

**FILED
Court of Appeals
Division II
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NO. 52026-5-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

In re the Estate of Robert Carlton Gilkey,
Deceased

APPELLANT'S OPENING BRIEF

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TABLE OF AUTHORITIES

Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 217 (1992).

In re Estate of Larson, 103 Wn.2d 517, 694 (1985).

Estate of Winslow, 30 Wn.App 575, 636 (1981).

Bishop v. Miche, 137 Wn.2d 518, 523, 973 P.2d 465 (1999).

Miller v. City of Tacoma, 138 Wn.2d 318, 323, 979 P.2d 429 (1999).

A. ASSIGNMENTS OF ERROR

Number 1. The Superior Court erroneously closed probate when well documented evidence of mismanagement and fraud committed by the co-personal representatives were brought to the attention of the Court.

Number 2. The Superior Court erroneously sanctioned Victoria Gomes in the amount of \$2500 when her objections were well grounded in fact and law.

Number 3. The Superior Court erred in not allowing TEDRA procedures to begin.

Number 4. The Superior Court erred in not holding a hearing on appellant's Motion for an Order requiring the co-personal representatives to provide a verified accounting of decedent's estate.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Number 1: Did the Superior Court erroneously closed probate when well documented evidence of mismanagement and fraud committed by the co-personal representatives were brought to the attention of the Court. The Court entered NO findings of Fact nor any Conclusions of Law.

Number 2: Did the Superior Court erroneously sanctioned Victoria Gomes in the amount of \$2500 when her objections were well grounded in fact and law.

Number 3: Did the Superior Court erroneously fail to allow TEDRA proceedings to begin when appellant provided a Notice of Mediation Under TEDRA prior to the hearing of May 19, 2017.

Number 4: Did the Superior Court err in not holding a hearing on appellant's Motion for an Order requiring the co-personal representatives to provide a verified accounting of decedent's estate when appellant filed her Petition on April 4, 2017, and a Hearing on the issue was never set up.

B. INTRODUCTION

Robert C. Gilkey spent the majority of his life living in Honolulu, Hawaii from the mid 1950's to 2007. There he and his wife raised seven children. In 2007, with the urging of his second youngest son, Joseph Gilkey, Robert moved into an independent retirement community located near Joseph, in Lawrenceville, Georgia. Joseph took over the management of his finances, medications, and some of his care needs.

In October 2010, his family learned that Joseph was not managing his father's finances properly when a house, owned by Robert, in Lacey, Washington, went into foreclosure due to Joseph neglecting to pay the mortgage. When confronted, Joseph refused to provide the family with any financial records or to remedy the foreclosure. During this time, he also stopped visiting and assisting Robert with his needs. He cut off communication with his siblings without explanation.

Victoria Gomes, the third oldest child, was living in the Lacey, Washington house with her husband and daughter at the time Joseph

withdrew from his duties. Victoria assumed the care of her father long distance by working with a paid caretaker serving in Robert's retirement community. She managed and monitored her father's care through the caretaker. And in order to straighten out and manage Robert's finances, Ronald Gomes, Victoria's husband, obtained power of attorney from Robert. Ronald had to piece together the finances without Joseph's cooperation. Joseph completely abandoned and mismanaged his father's assets.

In 2011, Robert's caretaker increasingly expressed concern that Robert was losing interest in day-to-day living. He neglected his hygiene, stopped going for meals in the dining room, and began canceling medical appointments made for him. He was alone, isolated from in-person contact, except that from his caregiver.

During this period, Robert was in and out of a skilled nursing facility due to his deteriorating condition. He lost a lot of weight and his mental state was declining.

As 2012 approached, his caretaker made it clear he would no longer be self-sufficient enough to live in his retirement community due to the increasing level of assisted care he needed. In March 2012 he again was transferred to a skilled nursing facility.

Many of his children thought Robert should be placed in a permanent nursing facility. Victoria, however, believed her father would thrive once he was around family members. Joseph was the only family member near their father, and clearly he wanted no contact with Robert or the family. The rest of the siblings were scattered in other states, such as: Virginia, California, Washington state, and Hawaii.

Victoria decided to have her father move in with her and her family at the house he owned in Lacey, Washington. He arrived there in April 2012. Robert's mood and outlook did improve from the start but other factors became apparent. She was not made aware of his incontinence (both in urinating and his bowel movements). He also had an increased need to be watched and assisted. Basic tasks like getting up, changing clothes, using the bathroom, all needed someone's attention. Many little movements like using a TV remote or finding something on his nightstand was a call for assistance. He had fainting spells from a soon-to-be diagnosed condition of "orthostatic hypotension". All was exacerbated by his lifelong handicaps of being legally blind and very uncoordinated.

It was apparent Robert was in need of around-the-clock care. Victoria and Ronald hired a part-time caregiver, Joseph Evans, to help during the day. It truly developed into an exhausting regiment.

In August 2013, two of Victoria's siblings, John Gilkey and Cristina Gilkey, became concerned with the amount of money being spent to care for Robert in his home. They believed he should be moved to a "professional" care facility of some kind, to lower the costs. Let it be known, the whole family was well aware that Robert adamantly refused to go into another care facility. He expressed his wishes to remain in his home in Lacey, Washington.

It was at this time family disagreements began. Victoria decided she no longer would be burdened with the financial aspects of Robert's care. She filed for a professional guardian to take over. A financial guardian was appointed in December 2013. Victoria was appointed limited guardian of the person.

