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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 306861

Superior Court No. 10-401154-6

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

IN THE MATTER OF THE ESTATE OF
GARTH BENJAMIN PETERSON, Deceased.

APPELLANTS' REPLY BRIEF

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II. TABLE OF AUTHORITIES

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III. INTRODUCTION

The main issue in this case is the conduct of the Personal Representative in pursuing payment of his Creditor's Claim. Understandably Thomas Milby Smith, hereafter known as Smith, wanted his Creditor's Claim paid after nearly 20 years. To facilitate and guarantee the payment of his Creditor's Claim, Smith waited until the debtor passed away. Smith patiently waited the statutory 40 days and no heir stepped forward to probate the estate. Smith petitioned the Court and the Court approved his appointment as the Personal Representative.

The problem that arose out of this appointment was that there was and remains mutual hostility between Smith and the Peterson heirs. This hostility is as a result of former attorney-client relationships, prior legal wrangling with deceased Peterson, Smith and Judge Leveque. The situation has been further frustrated by the intricacies and nuances of the law, which has culminated in an exorbitant attorney's fees and costs to the Estate by a Personal Representative who owed a fiduciary obligation to the heirs, but who has neglected to act in such capacity.

This brief is in reply to the pertinent issues that the Peterson heirs feel lead to an unjust probate of their fathers estate. The brief will also cite factual inaccuracies that warrant relief to the heirs.

IV. Argument

In reply to Thomas Milby Smith, Inc., P.S.'s Brief, Rena and Lyndra Peterson will briefly reply to each argument.

A. Smith contends the Trial Court had jurisdiction over the Peterson Estate.

Smith argues that the Court always had jurisdiction over the Peterson Estate, however it is better stated that the Trial Court had jurisdiction over the estate's property. Personal Jurisdiction is completed by proper service upon the heirs of the estate. Smith contends that there was waiver on the part of the heirs by appearing, yet only two heirs appeared in Court contesting the Court proceedings, namely Rena and Lyndra Peterson. The other two heirs never appeared in Court on any proceedings. In addition Request for Special Notice of Proceedings in probate under RCW 11.28.240 was filed (CP 264-265). Smith failed to comply with said request (CP 938).

Smith failed to give the Peterson heirs proper notice (CP 264-265, 353, 355, 1103-1111, 1301, 687-694). The pattern of inconsistent and misleading notices attempted by Smith began at the inception of this probate (CP 31). Statutory notice to an heir in probate is prerequisite to the court's entry of a valid decree of final distribution affecting an heirs' rights, *In re Petersons' Estate*, 12 Wn.2d. 686, 123 P.2d 733 (1942), *Lawer v. Beesley*, 86 Or. App. 711, 740 P.2d 1215 (1987). The original Notice of Appointment and Certificate of Mailing to Rena Peterson does not list a correct address and the certificate of receipt tracking number denotes it was never accepted by anyone. Smith alleges that he conducted substantial research in an attempt to ascertain the heirs' whereabouts. In his Brief he cites that after being appointed Personal Representative, Smith 'did not know or could not recall' if there were more heirs than Rena Peterson (Pg 6 Respondent's Brief). Smith hired an investigator; he conducted an internet search and visited the Spokane County Health District. This was all at a substantial cost to the Estate. However, on July 22, 2011, eleven months after being appointed Personal Representative, Smith presented and Judge Leveque signed, an order amending the heirs' addresses for service by mail for the second time (CP 447-450). Of the four heirs, Smith had the wrong address for two of them, one of them being a named litigant in this action, Rena Peterson (39-43 & 447-450).

The issue that arises out of this Order is that Smith misleads the court in his Response Brief by stating that he mailed notice to the heirs on December 27, 2010 – “long before the court entered any order determining the disposition of the estate property” (Pg 29 Respondent’s Brief). He may have mailed notice, but seven months later he amended the addresses, after several Orders had been entered determining the disposition of valuable estate property (CP 447-450).

