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JAN 12 2012

CLERK OF COURT
COURT OF APPEALS
300 N. RAYBURN AVENUE
SPokane, WA 99201

No. 30272-5-III

IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

IN THE MATTER OF THE ESTATE OF SHIRLEY E. WILSON,
Deceased,

Appellant.

Spokane County No. 09-4-01585-8

BRIEF OF APPELLANT

Robert E. Kovacevich, #02723
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I.

ASSIGNMENTS OF ERROR

One

The Court erred by denying James Wilson's Petition for Removal of Personal Representative.

Two

The attempted conveyance by Larry Wilson to himself was void.

Three

The Court erred in closing the estate without requiring the personal representative to account for the proceeds of the sale of the Deceased's personal residence.

Four

The proceeds from the sale of Decedent's personal residence should be included as estate assets.

Five

The Court had no jurisdiction to enter a decree in a Washington probate conveying real estate located in the State of Idaho.

Six

The Court erred in closing the estate and awarding the personal representative's fee's and costs, including attorney's fees.

II.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Can the attorney-in-fact of a durable power of attorney convey real estate to himself by signing as both grantor and grantee without paying consideration?
2. Did the attorney-in-fact, who had the burden of proof, establish a real estate gift to him from the principal?
3. Are the proceeds from the property conveyed to the attorney-in-fact part of the Deceased's subsequent estate?
4. Did the Personal Representative properly distribute Idaho real estate without commencing an ancillary probate in that state?

III.

STATEMENT OF THE CASE

A. Procedural History

On June 14, 2011, (CP 23), James Wilson filed a petition asking the court to issue a citation to remove the personal representative and appoint him as successor. The grounds were that Larry D. Wilson breached his fiduciary duty for failure to account for funds from the sale of Decedent's residence and include them in the Decedent's estate. The petition also requested that Larry D. Wilson be denied any compensation for administering the estate.

B. Statement of Facts

Larry D. Wilson, the Personal Representative, is the son of Decedent. James Wilson is the grandson of the Decedent. His father is deceased. (CP 14, 23). Decedent died intestate. (CP 32). The statutes of descent, RCW 11.04.015(2)(a), confer the estate one half to each. James Wilson takes by right of representation. (CP 14).

On September 17, 2005, Larry Dean Wilson as attorney-in-fact for his mother, by power of attorney, recorded under Auditor's File 4675516 on January 2, 2002, quit claimed Decedent's house to himself. (CP 23). Larry Dean Wilson executed the deed to himself signing Shirley Wilson's name as grantor and also signed his own name as grantee. (CP 1, 23). The deed was filed in the Spokane County Auditor's Office on September 28, 2005 as Document No. 528527. (CP 14). Shirley Wilson was not competent on August 26, 2006. (CP 14, 23). She was admitted to a nursing home the day before. (CP 32).

No consideration was ever proven or explained for the conveyance. No power of attorney was produced giving permission to the attorney in fact to make unlimited gifts to himself. The residence was sold by Larry D. Wilson on July 20, 2006 to Robert J. Vovos for \$190,000. (CP 15, 32). None of the proceeds were included in the Decedent's estate. Decedent died on April 30, 2008. (CP 14).

IV.

ARGUMENT

A. The Standard of Review is De Novo.

The appeal is from a denial of a petition interpreting statutes and is de novo. *Optimer International Inc. v. RP Bellevue LLC*, 170 Wash.2d 768, 771, 246 P.3d 785 (2011).

B. The Attempted Conveyance is Void.

RCW 11.19.110 permits the holder of a power of attorney to exercise in his/her favor only if it meets the standards of 2041 or 2514 of the Internal Revenue Code. RCW 11.95.100-170; 11.94.070. 34A Am.Jur.2d *Federal Taxation* ¶ 143,664 states, “the breadth and scope of a power of appointment are determined by state law.” The power to appoint only for maintenance, education, support or health is called an “ascertainable standard.” Larry Wilson was the holder of the power and did not qualify under the ascertainable standards defined in the Internal Revenue Code. 26 U.S.C. §§ 2041(b)(1)(A) and 2514(c)(1).

