

FILED

NOV 22 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 300081

**COURT OF APPEALS FOR DIVISION III
STATE OF WASHINGTON**

In Re Estates of

HARVEY L. JONES and
MILDRED L. JONES,

Deceased

TERESA ENGBRETSON and MARY ANN SEALOCK, heirs of
Harvey L. Jones and Mildred L. Jones,

Appellants

vs.

WILL L. JONES, personal representative of the estates of Harvey
L. Jones and Mildred L. Jones,

Respondent.

**APPELLANTS' REPLY BRIEF/
RESPONSE TO CROSS-APPELLANT'S BRIEF**

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I. STATEMENT OF ADDITIONAL FACTS

The facts of this case have been previously set forth in detail in Appellants' Brief.

Undisputed is the fact that Will Jones and Dennis Jones, and their financial advisor, Eric Weinheimer¹, had Mildred Jones sign the subject documents in her individual capacity and as the "trustee of the Testamentary Trust of Harvey L. Jones." Brief of Appellants, page 5; C.P. 369, 232, 249. Also not in dispute is the fact Mildred Jones did not have benefit of legal counsel and did not discuss the subject documents with her attorney (or any attorney) prior to them being signed. Brief of Appellants, page 16; C.P. 304-305, 334.

One fact claimed by Mr. Jones is correct but not complete. He states that "Mildred also independently reviewed the documents with a neighbor and long-time friend, Mark Arstein." Brief of Respondent, pg. 9. While this did happen, Mr. Jones does not state that Mr. Arnstein told her not to sign the documents. C.P. 307.

¹ As for the character of Mr. Weinheimer, who designed and drafted all of the August 2003 documents and has advised Will Jones throughout this case, see "Eric Weinheimer Character for Truthfulness or Untruthfulness" in Memorandum of Authorities of Teresa Engbretson and Mary Ana Sealock in Opposition to Motion for Summary Judgment (Re: Rescission) filed by Personal Representative Will Jones. C.P. 312-317.

Nor do Will and Dennis Jones dispute that they were in a confidential relationship with their mother. As stated by Teresa Engbretson:

8. Our mother greatly missed her husband. She was very emotionally impacted by his death. She had never, to my knowledge, been actively involved in making farm business decisions prior to his death. She did, however, want to continue to live in her family home (located on two acres contiguous to the farm that she and our dad owned together).

12. Our mother developed health and mental problems after our father died. I think his death threw her emotionally. She was never a sophisticated business woman. She relied on our dad to run the family farm. When he died, she relied entirely on Will and Dennis.

Declaration of Teresa Engbretson in Opposition to the Motion for Summary Judgment Filed By Will Jones. C.P. 333, 334.

There are genuine issues of material fact with regard to the relationship between Mildred Jones and her sons, the operation of the family farm, why the 2003 subject documents were prepared, why Mildred Jones had to gift shares of the farm corporation to her sons, and what she knew or understood about the documents. Any or all of which should have defeated the motion for summary judgment.

II. ARGUMENT

The issue before the trial court was and this court is:

. . . Whether Mildred's daughters have some legal or equitable right to pursue a cause of action that would entitle them to rescind the 2003 agreements.

C.P. 29.

Judge Pro Tem Peters said that Teresa and Mary Ann have a right to seek rescission. V.R.P. 32, 38. Nevertheless, because he found that Will Jones and Dennis Jones did not exert undue influence over their mother and the 2003 documents were valid, he granted the motion for summary judgment and dismissed the TEDRA petition filed by Teresa and Mary Ann with prejudice. V.R.P. 38. C.P. 115.

The issue of undue influence and the validity/enforceability of the 2003 documents was not before Judge Pro Tem Peters. He was not asked to decide these issues. They had previously been argued, in a prior Motion for Summary Judgment, to Judge Gavin, who denied the motion. C.P. 18-20, 440-442. It was error for Judge Pro Tem Peters, sua sponte, to find and rule as he did.

If Judge Pro Tem Peters was correct, and Teresa and Mary Ann believe he was, that they have a right, legally and equitably, to seek rescission of the 2003 documents, this court should reverse the trial court's Order granting the Motion for Summary Judgment.

