

FILED

AUG 21 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 30799-9-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION NO. III

In the Matter of the Estate of: RICHARD OBERDORFER

BRIEF OF RESPONDENT

James A. McPhee, WSBA # 26323
Jessica C. Allen, WSBA #39873
Workland & Witherspoon, PLLC
601 West Main, Ste. 714
Spokane, WA 99201
Telephone: (509) 455-9077
Fax: (509) 624-6441
jmcphee@workwith.com
jallen@workwith.com
Attorneys for Respondent

FILED

AUG 21 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 30799-9-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION NO. III

In the Matter of the Estate of: RICHARD OBERDORFER

BRIEF OF RESPONDENT

James A. McPhee, WSBA # 26323
Jessica C. Allen, WSBA #39873
Workland & Witherspoon, PLLC
601 West Main, Ste. 714
Spokane, WA 99201
Telephone: (509) 455-9077
Fax: (509) 624-6441
jmcphee@workwith.com
jallen@workwith.com
Attorneys for Respondent

Table of Contents

I. INTRODUCTION 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT..... 4

 A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEYS FEES AND COSTS TO THE CO-TRUSTEES PURSUANT TO RCW 11.96A.150..... 4

 1. Standard of Review 4

 2. TEDRA confers broad discretion of the trial court..... 4

 3. A finding of fault is not a prerequisite for awarding fees and costs under RCW 11.96A.150..... 6

 4. Assuming for argument’s sake that a finding of fault is a prerequisite for an award of attorney’s fees under TEDRA, Appellant’s actions provided such fault 7

 B. THE TRIAL COURT ISSUED SUFFICIENT FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THE *ORDER GRANTING PETITIONERS’ MOTION FOR ATTORNEYS’ FEES AND COSTS*..... 8

 C. THE CO-TRUSTEES ARE ENTITLED TO ATTORNEYS FEES AND COSTS ON APPEAL PURSUANT TO RAP 18.1 AND 14.2..... 11

 D. APPELLANT’S REQUEST FOR ATTORNEY FEES SHOULD BE DENIED. 11

IV. CONCLUSION..... 12

Cases

Cook v. Brateng, 158 Wn.App. 777, 795, 262 P.3d 1228 (2010)..... 5

Delegan v. White, 59 Wn.2d 510, 512-3, 368 P.2d 682 (1962)..... 9

Gillespie v. Seattle-First Nat. Bank, 70 Wn.App. 150, 177, 855 P.2d 680
(1993)..... 7

Hubbard v. Medical Service Corp., 59 Wn.2d 449, 367 P.2d 1003 (1962) 9

In re Estate of Black, 116 Wn.App. 476, 489, 66 P.3d 670 (2003)..... 5, 6

In re Estate of Black, 153 Wn.2d 152, 173, 102 P.3d 796 (2004)..... 4

In re Estate of Ehlers, 80 Wn.App. 751, 911 P.2d 1017 (1996)..... 12

In re Guardianship of McKean, 136 Wn.App. 906, 150 P.3d 223 (2007) . 6

Just Dirt, Inc. v. Knight Excavating, 138 Wn. App. 409, 415-16, 157 P.3d
431 (2007)..... 11

Laue v. Estate of Elder, 106 Wn.App. 699, 25 P.3d 1032 (2001),
reconsideration denied, as amended, review denied 145 Wn.2d 1036,
43 P.3d 20 12

*Oroville Cordell Fruit Growers, Inc. v. Minneapolis Fire & Marine Ins.
Co.*, 72 Wn.2d 544, 434 P.2d 3 (1967)..... 9

Rhinehart v. Seattle Times, 59 Wash. App. 332, 342, 798 P.2d 1155
(1990)..... 11

Whitney v. McKay, 54 Wn.2d 672, 679, 344 P.2d 497 (1959) 9

(continued on next page)

Statutes

RCW 11.96A.020(2)..... 7
RCW 11.96.140 7
RCW 11.96A.150..... 4, 5, 6, 7

Rules

RAP 14.2..... 11
RAP 18.1..... 11
CR 59..... 4

I. INTRODUCTION

Respondents, Richard H. Oberdorfer and Jeanette Farm, as Co-Personal Representatives of the Estate of Richard Oberdorfer and Co-Trustees of the Oberdorfer Living Trust (hereinafter “Co-Trustees”), submit the following in response to *Appellant Robin Merrill’s Opening Brief* and request that this Court affirm the award of attorneys’ fees and costs made by the trial court. In addition, the Co-Trustees request an award of attorneys’ fees and costs incurred in this appeal.