The notice requirement was habitually missed in this probate and for Rena Peterson, the most active heir, her address was never correctly ascertained for the purpose of notice until July 22, 2011 (CP 447-450). “Identifying the heirs accurately is important in probate administration because the Personal Representative has an obligation, within 20 days after being appointed, to give written notice of the pendency of the probate proceedings to “each heir, legatee and devisee of the estate...whose names had been known to him or her”. *In re Estate of Little*, 127 Wash.App. 915, 113 P.3d 505 (2005).

Smith did not make a reasonable attempt to locate the names and addresses of the heirs, despite being the attorney for the family and previously dealing with Rena and Lyndra Peterson, as well as the deceased (CP 674-678). He alleges he made reasonable attempts, however accurate mailing addresses were not ascertained until July 22, 2011 (CP 447-455).

The heirs of the Peterson estate request that the Court reverse and revisit the Trial Court's finding that proper notice was given to the heirs.

B. Smith's lack of qualifications to serve as Administrator of the Peterson Estate.

Smith contends that the Trial Court correctly found Smith qualified to serve as the Administrator of the Peterson Estate. The Petersons contend that Smith lacked the qualifications to serve and did not properly perform his fiduciary obligations as the Personal Representative. Smith was entitled by statute to be appointed as Personal Representative; however he was not qualified for reasons set out in Petersons' Appellant Brief at Pages 23, 24, 25, 26 and 27.

Smith also contends that the Court corrected any issue regarding propriety of Smith acting as Personal Representative by entering a nunc pro tunc Order. The Court was more interested in protecting Smith than overseeing the proper enforcement of his fiduciary obligations to the heirs. The Personal Representative's bond, however was never corrected (CP 1382-1384). Although these issues by themselves may not be grounds to void the probate, they are indicative of the lack of attention paid to the Estate's probate.

The heirs are deprived of the Personal Representative's bond by reason of the nunc pro tunc Order (CP 1268-1270). The nunc pro tunc Order did not cure the error, as the error involved a substantive issue of law. A nunc pro tunc administrative Order is invalid if it has the affect of changing the substance of previous Order. *Pasco v. Napier*, 109 Wn.2d 769, 755 P.2d 170 (1988). In *Pasco* at Page 775, the Court said:

It (nunc pro tunc Order) cannot be used to change the terms of, or remedy omissions in, the prior judgment or decree.

Here the Court could not change and remedy the defect because it would involve a substantive change and not a procedural change.

The heirs ask the Court to reverse and revisit the findings of the Trial Court that Smith was a qualified Personal Representative.

C. Smith, P.S. did not properly perform all his duties as Personal Representative.

On Page 24 of Appellants' Brief, Rena and Lyndra Peterson list 13 items where Smith was guilty of waste and mismanagement. Smith argues that the Trial Court correctly found that Smith fulfilled his fiduciary duties to the heirs although Smith never adhered to comply with the Request for Special Proceedings under RCW 11.28.238 filed in March of 2011 (CP

264) and in June 2011 (CP 938). The Appellant Court can observe from the pleadings that Smith was more interested in receiving payment on his Creditor's Claim and protecting himself from potential liability claims of the heirs than in acting in a fiduciary capacity with the heirs to properly execute a fair and judicial probate. This is clearly evidenced in the fact that once the Creditor's Claim was paid, Smith moved the court to resign, thus leaving the probate incomplete and currently without an Administrator (CP 1356-1375). Smith further frustrated the situation by opposing the appointment of Lyndra and/or Rena Peterson as Personal Representative (CP 822-832, 997-998). Smith had no reason or basis to object except for his feeling of repugnance for the heirs, which prevailed throughout the probate proceedings.

The heirs ask the Court to appoint Lyndra and Rena Peterson as Personal Representatives and to revisit the findings of the Trial Court regarding the handling and self-dealing of the Estate by Smith (CP 651-656).

