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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 34545-9-III

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

IN RE ESTATE OF ANNE MARIE ROE

WILLIAM ROE, RESPONDENT RE CROSS APPEAL AND
KATHLEEN ROE BENNIS-APPELLANT

v.

GERALD F. ROE,
PERSONAL REPRESENTATIVE OF THE ESTATE OF ANNE
MARIE ROE- RESPONDENT AND CROSS APPELLANT

BENNIS REPLY AND RESPONSE

TO CROSS APPEAL

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TABLE OF CONTENTS

First Assignment of Error: The court erred by limiting the facts to those contained within the “Stipulated Facts”..... 1

Issue 1. Judge Cooney appropriately granted Bennis’s Motion to Reconsider. The issue is foreclosed for want of an assignment..... 1

Issue 2. The Stipulated Facts did not bar consideration of additional facts inferring debt forgiveness..... 3

Reply to Respondent’s argument that Stipulated Facts are considered to be correct and complete..... 3

Reply to respondent’s argument that Bennis’s evidence of debt forgiveness ran afoul of the rule that new arguments or theories of law not raised at the time of the hearing on Summary Judgment are barred and will not be entertained thereafter..... 8

Reply to Respondent’s argument that the parties submitted the case on cross motions for full summary judgment..... 8

Issue 3-4. Bennis argued that Declarations were not subject to exclusion as a sanction for violation of discovery rules, scheduling orders, or summary judgment rules. Respondent argues that Appellant’s arguments are superfluous because Judge Cooney did not exclude them on that ground..... 9

Issue 5. Inventory from Theodore Roe Estate.....10

Second Assignment of Error: Court erred by extending the Doctrine of Retainer to exclude inferences unless arising from affirmative acts.....10

LEGAL FEES.....13

Issue 6. Judge Cooney did not err in denying the Estate’s claim for legal fees based upon CR 11. The Estate should be sanctioned for its frivolous appeal of this issue.....13

 Theory 1. Assumes that Stipulated Facts preclude other facts.....15

 Second Legal Theory. Stipulation does not preclude other facts.....17

Issue 7. Judge Cooney did not err when he denied fees under RCW 11.96A.150.....18

LEGAL STANDARD TO SET SHIFTED FEE AMOUNTS.....23

CONCLUSION.....24

Cogle v. Snow, 56 Wash.App. 499, 508, 784 P.2d 554 (1990).....	9
Cook v. Vennigerholz 44 Wn.2d 612 (1954).....	3, 4, 18
Desimone v. Mutual Materials Co., 20 Wn. (2d) 434, 147 P.(2d) 945.....	4
Estate of Kvande v. Olsen, 74 Wash.App. 65, 71, 871 P.2d 669, 672 (1994).....	18
Gaffney v. Rubino (In re Builders Capital & Servs.), 317 B.R. 603, 611 (Bankr. W.D.N.Y 2004).....	10, 11
Henry J. Friendly Indecision about Decision 31 Emory LJ 747, 778 (1982).....	11
Hesthagen v. Harby, 78 Wn.2d 934 (Wash. 1971).....	20
In re Cornett's Estate, 102, Wash. 254, 173f Pac. 44.....	19
In re Estate of Johnson, 187 Wash. 552, 554, 60 P.2d 271, 272 (1936).....	20
Keck v. Collins, 181 Wash. App 67, 93-94.....	1
Kinney v. Cook 190 Wash.App. 187 (2009).....	13
Lappin v. Lucurell, 13 Wn.App. 277, 284-285 (Wash. Ct. App. 1975).....	12
Martinez v. Kitsap Pub. Servs, Inc., 94 Wash.App. 935, 942, 974 P.2d 1261 (1999).....	6
Moorman v. walker, 54 Wash.App. 461, 462, 773 P.2d 887, 888 (1989).....	17