II. STATEMENT OF THE CASE

The Co-Trustees filed a TEDRA petition to determine the present beneficiaries of the Oberdorfer Living Trust (hereinafter the “Trust”) and thereby silence Appellant’s threats to sue for an unwarranted share thereof and for breach of fiduciary duties. (CP 1). On December 29, 2009, Appellant, as Personal Representative of the Estate of Elizabeth Merrill¹, notified the Co-Trustees that he was claiming a purported interest under a subtrust of the Trust. (CP 144, 186). In particular, Appellant’s counsel asserted, “I am bringing this to your attention as my clients feel that they are entitled to receive their share of the Family Trust.” (CP 144, 186).

On January 14, 2010, the Co-Trustees informed Appellant that since Elizabeth Merrill’s share of the subtrust lapsed at her death, her

¹ Appellant misidentified Elizabeth Merrill in his opening brief. She was his wife, not his mother.

estate retained no interest in the subtrust. (CP 144). Contrary to Appellant's assertion that the Co-Trustees were not receptive to discussing the case, the Co-Trustees' counsel wrote to Appellant's counsel repeatedly concerning the matter (CP 144, 203).

By letter dated February 19, 2010, Appellant's counsel disagreed with the Co-Trustees' analysis and stated:

I disagree with your analysis and I believe that unless we can come to some understanding, I may be bringing a declaratory judgment action under TEDRA ... (CP 144, 189).

In addition, Appellant threatened to sue the Co-Trustees for breach of fiduciary duty if they did not hold back sufficient funds to cover Appellant's alleged share:

That being said, I would caution you that in the event any distributions are made from the Family Trust to any of the beneficiaries thereof, it may be prudent to hold back enough ... if the court does establish that ... other beneficiaries ... are in fact entitled to a quarter of the trust assets. To do so otherwise would invite an action against the Trustees for breaching their fiduciary duty. (CP 145, 191) (emphasis added).

This letter placed the Co-Trustees in a perilous position as it could be a breach of fiduciary duty to the true beneficiaries to *withhold* a trust distribution, yet Appellant threatened to sue for breach of fiduciary duty if they *made* a trust distribution.

Therefore, on July 6, 2010, the Co-Trustees filed a TEDRA petition and asked the trial court to declare the present beneficiaries of the

Trust which would avoid Appellant's threatened litigation for an unwarranted share and for breach of fiduciary duty. (CP 1). On July 23, 2010, Appellant filed an Answer and challenged the proposed distribution plan of the Co-Trustees. (CP 3). This unnecessary opposition by Appellant ultimately failed, but not until after it resulted in significant expense to the Trust.

It should be noted that without opposition from Appellant, this matter would have reached the same outcome and been resolved at the July 31, 2010 hearing.

On July 30, 2010, Appellant appeared and contested the Co-Trustees' motion which sought to avoid mediation. (CP 145, 242). At that time, the Co-Trustees informed Appellant that mediation was not their preferred route because the TEDRA petition sought only to determine the present beneficiaries and seek protection against Appellant's threatened litigation. (CP 145). Nonetheless, the Co-Trustees participated in mediation on November 11, 2010 pursuant to Appellant's request. (CP 146). The unsuccessful mediation further increased the attorney fees and costs incurred in this matter.

Appellant continued to escalate attorney fees and costs when he unsuccessfully opposed the Co-Trustees' summary judgment motion,

arguing that he should be awarded summary judgment despite never himself filing a cross-motion for summary judgment. (CP 243, 254, 255).

After the trial court granted the Co-Trustees' motion for summary judgment, Appellant again caused additional unnecessary attorney fees and costs by filing a motion for reconsideration in which he raised a new theory for the first time, a practice which is not allowed by CR 59. (CP 192).

III. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEYS FEES AND COSTS TO THE CO-TRUSTEES PURSUANT TO RCW 11.96A.150.

1. Standard of Review

When reviewing an award of attorney fees, the Court 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 Black*, 153 Wn.2d 152, 173, 102 P.3d 796 (2004).

2. TEDRA confers broad discretion upon the trial court.

TEDRA gives the courts "full power and authority" to proceed "in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court." *In re Estate of Black*, 116 Wn.App. 476, 483, 66 P.3d 670 (2003).

In addition, RCW 11.96A.150(1) grants the court discretionary authority when making a fee award under TEDRA.

- (1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. This court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved. (emphasis added)

RCW 11.96A.150(1)

“In exercising its discretion under this section [RCW 11.96A.150], the court may consider any and all factors that it deems to be relevant and appropriate, which factors may need not include whether the litigation benefits the estate or trust involved.” *Cook v. Brateng*, 158 Wn.App. 777, 795, 262 P.3d 1228 (2010) citing RCW 11.96A.150(1). Further, the touchstone of an award of attorney fees from an estate is whether the litigation resulted in a substantial benefit to the estate. *In re Estate of Black*, 116 Wn.App. 476, 489, 66 P.3d 670 (2003).

