

**FILED**

APR 06 2017

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 347494

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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In the Matter of the Estate of  
  
MARY TERESA MAIURI,  
  
Deceased.

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BRIEF OF RESPONDENT,  
  
Michael Maiuri

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## A. INTRODUCTION

Probate closed in 1996 with three brothers taking their mother's estate. They are Robert, Michael and Charles, referred to by first name since they are all Mr. Maiuri (Mē-yur-ē). Charles was disabled and his share was to be held in a testamentary trust by Robert. When Charles died, the remaining trust property was divided four ways, to Robert, Michael, and Robert's two sons Jay and Marcus. The final distribution of Charles' trust was done in 2003. In 2015 Jay and Marcus petitioned to reopen the probate because they received neither a notice of probate nor a notice of completion of probate. They further complained that they did not get the land that Grandma had promised them.

Even if the court imposed a constructive trust on the portion of real estate that petitioners complain about, the evidence shows that the complaining petitioners in this case actually received more than their share of the estate.

After trial the court found that by 2003 petitioners had actual notice and an opportunity to challenge the final distribution of cash instead of land. That started the clock ticking as to a reasonable time to bring their claim. They did not bring their claim within a reasonable time and, therefore, the court properly closed the probate, dismissed the petition and canceled the lis pendens.

## **B. ASSIGNMENT OF ERROR, ISSUES, STANDARD**

ASSIGNMENT OF ERROR. Respondent, Michael Maiuri, personal representative of the Estate of Mary Teresa Maiuri, does not believe that the trial court erred when it decided after a bench trial that Petitioners waited too long to reopen the estate. Because the trial court correctly determined that the petition was time barred, all other assignments of error are moot.

### ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

Did Petitioners timely seek redress from the court? No.

### STANDARD OF REVIEW

Rulings under CR 60(b) are typically reviewed for manifest abuse of discretion. *Kennedy v. Sundown Speed Marine, Inc.*, 97 Wn.2d 544 , 548, 647 P.2d 30 (1982). However, the cases are reviewing the denial of a motion for relief under CR 60(b), not a ruling following trial. Here, in ordering the estate closed, the trial court essentially reconsidered the basis for its prior ruling to reopen. The court's findings reflect a closer examination of actual evidence and reassessment

of the issues presented in the earlier motion to reopen. Because they are supported by substantial evidence, this court should affirm.

### **C. STATEMENT OF THE CASE**

#### 1. SUMMARY.

Brothers Robert Maiuri and Michael Maiuri were co-personal representatives of their mother's estate. (CP 13). Their brother Charles was disabled so his share was to be held in a testamentary trust. (CP 5-7). Probate closed in 1996 with three brothers taking their mother's estate. (CP 25). When Charles died, the remaining trust property was divided four ways, to Robert, Michael, and Robert's two sons Jay and Marcus. (CP 7). Whatever Charles owned outside of the trust went by joint tenancy to Robert and Michael. (CP 200, ¶ 9). The final distribution of Charles' trust was done in 2003. (Ex 8, 9). In 2015 Jay and Marcus petitioned to reopen the probate because they received neither a notice of probate nor a notice of completion of probate. (CP 36-39). They further complained that they did not get their land that Grandma had promised them. (RP 39, lines 17-19, RP 51-52).

After trial the court found that petitioners had actual notice and an opportunity to challenge the final distribution of cash instead of land. (CP 202, ¶ 4). That started the clock ticking as to a reasonable time to bring their claim. They did not bring their claim within a reasonable time and, therefore, the court properly dismissed the case. (CP 202, ¶ 4).

2. FACTUAL BACKGROUND.

Petitioners Jay and Marcus are grandsons of the decedent Mary Maiuri. (CP 196). They were beneficiaries of her testamentary trust. (Ex. 1, Article VII(d) at page 4). This trust was for Charles' share of the home and contents and his one-third share of the residue. (Ex. 1, Articles IV, VI). When Charles died the home and contents went to Michael and anything else left in the trust was divided four ways to Robert, Michael, Jay and Marcus. (Ex. 1 Article VII(d) at page 4). If Robert did not act as trustee, then Michael was the substitute. (Ex. 1 Article VIII).