Peluso v. Barton Auto Dealerships, Inc., 138 Wash.App. 65, 72 (2007).....	14
Rivers v. Wash. State Conf. of Mason Contractors, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002).....	1
Ross v. State Farm Mutual Insurance Company, 132 Wn.2d 507 (1997).....	5
Signature Flight Support Corp. v. Landow Aviation LTD, 441 Fed Appx 776, 785 4 th Cir 2011.....	11
State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 338-39 P.2d 1054, 1075 (1993).....	13
Stephens v. Gillispie, 126 Wash.App. 375, 380, 108 P.3d 1230, 1232 (2005).....	6
Stewart v. Baldwin, 86 Wash. 63 149 Pac. 662.....	19
Sutton v., Mathews, 41d Wn.(2d) 64, 247 P.(2d) 556.....	4, 17, 18
Unigard Ins. Co. v. Mut. Of Enumclaw Ins. Co., 160 Wash. App. 912, 922, 250 P.3d 121, 127 (2011).....	2

First Assignment of Error: The court erred by limiting the facts to those contained within the “Stipulated Facts.”

Issue 1. Judge Cooney appropriately granted Bennis’s Motion to Reconsider. The issue is foreclosed for want of an assignment of error.

Judge Cooney granted Bennis’ Motion to Reconsider the debt foreclosure issue finding it to be an undecided secondary issue within the case. The Appellant Court reviews a reconsideration ruling for abuse of discretion, *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002), the trial court may reconsider a summary judgment ruling if contrary to law or if substantial justice has not been done (CR 59(a)(7) and (9) *Keck v. Collins*, 181 Wash. App 67, 93-94.

Without the benefit of an assignment of error, Respondent argues that the the debt forgiveness issue was not presented before the Summary Judgment Order was signed, was outside of the issues in the case, and not subject to reconsideration under CR 59(a). The Respondent is wrong. Mr. Reinbold filed documents saying that Judge Cooney’s oral decision did not address the debt forgiveness issue before presentment hearing when the Summary

Judgment Order was signed: Bennis' Proposed Order Granting Partial Summary Judgment, CP 128-131, Bennis Memorandum of Authorities in support of her proposed order, CP 120-121; Declaration of Brian Bennis re Debt Forgiveness, CP 117; and Declaration of Bennis re Debt Forgiveness, CP 113. When Judge Cooney signed the Estate's version of the Order Granting Summary Judgment, Bennis immediately filed a Motion for Reconsideration supported by the same declarations. Judge Cooney received additional briefing and issued a letter opinion on November 16, 2015 agreeing that:

The Court never entered a decision as to whether the loans made to Ms. Bennis had been forgiven. This issue is secondary to the Court's ruling that the funds provided to Ms. Bennis constituted a loan rather than a gift. Therefore, the court will grant the motion for reconsideration on the sole issue as to whether the loan made to Ms. Bennis had been forgiven.

CP 188-189. The Order Granting Bennis Motion to Reconsider was signed December 8, 2015, CP 340-342.

Respondent has not assigned an error to Judge Cooney's ruling. The ruling is thus no longer reviewable, RAP 10.3 (b) and (g) and *Unigard Ins. Co. v. Mut. of Enumclaw Ins. Co.*, 160 Wash. App.

912, 922, 250 P.3d 121, 127 (2011), *Booker Auction Co. v. Dept. of Revenue*, 158 Wash. App. 84, 90, 241 P.3d 439, 442 (2010).

Moreover, Judge Cooney did not abuse his discretion when he ruled that debt forgiveness was an undecided secondary issue within the pleadings. Kathleen Bennis raised the issue in her TEDRA Complaint, ¶ IV, CP 21; the Estate discussed the issue in its Memorandum in Support of its Motion for Summary Judgment, CP 60; Bennis and William Roe again discussed the issue in their Response, CP 76-77. Neither party objected that the other party's discussion. Judge Cooney's identification of the debt forgiveness issue as within the case is consistent with the findings of the Commissioner Wasson, CP 223-225.

Issue 2. The Stipulated Facts did not bar consideration of additional facts inferring debt forgiveness.

Reply to Respondent's argument that Stipulated Facts are considered to be correct and complete:

Two sections of Respondent's Brief proclaim: "Stipulated Facts" are by law considered to be "correct and complete" citing *Cook v. Vennigerholz* 44 Wn.2d 612 (1954). Res Br p. 7 & 9.