1. Teresa and Mary Ann have a legal and/or equitable right to rescind the 2003 documents.

Will Jones argues in his Brief that:

Mildred's daughters argue they are entitled to rescission because they are ". . . acting on behalf of the Estates." (Bf. App. 36). They direct the court to various excerpts from the TEDRA statute, Ch. 11.96A R.C.W. as support for the proposition they can invoke that statute in order to determine the validity of the 2003 agreements in which they have an interest as heirs of their parents' estates. Mildred's daughters do not support their argument with citation to legal authority. It is well established that the court will not consider any argument not supported by citation to legal authority. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Brief of Respondents/Cross-Appellants, page 20-21.

RCW 11.96A.020(1) is statutory authority for a court to resolve "All matters concerning the estates and assets of . . . deceased persons." See Argument/Analysis in Brief of Appellants, pgs 26-27. Teresa and Mary Ann are parties, as defined in the TEDRA statute, who have an interest in the subject matter of this probate proceeding. Which "matter," as defined in the statute, includes the construction of "other writings." RCW 11.96A.030(1)(c). Which "other writings" include the 2003 subject documents.

In his Brief, Mr. Jones states:

As the duly appointed personal representative of his parents' estates, only Mr. Jones is vested with authority to represent those estates in litigation. RCW 11.48.010; *Rummens v. Guaranty Trust Co.*, 199 Wash. 337, 92 P.2d 228 (1939) (Only a duly appointed personal representative can bring an action to recover assets of an estate).

Brief of Respondents/Cross-Appellants, page 21.

The case cited by Mr. Jones, *Rummens v. Guaranty Trust Co.*, states, as a general rule, "that executors and administrators alone can bring actions to recover assets belonging to a decedent's estate or to obtain damages for the conversion of the personal property of the estate." *Rummens v. Guaranty Trust Co.*, 199 Wash. at 344. However, the *Rummens* court also said there are exceptions to this general rule. Mr. Jones did not reference these exceptions, some of which apply to this case and his specific behavior.

There are, however, certain well-defined and specifically recognized instances which, by reason of their peculiar factual situations, do not come within the provision or requirement of the rule. Among these instances the most common are (1) where there has been collusion between the personal representative and the fraudulent transferee; (2) where the personal representative unreasonably refuses to bring the action; (3) where the transferee is himself the personal representative; (4) where there is no necessity for administration; and (5) where the estate of the decedent grantor has been fully settled, and the administration closed.

Rummens v. Guaranty Trust Co., 199 Wash. at 346.

At least three of the listed exceptions apply in this case: (1) Will and Dennis Jones colluded to take advantage of their mother; (2) Will Jones has refused to challenge the 2003 subject documents (for obvious reasons - - since he and his brother are the beneficiaries thereof); and (3) Will Jones is both the transferee (i.e., the beneficiary) of the subject documents and the personal representative. See argument in Appellants' Brief, pg. 12-20.

Exceptions to the general rule in *Rummens v. Guaranty Trust Co.*, are not limited to those referenced above.

But these specific instances [i.e., exceptions to the general rule cited by Will Jones] are not exclusive, nor does their enumeration correctly or accurately express or define the limits of the general rule. They are, after all, but illustrations of a well-settled principle to which the rule itself conforms. That principle is one of chancery jurisdiction, which, expressed in the form of a precept, is probably the most important of the equitable maxims, namely, that equity will not suffer a wrong (or, as sometimes stated, a right) to be without a remedy.

Rummens v. Guaranty Trust Co., 199 Wash. at 346-347.

Mildred Jones was an elderly woman who had just lost her husband of many years. She relied on her sons to run the family farming business. She trusted them to make decisions that would benefit her and the family farm. C.P. 333, 334. She did not review

with independent legal counsel the documents that they brought to her home and had her sign. The documents resulted in estate assets being gifted to Will and Dennis and a reduction in value of remaining estate assets. All of this was for the financial benefit of Will and Dennis versus the estates and their sisters (with whom, according to their parents' wills, they were to divide estate assets "share and share alike"). C.P. 48, 304.