By invoking TEDRA, the Co-Trustees benefited the Trust and its true beneficiaries by seeking a binding definition of actual trust beneficiaries. Once a challenge emerged from Appellant, the Co-Trustees

again benefited the trust by successfully defending an unwarranted claim by removing Appellant, who wrongfully claimed a twenty five percent (25%) interest in the subtrust.

3. A finding of fault is not a prerequisite for awarding fees and costs under RCW 11.96A.150.

Appellant incorrectly asserts that “[b]efore a court may award attorney fees in equity, the court must specifically find the party against whom attorney fees are awarded was at fault in causing the litigation.” *Appellant Robin Merrill’s Opening Brief*, pg. 5 citing *In re Guardianship of McKean*, 136 Wn.App. 906, 150 P.3d 223 (2007).

In *Gillespie v. Seattle-First Nat. Bank*, Division One of the Court of Appeals held that finding bad faith or self-dealing was not required to support an award of attorney fees to beneficiaries for breach of trust. *Gillespie v. Seattle-First Nat. Bank*, 70 Wn.App. 150, 177, 855 P.2d 680 (1993)². *Gillespie* found that:

Under RCW 11.96.140 either the superior court or the court on appeal, may, in its discretion, order ... attorneys fees, to be paid by any party ... as justice may require. The statutory language does not require bad faith or self dealing. Rather, fee awards are left to the discretion of the court.

Id. at 177.

² Note, in *Gillespie*, the Court interpreted RCW 11.96.140, which dealt with costs and attorney fees in superior and appellate courts. RCW 11.96.140 was repealed effective January 2000; however, the content of the fee portion of the statute was recodified in RCW 11.96A.150, which is the statute at issue in this matter.

Appellant's "at fault" prerequisite would impermissibly restrict the court when awarding attorneys fees under TEDRA's broad scheme. TEDRA was enacted to give the trial courts "full power and authority" to proceed "in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court." RCW 11.96A.020(2). Pursuant to TEDRA's unambiguous provisions and the case law interpreting it, a trial court is not required to make a finding of fault in order to award attorney fees and costs.

4. Assuming for argument's sake that a finding of fault is a prerequisite for an award of attorneys' fees under TEDRA, Appellant's actions provided such fault.

Assuming, *arguendo*, that finding fault is required for an award of attorney fees and costs, Appellant's actions provide such fault. As provided in detail above, Appellant's unwarranted demands for trust assets and threats to sue for breach of fiduciary duty pressed the Co-Trustees to file the TEDRA petition. Appellant's assertions forced the Co-Trustees into an unmanageable position, as it could be a breach of duty to the true beneficiaries to *withhold* a trust distribution, yet Appellant threatened to sue for breach of fiduciary duty if they *made* a trust distribution. Appellant's meritless challenge to the proposed distribution plan and his threats of litigation for breach of fiduciary duty were the sole and direct cause of this litigation. His forcing the parties into an unsuccessful

mediation, his opposition to the summary judgment motion (in which he requested summary judgment without filing a cross-motion), and his motion for reconsideration (which contained new theories of the case) repeatedly caused the Co-Trustee's to incur unnecessary attorney fees and costs. Apparently conceding that his arguments were untenable, Appellant did not seek review of the merits of the case, but rather limited review to the award of attorney fees and costs.

Therefore, assuming that this Court imposes an "at fault" requirement as a prerequisite to an award of attorney fees under TEDRA, Appellant's actions provide the fault upon which to make such a finding.

B. THE TRIAL COURT ISSUED SUFFICIENT FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THE *ORDER GRANTING PETITIONERS' MOTION FOR ATTORNEYS' FEES AND COSTS.*

Where the court's findings of fact are supported by substantial evidence, they will be sustained on appeal. *Hubbard v. Medical Service Corp.*, 59 Wn.2d 449, 367 P.2d 1003 (1962); *Oroville Cordell Fruit Growers, Inc. v. Minneapolis Fire & Marine Ins. Co.*, 72 Wn.2d 544, 434 P.2d 3 (1967).

The court need not find ultimate facts upon the material issues, and it is not required to include evidentiary facts in findings. *Whitney v. McKay*, 54 Wn.2d 672, 679, 344 P.2d 497 (1959). The court is not required to make findings based on every bit of evidence offered, even if it

is undisputed. *Delegan v. White*, 59 Wn.2d 510, 512-3, 368 P.2d 682 (1962). It is sufficient if, on the basis of all the evidence, the trial court finds the ultimate facts on the material issues. *Id.* citing *McKay* at 678.