The dispute in *Cook* involved a partnership dissolution. The trial court ordered the sale of partnership real property and then applied the sale proceeds to resolve underlying accounting

disputes. On appeal one partner claimed that the trial court erred when it ordered the sale of partnership property. The determinative question was whether the parties stipulated in open court to the sale:

During oral argument in this court, counsel for appellant denied that such a stipulation had been made, and asserted that he did not hear the court make the statement referred to above. Appellant had not, however, challenged the correctness of the **statement of facts** when presented for settlement. See *Desimone v. Mutual Materials Co.*, 20 Wn. (2d) 434, 147 P. (2d) 945. The certificate attached thereto in fact recites that counsel for both parties were present and concurred in the settlement of the statement of facts. **Therefore, the statement of facts must be considered correct and complete as certified by the trial court. *Sutton v. Mathews*, 41 Wn. (2d) 64, 247 P. (2d) 556.**

Cook v. Vennigerholz, 44 Wn.2d 612, 615, 269 P.2d 824, 826 (1954), my emphasis.

The “ Statement of Facts” that the Supreme Court considered to be “correct and complete” was not a document entitled “stipulated facts” as here. In 1954 the Superior Court certified what we now call the “verbatim Report of Proceedings” to the reviewing court. This document was called “Statement of Facts:”

When researching case law, it should be remembered that the current rules changed the terminology

associated with the record. Prior to 1976 when the current rules were adopted, the verbatim report of proceedings was called rather oddly, the statement of facts. The clerks papers were called, even more oddly, the transcript.

Karl Tegland 2A Wash Prac Rules Practice RAP 9.1 updated 2016, and see *Washington Reports Volume 34A 2d; Rule 37-40.* The “Statement of Facts” deemed to be “complete and correct” was the verbatim report of proceedings, not a “Stipulation” or “ Stipulated Facts.” There is no legal authority in Washington that adopts the illogical rule that every document entitled “stipulated facts” is a correct and complete statement of all material facts. Logically, facts that are inconsistent with stipulated facts are precluded. Facts that are consistent with stipulated facts remain admissible. Parties can submit a case based upon stipulated facts by inserting a paragraph that there are no other facts. In that case the principals of *Ross v. State Farm Mutual Insurance Company*, 132 Wn. 2d 507 (1997) apply and no other facts are considered.

The “ Stipulated facts” in this case defined the issue to which they applied: ¶ 14 and ¶ 15 recite that the Estate contends that advances to Kathleen Bennis and William Roe should be “taken into account and offset against their estate shares.” ¶ 17 states that Gannon is in accord. In ¶16 the parties stipulated:

¶ 16 William J. Roe and Kathleen Bennis have objected to the Personal Representative offsetting the loan amounts as indicated herein alleging that the transfers were gifts and not loans.

The stipulation did not limit the *issues* in the case. The parties continued to brief and discuss the debt forgiveness issue after the stipulation. Stipulations are subject to the same rules of interpretation as contracts including the factors mentioned Berg, *infra*, *Stephens v. Gillispie*, 126 Wash. App. 375, 380, 108 P.3d 1230, 1232 (2005); *Martinez v. Kitsap Pub. Servs., Inc.*, 94 Wash. App. 935, 942, 974 P.2d 1261 (1999).

In discerning the parties' intent, subsequent conduct of the contracting parties may be of aid, and the reasonableness of the parties' respective interpretations may also be a factor in interpreting a written contrary.

Berg v. Hudesman, 115 Wn. 2d 657, 668, 801 P.2d 222, 229 (1990).

Both parties briefed and argued the debt forgiveness issue as indicated above. The court recognized the issue as an outstanding secondary issue. The conduct of the parties shows that the issues portion of the stipulation was intended to limit the scope of the stipulated facts to the whether advances were debts or gifts.

¶ 13 limits the facts to be applied to that issue:

The parties agree that there are no other writings regarding the alleged loans other than the checks and the “loan” document signed by Kathleen Bennis.

The Stipulation did not foreclose the Declaration of Brian Bennis, CP 113, or Kathleen Bennis re Debt Forgiveness, CP 117, for the following reasons:

1. The Declarations were not within the scope of the issues to which the Stipulated Facts applied.

2. ¶ 13 is the only provision that limits facts. ¶ 13 does not apply to the Declarations because they are not writings but testimony.