Mr. Jones has stated that his sisters, Teresa and Mary Ann, "have no legal or equitable right to pursue any cause of action that would entitle them to rescind the 2003 agreements." C.P. 29. Teresa and Mary Ann have both a legal right and an equitable right to do so. RCW 11.96A is statutory authority, i.e., a legal right, for Teresa and Mary Ann to seek rescission of the subject documents. Teresa and Mary Ann also have an equitable claim for relief.

Where there is a substantive legal right, that is, a right which comes within the scope of juridical action, as distinguished from a mere moral right, and the procedure prescribed by statute for the enforcement of such right is inadequate or the ordinary and usual legal remedies are unavailing, it is the province of equity to afford proper relief, unless the statutory remedy is exclusive.

Rummens v. Guaranty Trust Co., 199 Wash. at 347 (internal citations omitted).

A case in which an heir challenged the action of a personal representative (similar to what is being done in this case) is *In Re Estate of Vance*, 11 Wn. App. 375, 522 P.2d 1172 (1974). In that case, the question to be decided by the court was:

Is it a breach of trust for executors of an estate to appeal an Internal Revenue Service agent's termination of the value of certain estate stock being purchased by the co-executor, pursuant to an option contained in the will, if the net effect of a successful appeal to the tax court would be to (1) reduce the cost of the stock to the co-executor purchaser and thereby (2) reduce the net amount for distribution to the heirs?

In Re Estate of Vance, 11 Wn. App. at 376.

In the *Vance* case, one of the heirs filed a petition "to prevent the appeal, or to remove the executors on the ground that the tax court action, which was aimed at reducing the value of the stock, was not authorized by the terms of the will and was in direct conflict with the interest of the heirs." 11 Wn. App. at 377. The issue was tried and the trial court held that the action contemplated by the executors:

was consistent with the terms of the will which manifested an intent by the testatrix to obtain a fair valuation of the stock and, therefore, even though the net effect of such action might be to lessen the amount of each heir's distributive share, such a possible effect was contemplated by the testatrix such that no conflict of interest existed amounted to a breach of trust.

In Re Estate of Vance, 11 Wn. App at 377.

Although the decision of the court did not specifically address whether the heir who brought the action had a right to do so, the fact that the case was tried to verdict and no one challenged the executor's right to bring the action is evidence that an heir may challenge an act by the personal representative. Which, of course, is exactly what Teresa and Mary Ann have done in this case. Since their brother, Will, the personal representative of their parents' estates, has not acted to challenge the 2003 documents (for obvious reasons), they are left with no choice but to proceed themselves to bring the action. They have a right, both in law, on the authority of the TEDRA statute and the cases cited, and in equity, to do so.

Teresa and Mary Ann may also seek rescission because they are aggrieved parties, i.e., they are heirs and the subject documents result in a reduction of estate assets and values. Although the question dealt with standing to bring an appeal, a case which discusses who is an aggrieved party is *Estate of Wood*, 88 Wn. App. 973, 947 P.2d 782 (1997). In that case, the person initially named as personal representative, Nancy Russell, was removed as such per order of the court. She appealed. The new

personal representative, Ardella LaBelle, claimed that Ms. Russell could not appeal the decision because she lacked standing. As stated by the court in *Estate of Wood*:

Ms. LaBelle also claims that Ms. Russell lacks standing to bring this appeal. Only an aggrieved party may seek review of a superior court decision. RAP 3.1. An aggrieved party is someone whose proprietary, pecuniary, or personal rights are substantially affected. *In re Guardianship of Lasky*, 54 Wn. App. 841, 848, 776 P.2d 695 (1989). When the administrator has no interest in the probate action other than being the administrator, he or she lacks standing to appeal. *State ex. Rel. Simeon v. Superior Court*, 20 Wn.2d 88, 90-91, 145 P.2d 1017 (1994); *Cairns v. Donahey*, 56 Wash. 130, 133-34, 109 P. 334 (1910). But Ms. Russell has an interest as an heir as well as being the personal representative, a distinguishing factor which can confer standing. *Id.* at 133-34.

Estate of Wood, 88 Wn. App. at 976.