The durable power of attorney must specifically include an unrestricted gift clause in order that the gift be valid. RCW 11.94.050. The statute states that the attorney-in-fact "shall not have the power, unless specifically provided. . .to make gifts of any property owned by the principal." The durable power document must specifically provide unlimited gifts. The durable power in this case contained no unlimited power, hence the deed was void.

Estate of Lennon v. Lennon, 108 Wash.App 167, 183, 29 P.3d 1258 (Div. I 2001) holds that an attorney-in-fact has no power to make gifts unless the power specifically states that unlimited gifts are allowed. The burden to prove a gift is on the recipient to be proven by clear, cogent and convincing evidence of an intention to gift and actual delivery.

Courts strictly construe a power of attorney. *Scott v. Goldman*, 82 Wash.App 1, 6, 917 P.2d 131 (Div. II 1996). Larry D. Wilson would not even explain why he deeded the residence to himself. He never proved anything.

Estate of Aguirre ex. rel. Aguirre v. Koruga, 42 Fed.Appx 73, 76, 2002 WL 1579746 (9th Cir. 2002) holds that Washington State law requires that the person claiming the gift has the burden of proof by clear, cogent and convincing evidence. The case also holds a gift to an attorney-in-fact under a durable power of attorney places the burden of proof of the gift on the attorney-in-fact. In addition, to specific language in the document, the donee must prove that the donor asserted that she wanted to make the gift. James Wilson's Declaration (CP 14) states that the Decedent did not have mental capacity at the time of the alleged gift. If the gift is not proven, the funds belong to the estate. As stated, Larry D. Wilson did not prove any elements of a gift.

C. The Personal Representative Must Account For The Proceeds of the Sale.

A nonintervention probate proceeding, when the personal representative has failed to comply with his fiduciary duties of faithful execution and management of the estate, requires removal. RCW 11.68.070 states:

If any personal representative who has been granted nonintervention powers fails to execute his or her trust faithfully or is subject to removal for any reason specified in RCW 11.28.250 as now or hereafter amended, upon petition of any unpaid creditor of the estate who has filed a claim or any heir, devisee, legatee, or of any person on behalf of any incompetent heir, devisee, or legatee, or of any person on behalf of any incompetent heir, devisee, or legatee, such petition being supported by affidavit which makes a prima facie showing of cause for removal or restriction of powers, the court shall cite such personal representative to appear before it, and if, upon hearing of the petition it appears that said personal representative has not faithfully discharged said trust or is subject to removal for any reason specified in RCW 11.28.250 as now or hereafter amended, then, in the discretion of the court the powers of the personal representative may be removed and a successor appointed. In the event the court shall restrict the powers of the personal representative in any manner, it shall endorse the words "Powers restricted" upon the original order of solvency together with the date of said endorsement, and in all such cases the cost of the citation, hearing, and reasonable attorney's fees may be awarded as the courts determines. RCW 11.68.070 (2010).

The court has broad discretion to remove an executor so long as its grounds are valid and supported by the record. *Estate of Ardell*, 96 Wash.App 708, 718, 980 P.2d 771 (Div. III 1994) citing *In re Beard's Estate*, 60 Wash.2d 127, 132, 372

P.2d 530 (1962). Under RCW 11.68.070, the trial court has discretion to remove a personal representative with nonintervention powers if he fails to execute his trust faithfully, or for any other reason set forth in RCW 11.20.250. *Id.* at 718, citing *Beard*, 60 Wash.2d at 132, and *In re Estate of Aaberg*, 25 Wash.App 336, 339, 607 P.2d 1227 (1980). RCW 11.28.250 authorizes the court to revoke testamentary letters if it has reason to believe the personal representative wasted, embezzled, mismanaged estate property, or for any reason the court finds such action is necessary; including neglect to perform acts as personal representative, a reason also included in RCW 11.28.250. *Id.*

An intervivos conveyance of property from an heir as the testator's attorney-in-fact to himself prior to death falls squarely within the text of this rule, especially when the same heir sells the property to an uninterested party, accepts appointment as personal representative of the estate and refuses to account to the estate for the sale proceeds. See RCW 11.92.040(2). (Requiring an attorney-in-fact, aka, guardian ad

litem, to deliver the deceased incapacitated person's assets to the estate and account for proceeds of the incapacitated person's assets conveyed by the guardian). *Cf Kwiatkowski v. Drews*, 142 Wash.App 463, 489, 176 P.3d 510 (Div. II 2008).