3. The Declarations are admissible because the facts contained within are not inconsistent with any of the facts contained within the stipulation.

Anne Roe did not inventory the debt from Bennis implying that it had already been forgiven. The Inventory is not precluded by the Stipulated Facts because:

1. ER 201(d) requires the court to take notice of facts contained within court records when a party brings them to the Court’s attention.

2. The Inventory is not within the scope of the issue controlled by the Stipulated Facts.

3. The Inventory does not contain a fact that is inconsistent with any of the facts contained within the stipulated facts.

Reply to Respondent's argument that Bennis's evidence of debt forgiveness ran afoul of the rule that new arguments or theories of law not raised at the time of the hearing on Summary Judgment are barred and will not be entertained thereafter.

Respondent's argument treats debt forgiveness as an issue outside of the case. The rule cited by Respondent is an application of ER 402. Evidence relating solely to an issue outside of the case is not admissible because it is irrelevant. Judge Cooney's Order to Reconsider recognized that debt forgiveness was a secondary issue within the case. Evidence bearing upon that issue was thereby relevant and admissible, ER 402.

Reply to Respondent's argument that the parties submitted the case on cross motions for full summary judgment.

Each party asked for summary against the other. After the court announced its oral decision it was clear that the debt forgiveness issue had not been addressed. When Judge Cooney recognized that his ruling did not encompass the debt forgiveness issue, the case fell into the category of a case "not fully

adjudicated.” Such cases are controlled by the partial summary judgment provisions of CR 56(d). If the court cannot resolve the whole case the court must direct further proceedings in the action as are just. “Just proceedings” require consideration of untimely Declarations when there is a reasonable basis for the delay, as here *Coggle v. Snow*, 56 Wash. App. 499, 508, 784 P.2d 554 (1990) and CR 56 (f). Respondent’s characterization of the Summary Judgment Motions as “motions that did not ask for partial summary judgment” is not determinative of any issue in the case.

Issue 3-4. Bennis argued that Declarations were not subject to exclusion as a sanction for violation of discovery rules, scheduling orders, or summary judgment rules. Respondent argues that Appellant’s arguments are superfluous because Judge Cooney did not exclude them on that ground.

Appellant argued that her offered declarations were not excludable as a sanction for violation of discovery requests, scheduling orders, or the timing rules of CR 56, 29-34. She framed the issues separately to point that the declarations were tendered both before and after summary judgment was entered. Respondent characterizes these sections of the Appellant’s brief as unnecessary, contrived and disingenuous. Res Br p. 10.

We agree in part with Respondent. Judge Cooney never said that he was excluding Kathleen Bennis’ and Brian Bennis’

Declarations re Debt Forgiveness as a sanction associated with discovery or the scheduling orders or because they were untimely responses to the Estate's Motion for Summary Judgment. The Trial Court eventually gave one reason for its decision to exclude the declarations: They were outside of the Stipulated Facts, CP 259. Because Respondent does not claim that the declarations were subject to exclusion for any other reason there is no need to consider Appellant's arguments that they are not subject to exclusion for any other reason.

Issue 5. Inventory from Theodore Roe Estate.

Respondent did not respond to Appellant's arguments that the inventory should have been judicially noticed pursuant to ER 201.

Second Assignment of Error: Court erred by extending the Doctrine of Retainer to exclude inferences unless arising from affirmative acts.

Respondent has reminded us that the Retention Doctrine arises in equity. It arises to create a remedy, not available at law. Direct suits and setoffs are actions at law, barred by Statute of Limitations. The Debt Retention Doctrine was created to allow the estate to retain a debt owed by an estate beneficiary, in light of the

inequity of allowing the distribution. Equitable remedies are appropriately applied only if they lead to equitable results. *Gaffney v. Rubino (In re Builders Capital & Servs.)*, 317 B.R. 603, 611 (Bankr. W.D.N.Y. 2004). The court should exercise discretion to withhold the remedy where inequitable results are likely:

It is commonly said that there is residual equitable discretion not to give an equitable remedy. In Judge Friendly's words, a trial court has discretion to withhold a permanent injunction as necessary even when plaintiff has made out all of the other elements. (citing *Signature Flight Support Corp v. Landow Aviation LTD*, 442 Fed Appx 776, 785 4th Cir 2011; and *Henry J Friendly Indecision about Decision 31 Emory LJ 747,778 (1982)*).