Will Jones wants to affirm the 2003 documents. He has no interest in challenging their validity. Teresa and Mary Ann have pecuniary and personal interests affected by the 2003 documents. They are aggrieved parties and may seek rescission.

2. Teresa and Mary Ann did not fail to act promptly, without delay to challenge the 2003 documents.

In his Brief, Will Jones states that:

Many cases explain the purpose of rescission is to restore the parties as nearly as possible to their original positions as if no contract occurred. *Simonson v.*

Fendel, 101 Wn.2d 88, 93, 675 P.2d 1218 (1984); *Busch v. Nervik*, 38 Wn. App. 541, 547, 687 P.2d 872 (1984). Since the court is obliged to restore the parties to their original positions, an action seeking rescission must be pursued promptly, without delay. *Darnell v. Noel*, 34 Wn.2d 428, 435, 208 P.2d 1194 (1949). In cases where a party fails to act promptly, the court regards such conduct as an election to continue the contract and refuses to allow rescission. *Prager's Inc. v. Bullitt Co.*, 1 Wn. App. 575, 586, 463 P.2d 217 (1969).

Brief of Respondents/Cross-Appellants, page 23.

It was not until Mildred Jones died that Teresa and Mary Ann learned that their father's estate had not been probated, that a trust was to have been established for their mother (and had not been), and that various documents were signed by their mother on August 4, 2003, which documents significantly impacted and reduced the value of the Harvey Jones estate and the Mildred Jones estate. All of which was explained by Teresa Engbretson in her Declaration in Opposition to Motion for Summary Judgment Filed by Will Jones. C.P. 332-36.

Mr. Jones, in the Memorandum that he filed in support of his first Motion for Summary Judgment, C.P. 282-302, cited the case of *Hudson v. Condon*, 101 Wn. App. 866, 6 P.3d 615 (2000), with regard to when a cause of action based on an allegation of breach of fiduciary duty, fraud or misrepresentation begins to run. As

stated in that case, “Under the express terms of RCW 4.16.080(4), the cause of action for fraud does not accrue until the aggrieved party discovers the facts constituting a fraud.” 101 Wn. App. at 875. “Accordingly,” the *Hudson v. Condon* court said, “the statute of limitations for a damage action based on fraud commences when the aggrieved party discovers, or should have discovered, the fact of fraud or sustains some damage as a consequence.” *Id.*

Teresa and Mary Ann did not sustain damage in 2003. They did not sustain damage between 2003 and when their mother died in 2007. Prior to her death, Mildred Jones could have changed her will at any time. It was not until 2007 when Mildred died and her will was admitted to probate, at which time Will and Dennis sought to conclude the probate by valuing the assets based on and using the documents signed by Mildred in August 2003, that Teresa and Mary Ann for the first time recognized that they would sustain damage by virtue of the diminution in value of the estates. As such, the three-year statute (if it applies) would not begin to run until Mildred died and her will was admitted into probate (on August 3, 2007).

Judge Gavin addressed this time bar issue in his Summary Judgment decision. C.P. 14-16, 436-38.

Although there is proof of some knowledge in 2003 by Ms. Engbretson and Ms. Sealock of the August documents, material issues of fact exist with regard to when they knew of sufficient facts to discover they had a claim and whether they exercised due diligence to discover the existence of a claim. A review of the evidence does not result in a conclusion that reasonable minds could reach only one conclusion.

C.P. 16, 438.

3. Teresa and Mary Ann have not waived their right to seek rescission of the 2003 documents.

Teresa and Mary Ann have accepted no benefits from their brothers. What payments were made by Will and Dennis to their mother - - when, why and in what amounts - - has not been established. There are genuine issues of material fact regarding this issue. On this point, see Appellants' Brief, pgs 39-42.

The issue of waiver was discussed in *Estate of Cooper*, 81 Wn. App. 79, 713 P.2d 393 (1996).

Both Mr. Cooper and Richard testified that shortly after Mrs. Cooper's death, Mr. Cooper advised his children their mother had left her property in trust with a remainder interest in them. According to them, Joyce responded: "Daddy, I want you to take care of everything just as you always have." They contend this amounted to a waiver of her right to challenge Mr. Cooper's management of the estate. We disagree.