D. The Accounting Must Be Provided.

In re Estate of Jones, 152 Wash.2d 1, 93 P.3d 147 (2004) applies to this case. Its holding is binding precedent. In *Jones*, the beneficiaries of a nonintervention estate filed a petition in probate proceedings for interim and final accountings, and to remove and replace the personal representative. *Id.* at 7. The trial court granted the petition finding that the personal representative breached his fiduciary duty to the estate by, among other things, failing to include an appraisal of real property or a list of bank accounts in the estate inventory. *Jones*, 116 Wash.App 353, 360, 67 P.3d 1113 (Div. III 2003).

The Court of Appeals reversed the trial court's decision, holding that the trial court lacked jurisdiction to intervene in the probate when the misconduct was insufficient to disqualify the personal representative under RCW 11.68.070. *Jones*, 116

Wash.App at 358. However, the Supreme Court reversed and remanded the Court of Appeals' decision that grounds for removal were insufficient, holding that the trial court's removal of the personal representative was proper. *Jones*, 152 Wash.2d at 11-12. In reaching its holding, the Supreme Court reasoned that though the catchall phrase in RCW 11.28.250 "does not mean that the court may remove a representative on a whim," (*Jones*, 152 Wash.2d at 11), the trial court's removal was properly based on several breaches of fiduciary duty including personal use of estate property, commingling estate funds, and refusing to disclose information to the beneficiaries. *Jones*, 152 Wash.2d at 11-12.

The Supreme Court also reversed the Court of Appeals' decision that an accounting was not required, reasoning that under former RCW 11.96.070(1)(b), "a court could require an interim reporting as part of the representative's fiduciary duty [if] . . .it is equitable to do so in light of the representative's suspicious activities suggesting of self-dealing and unfaithfulness to the estate." *Jones*, 152 Wash.2d at 18, citing

In re Estate of Johnson, 187 Wash. 552, 554, 60 P.2d 271 (1936).

In re the Estate of Morin, 2004 WL 2650984 (Div. III 2004) the heirs to an estate petitioned the court to remove the personal representative for breaching his fiduciary duty to the estate when he failed to provide an accounting justifying the estate's attorney fees and costs. *Id.* at 4. This case is reviewed here as the facts are very similar. The trial court granted the petition to revoke the personal representative and held that his failure to provide an accounting justifying the amount of attorney fees and costs constituted a breach of fiduciary duty to the estate. The trial court ordered the estate's attorney to provide the successor personal representative with an accounting justifying his fee. *Id.* at 2. Upon subsequent motion, after the attorney failed to comply with the initial order for an accounting, the trial court ordered the attorney to refund payments made by the estate for his fees.

The Division II Court of Appeals affirmed the trial court's order for recovery of attorney's fees for the estate in response

to the attorney's failure to provide an accounting. *Id.* at 4. In reaching its holding, the Court of Appeals reasoned that failing to provide a court-ordered accounting is a breach of fiduciary duty to the estate and "RCW 11.96A.100(10) provides that the court may enter any order it deems appropriate if the initial hearing does not resolve the issues of law and fact." *Id.* at 4.

Here, like the personal representatives in *Jones* and *Morin*, Larry D. Wilson has engaged in suspicious activities suggestive of self-dealing. Even though Shirley Wilson was still alive when he quit claimed her property as her attorney-in-fact to himself as grantor and grantee, and then sold it, the fact that he repeatedly refused to provide an accounting proving he did not keep the proceeds for himself indicates that the purpose of the property sale was to acquire the property for his own personal gain by excluding it from probate. Further, even if Larry D. Wilson rightfully conveyed Shirley Wilson's property as her attorney-in-fact, the conveyance and sale evidence may prove that he may owe a debt to the estate for the proceeds.