63 USCA L Rev 530, 583. Laches is a common defense to actions in equity, *Supra* p. 581. That defense is particularly appropriate here in light of 24 years of account inactivity.

The Debt Retention Doctrine is unlikely to lead to an equitable result when applied to a parental loan with no account activity for 24 years. The doctrine is even less likely to lead to an equitable result in the face of a parental Will revision within six months of death where the Will does not mention the debt. The Debt Retention Doctrine is the law of Washington but it is an equitable doctrine that should not have been blindly applied to achieve an inequitable result, as here. In the exercise of

application of the remedy the trial judge must first consider the factors that would make its application inequitable, missing here.

There was certainly no justification for extension of the doctrine to exclude the logical inference of debt forgiveness arising from 24 years of account inactivity. Judge Cooney articulated his extension:

Given that the Statute of Limitations does not apply to the common law right of retainer, the court concludes that some type of affirmative act must be present for loan forgiveness to apply;

CP 258-259. The court's extension is not supported by any legal authority. The extension is not a necessary component of the doctrine. If forgiveness is inferred the debt proponent can provide evidence that the debt was not likely forgiven and the court will then apply the doctrine to a debt even if barred by the statute of limitations.

The extension is inconsistent with Washington's presumption of parental gifting, and inconsistent with the rule of law that a non-moving party is entitled in a summary judgment proceeding, to all reasonable inferences arising from established facts.

In *Lappin v. Lucurell*, 13 Wn. App. 277, 284-285 (Wash. Ct. App. 1975) the court differentiated between a presumption and

legal inference. In this equitable proceeding Judge Cooney denied Bennis (1) The Presumption of legal gifting; and (2) an inference of parental gifting; and (3) the logical inference of debt forgiveness arising from 24 years of account inactivity. Judge Cooney's novel legal corollary to the Debt Retention Doctrine is inconsistent with well established parental gifting doctrine and inconsistent to the purpose of an equitable proceeding.

LEGAL FEES

Issue 6. Judge Cooney did not err in denying the Estate's claim for legal fees based upon CR 11. The Estate should be sanctioned for its frivolous appeal of this issue.

Appellant courts review sanction decisions for abuse of discretion, recognizing that deference is owed to the trial court who is in a better position to decide the issue. *State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn. 2d 299, 338-39, 858 P.2d 1054, 1075 (1993) and sanctions, *Biggs v. Vail*, 124 Wn. 2d 193, 195, 876 P.2d 448, 450 (1994).

CR 11 is not available to sanction briefs filed in the Appellant Court, *Kinney v. Cook* 190 Wash. App. 187 (2009) but the court can sanction a party for filing a frivolous appeal, RAP 18.9(a) *Kinney*. The Respondent's Cross Appeal on the CR 11 issue is frivolous appeal, subject to sanction.

Practitioners and judges who perceive a possible violation of CR 11 must bring it to the offending party's attention as soon as possible. Without such notice, CR 11 sanctions are unwarranted *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 218-19, 829 P.2d 1099 (1992), *Biggs v. Vail*, 124 Wn. 2d 193, 198, 876 P.2d 448, 452 (1994).

When Bennis tendered her Declaration re Debt Forgiveness and Brian's Declaration re Debt Forgiveness, Respondent asked for an order barring Brian Bennis' Declaration as a sanction for violation of scheduling orders and on the ground that the debt forgiveness issue was a novel issue. CP 132-133. There was no mention of CR 11. Appellant argued that her declarations were not subject to sanction citing *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wash. App. 65, 72 (2007). Moreover, the offer of proof was needed to preserve the appeal issue.