A waiver is an intentional relinquishment of a known right. *Wagner v. Wagner*, 95 Wn.2d 94, 102, 621 P.2d 1279 (1980). The statement attributed to Joyce

does not unambiguously renounce her right to prudent trust management. Her statement was not a waiver.

Estate of Cooper, 81 Wn. App. at 95.

Teresa and Mary Ann have not intentionally relinquished any right that they have to challenge the 2003 documents or the behavior of their brothers with respect to the undue influence exerted over their mother. The fact that Will and Dennis Jones want this court to validate documents signed by their mother as trustee of the Harvey Jones Trust, before the Harvey Jones will was admitted into probate and with no Harvey Jones Trust ever being established, is proof that they have not engaged in “prudent trust management.” Teresa and Mary Ann have never renounced their right to prudent trust management.

4. No restitution has been requested.

Whether restitution is needed has not, as of this date, been determined. If restitution is needed, the amount is not established. There are genuine issues of material fact regarding the issue of restitution (if any).

Will and Dennis Jones have withdrawn their creditor’s claim. As of this date they are not asking for restitution. See Appellants’ Brief, pgs. 39-41. The creditor’s claim was prepared for Messrs.

Jones by Jerome Aiken. C.P. 63. On their behalf, he sent a letter to Tom Scribner, attorney for Teresa and Mary Ann, wherein he said, with regard to their creditor's claim, that:

In light of your client's [sic] election, my clients [Will and Dennis Jones] are willing to conditionally withdraw the Creditor Claim they filed. The withdrawal is conditioned on the fact that my clients are not waiving any remedies or relief that may be available to them should the court in the TEDRA action grant rescission of the various agreements at issue. The remedies and the relief would generally be to restore my clients to the status quo that existed prior to the execution of the agreements at issue.

C.P. 101. See discussion of this issue in Appellants' Brief, pgs. 39-41.

There is, therefore, no basis, factually or legally, for Teresa and Mary Ann, or the estates of Mildred and Harvey Jones, to make restitution at this time. The argument by Mr. Jones that Teresa and Mary Ann may not rescind the 2003 documents until restitution is made is of no validity.

APPELLANTS' BRIEF IN RESPONSE TO RESPONDENT'S CROSS APPEAL

Will Jones has appealed the court's order of June 17, 2011 denying his motion for an award of attorney fees against Teresa Engbretson and Mary Ann Sealock personally. Mr. Jones correctly states that the order will be reversed only upon a showing of a clear abuse of discretion. *Bartlett v. Betlach*, 136 Wn. App. 8, 21-22, 146

P.3d 1235 (2006).² Mr. Jones does not argue, and has presented no facts or authority in support of his appeal, that Judge Pro Tem Peters abused his discretion when ordering attorney fees to be paid by the estates and not by Teresa and Mary Ann personally.

1. No abuse of discretion by trial court:

Teresa and Mary Ann agree that RCW 11.96A.150 gives the trial court authority to award reasonable attorney fees. As set forth in that statute, fees may be awarded “from any party to the proceedings . . . from the assets of the estate or trust involved in a proceedings . . . or . . . from any non-probate asset.” *Id.* In this case, Judge Pro Tem Peters awarded the fees “from the assets of the estate.” It was not an abuse of discretion for him to do so. On the authority of *Estate of Black*, 153 Wn.2d 152, 102 P.2d 796 (2004), this court should affirm the order of the trial court on the attorney fees issue.

The controlling statute in this case is RCW 11.96A.150. This statute leaves the award of attorney fees to the discretion of the court, and we will not interfere with a trial court’s fee determination unless “there are facts and circumstances clearly showing an abuse of the trial court’s discretion.” *In re Estate of Larson*, 103 Wn.2d 517, 521, 694 P.2d 1051 (1985); RCW 11.96A.150; see also RCW 11.24.050 (attorney fee statute under the will

² Cited incorrectly by Mr. Jones in his Brief, at page 32, as *Barlett v. Betlach*, 136 Wn. App. 822 [sic], 146 P.3d 1235 (2006).

contest chapter stating that where a will is revoked, assessment of costs shall be in the court's discretion).

