does not give the trial court authority to hire an independent attorney to sell the Estate's real property. Instead, it authorizes the trial court to order the personal representative to sell or mortgage the real property:

If it shall appear to the court at or prior to any final hearing that the estate cannot be fairly divided, then the whole of any part of said estate may be sold or mortgaged in the manner provided by law for the sale or mortgaging of property *by personal representatives* and the proceeds thereof distributed to the persons entitled thereto as provided in the final decree.¹⁵

Third, if, for some reason, the statute applied, the statute would provide the Court with the authority to

assign the whole or any part of said estate to one or more of the persons entitled to share therein. The person or persons to whom said estate is assigned shall pay or secure to other parties interested in said estate their just proportion of the value thereof as determined by the court from the appraisal or from any other evidence which the court may require.¹⁶

¹⁴ Brief of Litigation Guardian ad Litem at 5.

¹⁵ RCW 11.76.050 (emphasis added).

¹⁶ RCW 11.76.050.

That is what Paul proposed multiple times based on the actual, non-speculative valuations provided by the LGAL and the Trustee. Contrary to the LGAL's position, the plain language of RCW 11.76.050 supports Paul's attempts to bring closure to this Estate.

Regardless, RCW 11.76.050 applies only to estate assets – not the interest owned by Paul and there is nothing in the plain language of RCW 11.76.050 which provides the Court with authority to override RCW 11.68.090 and appoint a person other than the Personal Representative to effectuate the provisions of RCW 11.76.050. The LGAL also provides no analysis showing that RCW 11.76.050 negates or overrides RCW 11.68.090(1).

Selling the Community Property Estate's interest in the Property is in the Estate's best interest and the Trust's best interest. Paul has sought court approval of the sale, which is at or over the fair market value of the Estate's interest, and in any case well above the 90% required for a full intervention estate. Paul's offers have been based on recent valuations obtained by the LGAL and Trustee, not discounting the Estate's undivided, fractional interest or requiring speculative zoning changes. The trial court erred in denying Paul's motion to approve the sale of the Property.

B. The trial court lacks jurisdiction over Paul's half of the Property and erred in ordering the entire Property listed for sale.

Even if the trial court had not erred in denying Paul's motion to buy the Community Property Estate's one-half interest in the Property, it erred in ordering Paul's one-half interest in the Property be listed for sale. If any public listing were made, it should have been confined only to the Estate's one-half interest in the Property, rather than the entire Property.

The probate court has no jurisdiction over Paul's one-half of the Property. "The probate court has no jurisdiction to try title to real estate as between the executor of an estate and the husband of the deceased."¹⁷ "The superior court sitting in probate has no jurisdiction to try the title to property."¹⁸

On the one hand, the Trustee argues that the Community Property Estate does not have sufficient debts to justify not titling the Trust's one-half interest in the Property in the Trust and closing the probate,¹⁹ but at the same time, claims that the trial court has jurisdiction over Paul's interest in the Property for distribution because of community property debts.²⁰ These inconsistencies cannot be reconciled. Paul's separate interest in the Property is not an Estate asset and is not before the trial court. Sandra had

¹⁷ *Tucker v. Brown*, 20 Wn.2d 740, 805, 150 P.2d 604 (1944).

¹⁸ *Tucker*, 20 Wn.2d at 807.

¹⁹ Respondent's Brief of Bill Preacher at 12 – 16.

²⁰ Respondent's Brief of Bill Preacher at 25.

no authority to bequest Paul's interest in the Property to the Trust or any other person. Paul should not be at risk of being stripped of his ownership interest in his home because of the Trustee and LGAL's litigation tactics.

If the Trustee is taking the position that there is and will be no attempt to force Paul to sell his interest in the Property, that is a change in tactics undertaken by the LGAL and the Trustee to date. The LGAL previously attempted to force the sale of the entire Property and the trial court has ordered the entire Property, not an undivided, fractional interest listed for sale. The trial court's language also suggests that the Court would approve the sale of the entire, undivided interest in the Property, directing that "[a]ny offer received by Michael Smith must be presented to all the parties and may not be accepted without court approval."²¹ It also calls for "bona fide written purchase and sale agreement[s]" to be made on the Property's listing and a "cash earnest money deposit of five percent (5 %) of the offer."²² As noted above, the Estate would be selling only a fractional interest in the Property, yet that is not what has been listed for sale. If the Order were to "test the waters," as the Trustee argues, the Estate would test the waters on what is actually owned. In reality, the Order is not simply to

²¹ CP at 540.

²² CP at 539, 540.

test the waters, but is one more step in the Trustee and LGAL's ongoing attempt to strip Paul of his ownership in his own home.

The Trustee mistakenly argues that Paul disputed the trial court's jurisdiction in this matter.²³ Paul disputes the trial court's jurisdiction over his one-half ownership of his home, not the trial court's jurisdiction over the Community Property Estate's one half interest in his home. Paul invoked the trial court's jurisdiction over the Community Property Estate's interest in the Property, not over his separate ownership.

By the plain language of RCW 11.02.070, Paul's interest in the Property is not subject to Estate administration. His interest is not being used to settle community debts and is therefore not an asset that the Estate can offer for sale. The trial court lacked jurisdiction over Paul's interest in the Property and erred in ordering it be listed for sale.

C. Paul asks for an award of his attorney fees from the Estate.

Paul asks that this Court deny the LGAL and Trustee's requests for attorney fees.²⁴ The Trustee and LGAL have engaged in contentious litigation that have driven up costs to the Estate and Trust. The wrongful attempt to continue litigating this matter at the Trust's expense should not

²³ See Respondent's Brief of Bill Preacher at 21.

²⁴ Brief of Litigation Guardian ad Litem at 5; Brief of Respondent Bill Preacher at 27 – 28.

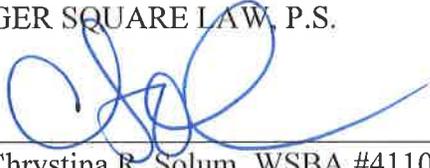
be rewarded. Paul should be awarded his attorney fees from the Community Property Estate.

II. CONCLUSION

For the foregoing reasons, Paul asks that this Court vacate the trial court's Order and remand for further proceedings consistent with this opinion.

RESPECTFULLY SUBMITTED this 25th day of January, 2018.

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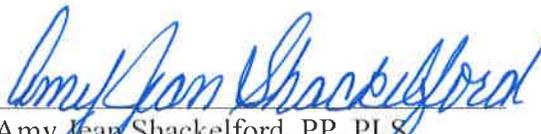
CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

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