The Estate again mentioned CR 11 in briefing after Judge Cooney had decided to consider the debt forgiveness issue:

Given the ill-conceived nature of this controversy involving Ms .Bennis and the unavoidable fact such claims have been advanced by her and her attorney in bad faith, without any legal justification and merely for purposes of delay and harassment, the Respondent Estate now respectfully requests that this court grant an award of costs including reasonable

attorney fees against the petition and her attorney both jointly and severally and individually in having forced for no justifiable reason to defend this matter. Moreover, the court has authority under TEDRA to exercise its discretion in consideration any an all appropriate factors with respect to an award for fees including wither the ligation benefits the estate or the trust involved. In this manner should the court rule against petitioner herein, the eventual result will be that the Estate has most certainly benefits from this libation as to Kathy Roe, see CR 11, RCW 4.94.185; RCW 11.96A.150.

CP 232. Respondent did not specify which claims were not supported by fact or law such that they violated CR 11. And Respondent's Brief in this court has the same defect. Appellant is thus tasked with demonstrating that her legal theories are:

- (1) well grounded in fact;
- (2) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

CR 11.

Bennis' claims are supported by two legal theories:

Theory 1. Assumes that Stipulated Facts preclude other facts.

Under this theory Bennis viewed Judge Cooney's Reconsideration Order as a rejection of her offers of proof and

argued the case as if the Stipulated Facts precluded other facts.

This theory contains the following components that are each supported by the record and stipulated facts:

1. 24 years of account inactivity.
2. Inventory showing that her Anne Roe to be wealthy enough to afford to forgive the debt.
3. Pattern of parental gifting (\$50,000 to William Roe).
4. Hennessey Firm modified Anne's Will within six months of her death. The Will admitted to probate did not mention the debt.

The high quality lawyers who wrote the Will would ask about debts.

The Will did not mention debts.

5. Bennis argued that the above facts infer debt forgiveness.
6. Bennis argued that the non-moving party is entitled to the benefit of all inferences.

This above theory of debt forgiveness is grounded in both law and fact. Judge Cooney responded:

Given that the Statute of Limitations does not apply to the common law right of retainer, the court concludes that some type of affirmative act must be present for loan forgiveness to apply;

CP 258-259. Judge Cooney's legal conclusion nullified the 24 years of account inactivity and all of the other factors save the Will revision.

The Will revision was an affirmative act, but Judge Cooney concluded that a will revision that does not mention a debt does not infer debt forgiveness. There was no case law on this subject. The pivotal decision was that only affirmative acts can infer debt forgiveness under the retainer doctrine. Judge Cooney's legal conclusion is an extension of the retainer doctrine not supported by existing law. A judge may extend a legal doctrine, subject to appeal, but when a judge creates a new legal principal, it cannot be used to sanction a lawyer who did not anticipate it. Such a sanction would be even more extreme than sanctioning an attorney for presenting a new legal theory not allowed. *Moorman v. Walker*, 54 Wash. App. 461, 462, 773 P.2d 887, 888 (1989).

Bennis is entitled to fees associated with her defense of this frivolous appeal, RAP 18.9(a).

Theory 2: "Stipulated Facts" preclude only inconsistent facts.

The Respondent argues that this legal theory is not in accordance with the Washington law because:

the statement of facts must be considered correct and complete as certified by the trial court. *Sutton v. Mathews*, 41 Wn. (2d) 64, 247 P. (2d) 556.

As we demonstrated, the “Statement of Facts” referenced in *Cook* and *Sutton* is completely different from the “Stipulated Facts” at issue here, and the rule of law announced in *Cook* and *Sutton* has no application here. There is no law in Washington stating or suggesting that Stipulated Facts are conclusively deemed to be correct or complete or that they preclude additional facts. Moreover, the rule is inconsistent with common sense.

There is no language in the Stipulated Facts to preclude Kathleen Bennis’ Declaration re Debt Forgiveness or Brian Bennis’ Declaration re Debt forgiveness. Bennis’ theory is not inconsistent with existing law and is supported by common sense.

Bennis is entitled to fees associated with her defense of this frivolous appeal RAP 18.9(a).

Issue 7. Judge Cooney did not err when he denied fees under RCW 11.96A.150

Appellate courts will not interfere with an allowance of attorneys' fees in probate matters unless there are facts and circumstances clearly showing an abuse of the trial court's

discretion *Estate of Kvande v. Olsen*, 74 Wash. App. 65, 71, 871 P.2d 669, 672 (1994).