Estate of Black, 153 Wn.2d at 173.

Mr. Jones cites two cases in which the court awarded fees against a party: *Villegas v. McBride*, 112 Wn. App. 689, 50 P.3d 678 (2002)³ and *In Re Estate of Blessing*, 160 Wn. App. 847, 248 P.3d 1107 (2011).

In *Villegas v. McBride* the sister of the administratrix of their mother's will filed a creditor's claim against the estate. The estate moved for summary judgment to dismiss the claim because it did not comply with RCW 11.40.070(1). The trial court entered partial summary judgment in favor of Villegas. 112 Wn. App. at 692. On appeal, the Court of Appeals, holding that the claim did not meet the requirements of RCW 11.40.070(1)(c), reversed the trial court and remanded for, among other things, "entry of fees and costs incurred below." 112 Wn. App. at 697.

As for the award of attorney fees against Villegas, the Court of Appeals said:

McBride argues the estate is entitled to fees and costs because Villegas' claim did not comply with RCW 11.40.070(1), this litigation deprived Frausto's children of

³ Cited incorrectly by Mr. Jones in his Brief, at page 33, as *Villegas v. McBride*, 112 Wn. App. 659 [sic], 50 P.3d 678 (2002).

part of their inheritance, and Frausto's estate is not a wealthy one.

112 Wn. App. at 697.

These three factors do not apply in the Jones case. First, the creditor's claim that Teresa and Mary Ann initially filed satisfied the requirements of RCW 11.40.070(1). Second, Teresa and Mary Ann are seeking to recover assets for the estates. If they are ultimately successful, their action will not deprive the heirs of part of their inheritance, it will increase their inheritance. Third, we are not dealing here with a "not . . . wealthy" estate. These combined estates are worth hundreds of thousands of dollars.

In *Estate of Blessing* the children of a decedent's former husband (claiming to be her stepchildren) sought a judicial determination that they were beneficiaries of the decedent's estate for purposes of the estate's claim for wrongful death of the decedent. The trial court held for the "stepchildren." The Court of Appeals reversed, finding that they no longer qualified as "stepchildren" of the decedent. 160 Wn. App. at 848. *Estate of Blessing* has absolutely no analysis of when, why or against whom to award attorney fees other than its concluding sentence: "The

estate prevailed and is entitled to fees and costs under RCW 11.96A.150 and RAP 18.1.” 160 Wn. App. at 854.

The TEDRA petition filed by Teresa and Mary Ann sought to recover assets of the estates and thereby increase the size of the estates and the distributive shares to the four Jones children. It did not seek to add additional heirs, thereby decreasing each heir’s distributive share. Since Mr. Jones refused to rescind the 2003 documents that benefitted him and his brother at the expense of the estates, Teresa and Mary Ann were acting on behalf of and to benefit the estates. On the authorities cited below, it was proper and not an abuse of discretion for the trial court to order that the fees be paid by the estates and not by Teresa and Mary Ann personally.

2. Justice and equity require that the fees awarded be paid by the estates.

A case discussing an award of attorney fees in a probate action is *Estate of Burmeister*, 70 Wn. App. 532, 854 P.2d 653 (1983). Kenneth and Janet Burmeister executed reciprocal wills in 1977. Janet died in 1988. She and Kenneth had four daughters. She was survived by Kenneth and their four daughters. In 1990, Kenneth married Jeanne Milner. Prior to their marriage, Kenneth

and Jeanne executed a prenuptial agreement. Kenneth died five months after marrying Jeanne. His daughter, Leanne Griffith, was appointed executrix of his estate. Jeanne filed a petition for an award in lieu of homestead, for a family allowance, and to declare the prenuptial agreement invalid. The trial court found that the prenuptial agreement was valid and binding. It ordered Kenneth's will revoked as to Jeanne and ordered that she take an intestate share of his estate to which a surviving spouse was entitled. The trial court awarded attorney fees in favor of Jeanne as a cost against the estate, and awarded Leanne, the executrix, attorney fees against the estate. Both parties appealed. *Estate of Burmeister*, 70 Wn. App. at 535.