John Gilkey filed a complaint with Adult Protection Services shortly before the filing for guardianship, claiming Victoria and her husband, Ronald, were financially exploiting her father. The APS investigator issued a finding of financial exploitation against Victoria in June 2014. She requested a hearing on the matter and was promptly cleared of any wrongdoing by the ALJ (Administrative Law Judge) on September 22, 2015. DSHS appealed that ruling to the Board of Appeals (DSHS-BOA). The BOA upheld the ALJ's ruling, clearing Victoria on January 13, 2016.

John Gilkey kept pursuing the Thurston County Prosecutor to file criminal charges against Victoria and her husband. Thurston County filed a theft charge against them in December 2016. In November 2017, all criminal charges were dismissed based upon a Motion pursuant to Knapstad, 107 Wn.2d 346 (1986). The prosecutor stated that he could not "ethically" maintain the prosecution.

Robert passed away on January 9, 2015.

C. STATEMENT OF THE CASE

This case involves glaring breaches of fiduciary duties by the co-personal representatives. At almost every step in the administration of the estate of Robert C Gilkey, the counsel for the co-representatives has attempted, and has been successful, at silencing the legitimate concerns of Victoria Gomes. Victoria is one of 7 children of Robert C Gilkey and the beneficiary under the will.

Robert C Gilkey passed away on January 9, 2015 probate was opened in Lewis County on January 30, 2015. Under the terms of the will all personal and real property was to be held, administered and distributed as provided for in article 4 of the Robert C Gilkey trust. (CP 4). Said trust was incorporated into the will by reference.(CP 5). The co-personal

representatives did not file a copy of said trust in the probate action.

However, Victoria Gomes filed a copy of the trust in her motion for reconsideration of Judge Toynbee's May 19, 2017 Order. CP (76-111).

On April 4th 2017, Victoria Gomes filed a Petition for an Order form amongst other things a verified accounting of the administration of decedent's estate. (CP 11-12) The trial Court never addressed her Petition for an Order.

The co-personal representatives' attorney filed a Final Report and Petition for Distribution on April 17, 2017. (CP 14 - 35).

Victoria Gomes filed her objection to closing probate proceedings on May 17, 2017. (CP 36- 54) In her Objection, Victoria included detailed and documented evidence that the co-personal representatives did not follow the distribution terms of the will, which again is detailed in the trust document. She also included detailed and documented evidence of waste mismanagement, and fraud by the co-personal representatives in their administration of the estate.

On May 19, 2017, a hearing was held in front of judge Toynbee upon the co-personal representatives' motion to close probate. Victoria Gomes was pro se and the co-personal representatives had attorney Scott Blinks to argue their motion. Neither the court nor Mr. Blinks addressed all the well documented objections filed by her on May 17, 2017. (CP36-54) and

(RP2-4). Instead, Mr. Blinks stated that “Essentially enough is enough. It’s ironic that a person that is awaiting criminal trial for having financially exploited her father is objecting to the closure of the estate.” (RP 2) Mr. Blinks argued that the co-personal representatives had absolute unfettered discretion to administer the estate. (RP 2) Mr. Blinks’ statement was patently untrue. The will gives discretion “Unless made fraudulently, in bad faith or in a grossly negligent manner.” (CP 7). The co-personal representatives; discretion is also limited by the terms of the Trust which dictates the specifics of distribution as indicated in articles 4 and 5 of the trust document. (CP 86 – 94)

Mr. Blinks called Victoria Gomes’ objections frivolous and requested attorney’s fees. The judge agreed and awarded a \$2500 claim against Ms. Gomes. The judge issued an order closing the estate on May 19, 2017. (CP 71-72).

Victoria Gomes filed a motion for reconsideration on May 30th 2017. (CP 73-111)

Judge Toynbee did not issue a ruling on the motion for reconsideration for almost a year. Judge Toynbee denied the motion for reconsideration on May 14th 2018.

D. ARGUMENT

1. Standard of Review

The appellate court reviews findings of fact to determine whether they are supported by substantial evidence. Miller v. City of Tacoma, 138 Wn.2d 318, 323, 979 P.2d 429 (1999). The court reviews conclusions of law *de novo*. Bishop v. Miche, 137 Wn.2d 518, 523, 973 P.2d 465 (1999).

2. Argument

The co-personal representatives had a fiduciary duty to the beneficiaries of the estate. The personal representative of an estate “stands in a fiduciary relationship to those then officially interested in the estate.” In re Estate of Larson, 103 Wn.2d 517, 694 (1985). The personal representative of the estate acts in a trust capacity and must conform to the rules governing a trustee. In re Estate of Winslow, 30 Wn.App 575, 636 (1981). In this regard, the personal representative is required to exercise the utmost good faith and diligence administering the estate in the best interest of the heirs. In re Estate of Larson, 103 Wn.2d at 521.

In this case, the co-personal representatives blatantly ignored the directions of the Trust. The probate should be reopened to address the issues of mismanagement and fraud by the co-representatives.

An objection cannot be frivolous if it is well grounded in fact and law. Bryant v. Joseph Tree, Inc, 119 Wn.2d 210, 217 (1992). Such a well

grounded objection cannot be the subject of sanctions. Victoria Gomes' Objections were detailed, supported by evidence and clearly proper under the law.

E. Conclusion

For all the above reason, Victoria Gomes asks this Court to Order the reopening of the probate, and to eliminate the sanctions imposed by the trial Court.

Dated this 13th day of November, 2018.

/s/ Victoria M. Gomes

Victoria M. Gomes, pro se.

VICTORIA GOMES - FILING PRO SE

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