Two of the factors from RCW 11.96A.150 are particularly important in this case:

(1) The 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**: RCW 11.96A.150 (1)

(2) 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**. RCW 11.96A.150 (2)

The Personal Representative's decision to pursue debt retention was and remains (1) violated his fiduciary duty to Kathleen Bennis and to the other estate beneficiaries, (2) was financially irrational (3) was inequitable and (5) could not have benefited the estate.

The Personal Representative's fiduciary duty to administer estate prudently, impartially and in good faith.

An executor, executrix or administrator of an estate of a deceased person acts in a trust capacity, and must conform to the rules governing a trustee. *Stewart v. Baldwin*, 86 Wash. 63, 149 Pac. 662; *In re Cornett's Estate*, 102 Wash. 254, 173 Pac. 44.

In re Estate of Johnson, 187 Wash. 552, 554, 60 P.2d 271, 272 (1936).

The administrator of a decedent's estate is an officer of the court and stands in a fiduciary relationship to those beneficially interested in the estate. In the performance of his fiduciary duties he is obligated to exercise the utmost good faith and to utilize the skill, judgment, and diligence which would be employed by the ordinarily cautious and prudent person in the management of his own trust affairs. *Stewart v. Baldwin*, 86 Wash. 63, 149 P. 662 (1915); *In re Estate of Maher*, supra. For a breach of his responsibilities which causes loss to another, he stands liable.

Hesthagen v. Harby, 78 Wn.2d 934 (Wash. 1971). RCW

11.68.090 provides that a nonintervention personal representative is subject to standard of a trustee under the provisions of RCW 11.100 et seq, which in relevant part provides:

A fiduciary shall invest and manage the trust assets solely in the interests of the trust beneficiaries. If a trust has two or more beneficiaries, the fiduciary shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries. RCW 11.100.045.

The amount in controversy is \$12,009. Gerald Roe and Elizabeth Gannon support the Personal Representative's legal position. Kathleen and William did not, Stipulation ¶¶ 14-17. Gerald and Elizabeth in the best case will benefit in the amount of \$3,000

each. The controversy was from the start financially irrational because the attorney fees will inevitably overwhelm the recovery.

The Personal Representative's legal position is especially irrational because the facts provided to him at the presentment hearing conclusively demonstrated that Bennis did not owe the debt. The Personal Representative's case depends upon employment of legal technicalities to prevent Bennis from presenting Brian Bennis' Declaration and the Inventory from the Theodore Roe Estate that together conclusively proved debt forgiveness. The Estate's cause is not supported by any moral or equitable justification but supported by its attorneys' conclusions that they could prevent Kathleen Bennis from proving that her parents forgave her debt. This situation is inconsistent with equity, required to justify attorney fees under 11.96A.150, and inconsistent with the Personal Representative's duty to impartially and prudently administer the estate.

Moreover, the Personal Representative's motivations must be evaluated in the context of a larger pattern of financially irrational conduct. Gerald Roe persuaded his attorneys to intentionally interfere with Kathleen Bennis's Chapter 13 confirmed Bankruptcy Plan to deprive her of \$55,000 of debt discharge, CP

140-144. This act is inconsistent with the duties of a personal representative towards an estate beneficiary and inconsistent with his moral duty owed from a brother to a sister. Gerald Roe also persuaded Douglas Edwards to irrationally sue Kathleen Bennis on January 1, 2014 seeking her removal as the trustee of her father's testamentary trust, CP 141, Spokane Count Cause No. 14-5-00017-2. The suit was filed in the name of Anne Roe, twelve days before she died. Thereafter, Elizabeth Gannon, a sibling, irrationally sued Kathleen Bennis asking her to account for her administration over the life of her father's testamentary trust, *Gannon v. Roe*, Cause No. 14-4-00797-5, referenced in Bennis' Declaration, CP 142.

The Personal Representative persuaded his attorneys to file and prosecute a premature appeal in the Court of Appeals that was dismissed with an order to the trial court to determine the amount of fees payable to Kathleen Bennis, CP 323.