The Court of Appeals affirmed the award of attorney fees to both Jeanne and Leanne.

Here, both sides advanced reasonable and good faith arguments in support of their respective positions. The trial court properly determined that costs and fees should be chargeable against the estate, rather than against the parties personally, so that all the contending parties would bear the cost of determining the proper distribution of the estate.

...

We note that in *In re Estate of Niehenke*, 117 Wn.2d 631, 648, 818 P.2d 1324 (1991), the court stated that "it is inappropriate to assess fees against an estate when the litigation could result in no substantial

benefit to the estate[.]” [Footnote omitted.] However, the court did not hold that attorney fees could *never* be appropriately awarded against an estate if the estate were not substantially benefited, but rather recognized that “there will be situations where attorneys’ fees are justly assessed against an estate[.]” *Niehenke*, 117 Wn.2d at 648. In *Niehenke*, the award of attorney fees against the estate affected the interests of uninvolved beneficiaries and would have resulted in their partially funding the attorney fees for the litigating parties. Here, however, all the beneficiaries are involved in the dispute and the award of fees against the estate justly imposed the costs of the litigation to ascertain their rights upon all those involved.

Estate of Burmeister, 70 Wn. App. at 539-540.⁴

In this case, Teresa and Mary Ann are seeking to set aside the August 2003 documents which, if they are successful, will result in assets being added to the estates, thereby increasing the distributive share of the four Jones children. Opposed to their efforts are Will Jones and Dennis Jones, both of whom want the August 2003 documents to be found valid, which would result in a diminution/reduction of estate assets with a corresponding reduction in the distributive share of the four Jones children.

The position taken by Will Jones throughout this litigation, therefore, has been to resist efforts to increase the estates. His

⁴ The Supreme Court accepted review in *Estate of Burmeister* and reversed the decision of the Court of Appeals (not on grounds regarding the award of attorney fees). *Estate of Burmeister*, 124 Wn.2d 282, 877 P.2d 195 (1994). With regard to the issue of attorney fees, the Court declined to award fees. 124 Wn.2d at 288.

success has not resulted in any benefit to the estates. On the contrary, his success has benefitted himself and his brother personally at the expense of the estates.

Another case discussing an award of attorney fees in a probate dispute is *Estate of Black*, 153 Wn.2d 152, 102 P.3d 796 (2004). That case involved a dispute over competing wills. One will was admitted to probate, after which a second, “lost,” will was submitted for admission to probate. The parties which submitted the “lost” will contested the first will. The beneficiaries of the first will contested the validity of the “lost” will.

The trial court ruled, on motion for summary judgment, in favor of the “lost” will and awarded attorney fees to the personal representative of the first will. 153 Wn2d. at 156-157. On appeal, the Court of Appeals reversed the summary judgment and the attorney fee award and remanded the case with instructions that all issues pertaining to the will should be decided in one proceeding. 153 Wn.2d at 157. The Supreme Court affirmed the decision of the Court of Appeals and remanded the case to the trial court for further proceedings. 153 Wn.2d at 175.

With respect to the issue of attorney fees, the Supreme Court affirmed the Court of Appeals which reversed the trial court’s

order awarding attorney fees to one party and “stated that the court should award fees to both parties or to neither.” 153 Wn.2d at 173.

The Supreme Court analyzed RCW 11.96A.150. In its decision, the Supreme Court cited *In Re Estate of Watlack*, 88 Wn. App. 603, 945 P.2d 1154 (1997). As explained by the Supreme Court, “in *Watlack*, the court ordered the estate to pay the attorney fees of all parties to the will dispute because the litigation involved all beneficiaries and affected the rights of all the beneficiaries.” 153 Wn.2d at 173.

In this case, the dispute involves all of the beneficiaries, affects the rights of all the beneficiaries and an award against the estate would not harm any uninvolved beneficiaries. For which reasons, it was not an abuse of discretion for Judge Pro Tem Peters to order that attorney fees should be paid by the estates, not by Teresa and Mary Ann personally.

3. If any attorney fees are awarded, they should be paid by the estate, not any of the parties personally:

This litigation has benefitted or will benefit the estates of Harvey and Mildred by following their final wishes and establishing what assets will be available, “share and share alike,” for their four children.