D. The Trial Court did not properly enter judgment on Smith P.S.'s Creditor's Claim.

Petersons contend that the judgment entered on the Personal Representative's Creditor's Claim should be reversed (CP 1272-1288). In

support of their argument, they argue that the professional corporation was a creditor of the Estate, and not Smith individually. The bond issue only covered Smith individually, and not the professional corporation (CP 1382, 1384). The Creditor's Claim should have been rejected, as Court approval was not obtained as required by RCW 11.40.070, and RCW 11.96A.080, and as specified in RCW 11.40.140. The nunc pro tunc Order did not cure this error, because it involved a substantive issue and not a procedural issue. *Pasco v. Napier*, 109 Wn.2d 769, 755 P.2d 170 (1988). The Creditor's Claim statute, RCW 11.40, is strictly construed. *Villegas v. McBride*, 112 Wn. App. 689, 50 P.3d 678 (2002).

The heirs ask that the Creditor's Claim be disallowed for reasons herein and as set out at the bottom of Page 30 of Appellants' Brief.

E. Smith wrongfully contends that the Trial Court never granted the heirs a Right of First Refusal over any estate property.

While a Court Order may not have been entered by the Trial Court, a First Right of Refusal by the Court was agreed to by the Personal Representative on May 19, 2011, as evidenced in the Court's transcript RP 68 and as also evidenced on the Order of Continuance (CP 352-353). Although ignorance of the law is no excuse, Smith, as a fiduciary for the Estate never took any interest in the heirs' requests. On page 68 of the

Report of Proceedings Smith clearly states that 'a first right of refusal is implicit in a probate' however this was not extended to the heirs past the letter from Smith to the heirs regarding the coins (CP 846-848).

On August 5, 2011, Rena Peterson filed a Motion to Reconsider and apparently an Affidavit of Prejudice (CP 466-468, 469-470, 471-472). While the motion is not artfully drawn, it requests the Court to allow the heirs the first right of refusal to purchase in part or in whole the entire estate (CP 469, 470) and also requests for the Court to remove itself because of its prejudice. The Court denied the Motion to Reconsider and the Motion for Recusal (CP 466-468, 523-524). Smith now denies that there was granted any right of first refusal (Page 40 of Respondent's Brief). Smith was in a fiduciary capacity to the heirs and should have honored the heirs' request for a first right of refusal. Instead, Smith required the heirs to bid without specifically notifying them of the last offer by a third party and merely serving upon them various petitions to sell the real and personal property. Rena and Lyndra Peterson at that time were representing themselves, and needless to say, were treated poorly by Smith and the court. A pro-se litigant is entitled to the same degree of justice as one who is represented by an attorney. In addition the Court denied Rena Peterson's Affidavit of Prejudice, as well as her previous

request to recuse himself in May of 2011 (RP 56). This was an abuse of the Trial Court's discretion.

V. CONCLUSION

The costs and fees incurred were excessive as evidenced by the Affidavit of a prominent probate lawyer, who indicated that a reasonable fee would have been in the approximate sum of \$5,000.00 (CP 932-940). While Rena and Lyndra Peterson did not cooperate with the Personal Representative due to the prior antagonism existing between the parties, the Personal Representative dealt with the heirs as if they were his enemies instead of being in a fiduciary capacity with them.

The Trial Court abused its discretion in not disqualifying himself and in the award of the judgment on fees and costs to Smith, which should be reversed and vacated (CP 1287). The Personal Representative's fees and costs should be disgorged and the heirs be awarded their fees and costs by personal judgment against Thomas Milby Smith. The heirs, Lyndra Peterson and Rena Peterson, should be appointed Co-Personal Representatives and the matter should be assigned to another Trial Judge for completion of the remainder of the probate. The heirs should be

awarded their fees and costs on appeal as per the request in their appeal
brief.

Dated this 31st day of August, 2012.

Respectfully Submitted.

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