The current suit continues the pattern. The suit makes no financial sense unless attorneys threaten and employ fee shifting tactics to pay their fees from Bennis's estate share. This conduct is not consistent with the intent of Anne Roe and Theodore Roe, with Gerald's duties as Personal Representative, or with equity.

Respondent is mistaken when he proclaims that the litigation will benefit the estate if he prevails. Legal fees long ago dwarfed the amounts in controversy. The legislature defined “estate benefit” as a factor to discourage this very sort of financially irrational litigation.

The trial court was justified in denying the fees, and for the same reasons this court should deny fees even if the appeal of the Estate prevails on the merits.

Respondent’s Cross Appeal on this issue is sanctionable as a frivolous appeal RAP 18.9(a). If not sanctionable fees should still be equitably awarded to Bennis if she prevails on the Respondent’s cross appeal, pursuant to RCW 11.96A.150.

LEGAL STANDARD TO SET SHIFTED FEE AMOUNTS

The trial court has yet to consider:

(1) The Personal Representative’s request for fee payment from the estate;

(2) William Roe’s anticipated request for fees as the prevailing party against the Estate’s attempt to offset \$49,150 from his estate share, including a decision as to who ought to pay said fees;

(3) Kathleen Bennis' anticipated request for fees as the prevailing party against the estate's attempt to offset \$4,300 from her estate share which advances were in fact gifts;

(4) The amount due Bennis re her successful opposition to the Estate's premature appeal, RAP 18.1(i). The court commissioner has already ruled that the fees must be paid but deferred the matter to the trial court; and

(5) This court may, but is not required to, shift fees in accordance with RCW 11.96A.150. RAP 18.1(i) allows this court to remand to the trial court to determine the amount of fees associated with this appeal.

RPC 1.5(a)(5) requires attorneys to charge fees in proportion to the amount in controversy RPC 1.5(a)(5). Kathleen Bennis and her attorney recognize that RPC 1.5(a)(5) applies to their fee requests if they prevail on the merits, but does not apply to fee requests related the Respondent's Cross Appeals.

CONCLUSION

Kathleen Bennis asks the court for an order:

Declaring that the Estate may not retain \$12,009 from her Estate share.

For a judgment for her attorney fees, if she prevails on the merits, pursuant to RCW 11.96A.150. These fees should be assessed against the Personal Representative at the rate of \$200 per hour, times the number of hours Mr. Reinbold expended on the Appeal, attorney fees aside, adjusted in accordance with RPC 1.5(a)(5).

For an order dismissing the Estate's Cross Appeal for fees and for a judgment against the Personal Representative pursuant to RCW 11.96A.150 or RAP 18.9 for fees at the rate of \$200 per hour times the hours spent addressing the Cross Appeal, the amount in controversy aside.

For an order declaring that the Estate's Cross Appeal was frivolous RAP 18.9(1) and for a judgment against the Personal Representative and its attorneys for attorney fees assessed at \$200 per hour times the time spent addressing the frivolous appeal, irrespective of the amount in controversy.

For an order declaring that all other fee assessments made in this case must reflect the amount in controversy in accordance with RPC 1.5(a)(5).

Dated 12/12/16

REINBOLD & GARDNER, PLLC

By 
Rodney M. Reinbold
WSBA #4656
Attorney for Appellant Bennis

FILED

DEC 14 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By.....

No. 34545-9-III

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

IN RE ESTATE OF ANNE MARIE ROE

WILLIAM ROE, RESPONDENT RE CROSS APPEAL AND
KATHLEEN ROE BENNIS-APPELLANT

v.

GERALD F. ROE,
PERSONAL REPRESENTATIVE OF THE ESTATE OF ANNE
MARIE ROE- RESPONDENT AND CROSS APPELLANT

DECLARATION OF SERVICE

Rodney M. Reinbold; WSBA #4656
REINBOLD & GARDNER
P.O. Box 751
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(509) 422-3610

CERTIFICATE OF SERVICE

I certify that on the 12th day of December, 2016, I caused a true and correct copy of the BENNIS REPLY AND RESPONSE TO CROSS APPEAL and this CERTIFICATE OF SERVICE to be served on the following addressees in the manner indicated below:


Printed name: Rodney Reinbold

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