Teresa and Mary Ann did not seek, by their TEDRA petition, to invalidate their parents' wills. They did not seek to enrich themselves at the expense of Will or Dennis. They were motivated by a desire to have assets put back into the estates, thereby increasing the value of the estates and benefitting the distributive heirs. Judge Gavin, who heard and decided the first motion for summary judgment regarding the issue of the August 2003 documents, agreed with Teresa and Mary Ann that there were genuine issues of material fact which should be decided at trial. It would be inequitable and unfair to Teresa and Mary Ann to make them personally responsible for any attorney fees awarded in favor of Will Jones.

"Although one party will be unsuccessful in the will dispute, if it is shown that the party has a duty to oppose the will and acted in good faith, under *Jolly* [*In Re Jolly's Estate*, 3 Wn.2d 615, 101 P.2d 995 (1940)], the party may still be entitled to attorney fees." *Estate of Black*, 153 Wn.2d at 174. In this case, Teresa and Mary Ann believe, in good faith, that they had a duty to oppose the August 2003 documents which resulted in their mother gifting (for no consideration) shares of the farm corporation to Will and Dennis and leasing, with an option to buy, real property owned by the

marital community (contrary to the Farming Agreement signed by Harvey, Mildred, Will and Dennis, C.P. 275)

Cases in which attorney fees are awarded against a party personally, and not out of the estate, involve findings of breach of fiduciary duties. See, for example, *Estate of Cooper*, 81 Wn. App. 79, 913 P.2d 393 (1996). “If there is a breach of fiduciary duties, the plaintiff has a right to recover fees against the trustee personally.” *Estate of Cooper*, 81 Wn. App. at 92. See also *Allard v. Pacific Nat’l Bank*, 99 Wn.2d 394, 407, 663 P.2d 104 (1983). In this case, Teresa and Mary Ann can in no way be found or said to have breached any fiduciary duty. On the contrary, they were motivated by a desire to benefit the estates and all four beneficiaries. It would be punitive, inequitable, and unfair to make them personally responsible for the attorney fees incurred by Will Jones.

CONCLUSION

This court should reverse the order granting summary judgment and dismissing with prejudice the TEDRA petition filed by Teresa Engbretson and Mary Ann Sealock. It was error for Judge Pro Tem Peters to find that Teresa and Mary Ann had a right to seek rescission and then grant the motion for summary judgment

(re: rescission) based on his sua sponte finding that the 2003 documents were valid.

As for the cross appeal filed by Will Jones, this court should affirm Judge Pro Tem Peters. His order awarding attorney fees to Mr. Tabler to be paid by of the estates, and not by Teresa and Mary Ann personally, was not an abuse of discretion.

Teresa and Mary Ann should be awarded their attorney fees - - either against Will Jones personally or out of the estates.

DATED this 21 day of November, 2011.

MINNICK • HAYNER, P.S.

A handwritten signature in black ink, appearing to read 'Tom Scribner', is written over a horizontal line. The signature is stylized and somewhat cursive.

By:

TOM SCRIBNER, WSBA #11285
of Attorneys for Appellants

FILED

NOV 22 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In Re the Estates of

HARVEY L. JONES and
MILDRED L. JONES,

Deceased

TERESA ENGBRETSON and MARY
ANN SEALOCK, heirs of Harvey L.
Jones and Mildred L. Jones,

Appellants,

vs.

WILL L. JONES, personal
representative of the estates of Harvey
L. Jones and Mildred L. Jones,

Respondent.

NO. 300439

CERTIFICATE OF MAILING

JUDY LIMBURG declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. That I am a citizen of the United States, over the age of 18 years, and not a party to this action;
2. That on November 21, 2011 a true a correct copy of **APPELLANTS' REPLY BRIEF/RESPONSE TO CROSS-APPELLANT'S BRIEF** was served by the method indicated below, and addressed to the following:

Michael Tabler

Schultheis Tabler Wallace, PLLC

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JUDY LIMBURG

**Signed this 21st day of November, 2011
at Walla Walla County, Washington**