Allowing a beneficiary to use his position as an attorney-in-fact and personal representative to secret assets from an incompetent person for his own personal gain undermines the purpose of RCW 11.68.070 and 11.28.250 because it places a duty to account on personal representatives and provides that the breach of those duties constitutes grounds for removal. Therefore, the Court should reverse the trial court's decision and grant James Wilson's Petition to Remove Larry Wilson as Personal Representative of the Estate of Shirley Wilson.

E. To Protect Creditors of a Foreign State and Pass Title, Real Estate Owned by Decedent in Idaho Must Be Probated in Idaho.

The Order of the Court entered August 26, 2011, distributed the Idaho real estate. James Wilson (RP 6) argued that the title to the land had to be cleared by an ancillary probate. No Idaho ancillary probate was commenced.

The U.S. Constitution, Article 3 § 2, vests judicial power to extend to disputes "between citizens of the same state claiming lands under grants of different states." U.S. Const. Art 1 § 10 prohibits one state from compacting with another.

The full faith and credit clause, U.S. Const. Art. 4 § 1 gives each state authority to recognize the jurisdictional state's judgments.

95 C.J.S. Wills § 551 states, "In many jurisdictions the courts of probate are empowered by statute to exercise jurisdiction of probate proceedings of wills of non-residents leaving real or personal property, or both, in the jurisdiction. The jurisdictional fact is the existence of assets within the state. For authority, it cites *Estate of Tolson*, 89 Wash.App 21, 947 P.2d 1242 (Div. II 1997). *Tolson* states (89 Wash.App at 31):

In the context of a probate action, it is fundamental that the law of the domicile governs the distribution of the assets of a decedent. *In re Estate of Stein*, 78 Wash.App at 261-62, 896 P.2d 740; *In re Estate of Olson*, 194 Wash. 219, 227, 77 P.2d 781 (1938). Although the law of the domicile determines the right to succession and distribution of the personal property that has its physical situs in a foreign jurisdiction, the existence of an estate belonging to a nonresident decedent in a foreign state may make it subject to an ancillary administration under the laws of such state. *In re Estate of Glassford*, 114 Cal.App.2d 181, 189, 249 P.2d 908, 34 A.L.R.2d 1259 (1952).

The case cited, *In re Estate of Glassford* states (249 P.2d at 191):

Local creditors and claimants need not be compelled to present their claims in another forum nor accept unenforceable assurances of payment by foreign executors which may later be repudiated while assets are situated in this state which may properly be applied to satisfy the obligations against the estate.

In *Radar v. Stubblefield*, 43 Wash. 334, 348, 186 P. 60 (1906), the decedent left real estate in Oregon and Washington. The parties conceded that real property located in Oregon has its probate situs in Oregon as payment of claims from local creditors is a reason for an ancillary probate.

Here, the trial court had no jurisdiction to distribute the Idaho real estate. The probate was not completed and should not have been closed.

Conclusion.

The gift to Larry D. Wilson, by deed signed as both grantor and grantee was an invalid conveyance. The proceeds of the subsequent sale must be accounted in the estate. Larry D. Wilson refused to account as attorney-in-fact and must be

removed as personal representative and an Idaho probate must
be commenced.

DATED this 12th day of January 2012.

A handwritten signature in black ink, appearing to read 'R. Kovacevich', written in a cursive style.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief of Appellant was served on counsel for Respondent by mailing the same by United States mail on January 12, 2012, in a postage paid envelope addressed as follows:

Mr. John Montgomery
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DATED this 12th day of January 2012.

A handwritten signature in black ink, appearing to read 'R. Kovacevich', written over a horizontal line.

ROBERT E. KOVACEVICH, #2723
Attorney for Petitioner