In the present matter, the Court appropriately issued findings of fact when it found:

Having considered the records and files herein, the Court finds that good cause exists to grant Petitioners' motion pursuant to CR 54(d) and RCW 11.96A.150 because Petitioners were the **prevailing parties** and the **amount and rates of attorney fees requested were reasonable** and **included deductions for extraneous matters**.

(CP 141) (emphasis added).

The wording in the Order mirrors the language from Judge Cozza's letter ruling dated January 31, 2012: (CP 236).

Next, with respect to the claim for attorneys fees: I do believe that RCW 11.96A.150 gives this court considerable discretion (as is customary in probate matters) to determine fees. Mr. McPhee has already deducted some extraneous matters. The fees are conservative in terms of rate and appear to be an appropriate accounting of time. Likewise, I think that the approximately \$13,000 requested by Mr. Luedke seem reasonable. Considering that the petitioner was the prevailing party, and the intent of Mr. Oberdorfer, I will order those fees to be paid jointly by the Estate of Elizabeth Merrill and Robin Merrill.

(CP 236) (emphasis added).

The trial court weighed relevant and appropriate factors from the records and files, considered the fact that the Co-Trustees were the prevailing party, considered the intent of the deceased trustor, considered

the amount and rates of attorney fees including deductions for extraneous matters, and exercised its broad discretion in making an award of attorney fees and costs under TEDRA. Given that the trial court is not required to make findings on every bit of evidence offered, the language in the Order is more than adequate to address the ultimate facts on the material issues, and, as such, the trial court's award of attorney fees and costs should be affirmed.

Assuming, *arguendo*, that the trial court did not make adequate findings of fact and conclusions of law, then the case must be remanded back to the trial court. *See Rhinehart v. Seattle Times*, 59 Wash. App. 332, 342, 798 P.2d 1155 (1990). In the absence of an adequate record upon which to review a fee award, the Court of Appeals will remand the award to the trial court to develop such a record. *Just Dirt, Inc. v. Knight Excavating*, 138 Wn. App. 409, 415-16, 157 P.3d 431 (2007).

Although the parties thoroughly briefed the legal and factual basis for the Co-Trustees' fee request, if the Court of Appeals holds that the trial court's findings and conclusions were insufficient then this matter should be remanded only for entry of findings and conclusions.

C. THE CO-TRUSTEES ARE ENTITLED TO ATTORNEYS FEES AND COSTS ON APPEAL PURSUANT TO RAP 18.1 AND 14.2.

RAP 18.1 provides for the award of reasonable attorney fees or expenses incurred on review “[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses”. RAP 18.1. In our case, the applicable law is RCW 11.96A.150, which provides “...any court on an appeal may, in its discretion, order costs, including reasonable attorneys’ fees, to be awarded to any party...” RCW 11.96A.150(1). In addition, pursuant to RAP 14.2, “the party that substantially prevails on review” is entitled to an award of costs. RAP 14.2.

Since the trial court’s award of attorneys fees should be affirmed, the Co-Trustees will have substantially prevailed in this appeal and are entitled to an award of costs and attorneys’ fees on appeal. This is the correct result even if the case is remanded to the trial court for entry of findings and conclusions. *See Laue v. Estate of Elder*, 106 Wn.App. 699, 25 P.3d 1032 (2001), reconsideration denied, as amended, review denied 145 Wn.2d 1036, 43 P.3d 20.

D. APPELLANT’S REQUEST FOR ATTORNEY FEES SHOULD BE DENIED.

When beneficiaries are unsuccessful in litigation and primarily pursue the action for their own benefit, the trial court does not abuse its discretion in denying them attorney fees. *In re Estate of Ehlers*, 80

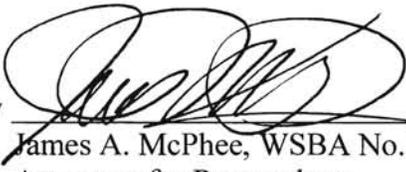
Wn.App. 751, 911 P.2d 1017 (1996). Since Appellant unsuccessfully pursued this matter for his own benefit, he is not entitled to an award of attorney fees and his request for the same should be denied.

IV. CONCLUSION

Based on the foregoing, the Co-Trustees respectfully request that the Court of Appeals affirm the trial court's decision and award the Co-Trustees their attorney fees and costs incurred on appeal.

DATED this 21st day of August, 2012.

WORKLAND & WITHERSPOON, PLLC

By 
James A. McPhee, WSBA No. 26323
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served by the method indicated below to the following this 21st day of August, 2012.

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX) to:

Geoff Swindler
103 E. Indiana Ave., Suite A
Spokane, WA 99207

- Email Transmission to:


Veronica J. Clayton