The estate residue included four acres of farmland. (RP 16, lines 1-5). Charles' share under the will was one-third of the four acres. (Ex. 1 Article VII(d) at page 4). This land was deeded to Michael. (Ex. 15, RP 8, lines 23-25).

When Charles died, the four beneficiaries of the testamentary trust were given cash distributions in 2003. (Ex. 8-12). Jay and Marcus each received \$13,184.16. (Ex. 17, pages 2-3). This cash came from Charles' CD (from money left by decedent) and Michael's CD. (Ex. 18, page 12, RP 110-111). The cash was neither part of the estate residue nor part of Charles' trust. The estate cash was held in joint tenancy with right of survivorship. (Ex. 17, pages 33, 34, 41).

Geri Lyons was legal secretary to the estate attorney, Mr. Monahan. (CP 201, ¶ 13). A note in the probate attorney's file stated:

Mike will come up with funds to pay them off. So we need to figure out what each is owed [the note also shows the CD amounts from page 12, in Mr. Monahan's handwriting]

Ex 18, page 14.

Ms. Lyons testified that this note was her handwriting and the calculation was Mr. Monahan's handwriting. (RP 68, lines 14-25). The estate attorney clearly realized at that point that petitioners Jay and Marcus were beneficiaries. (CP 201, ¶ 10). Moreover, Robert and Jay consulted other legal counsel. (Ex. 18, page 11). Geri Lyons also recognized her handwriting on Ex. 18, page 11, which is a memo to the estate attorney's file stating that Robert and Jay had consulted another attorney. (RP 70, lines 24-25, page 71, lines 1-25).

The only assets that can be identified as remaining when Charles died were some bonds, the CD, and the land. The bonds appeared to belong to Mary Maiuri. (Ex. 18, pages 2-3). Jay and Marcus received cash from Charles' CD and Michael's CD, neither of which were in Charles' trust, instead of land.

3. PROCEDURAL HISTORY.

Probate was closed in 1996. (CP 25). Final distributions for Charles' trust were made in 2003. (Ex. 8-12, 17 pages 2-3). The estate was reopened in 2015. (CP 62-66). The personal representative filed an answer to the petition and crossclaim against former co-personal representative Robert Maiuri in January 2016. (CP 109-111). A bench trial was held on February 5, 2016, and March 9, 2016. (CP 196). Therefore the trial judge was the trier of fact. The crossclaim was bifurcated and not tried. (RP 32-33). The estate was closed in 2016. (CP 223-224).

**D. ARGUMENT**

The court reopened this estate under CR 60(b)(5) and (11). (CP 199 top ¶) This was based on apparent extrinsic fraud and questions about estate administration. But the court specifically declined to find that assets had been improperly distributed. (CP 64, Conclusion #4 is lined out and initialed by the judge).

Under CR 60(b)(5), "the court may relieve a party . . . from a final judgment, order, or proceeding" if the "judgment is void." Motions to vacate a judgment must be brought within a reasonable time. CR 60(b). The trial court's decision on a motion to vacate under CR 60(b) is reviewed for abuse of discretion. *Kennedy v. Sundown Speed Marine, Inc.*, 97 Wn.2d 544, 548, 647 P.2d 30 (1982). A trial court abuses its discretion if it bases its decision on untenable or unreasonable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

But after trial the court found that petitioners were actually aware of the probate, asked why they only got money instead of land, and obviously decided not to contest the matter. (CP 199-202). The court concluded that the mistakes in estate administration were not the result of extrinsic fraud but were the result of ignorance and overreliance on the attorney. (CP 201, ¶ 2).

This court reviews "findings of fact under a 'substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.'" *Korst v. McMahon*, 136 Wn.App. 202, 206, 148 P.3d 1081 (2006) (quoting *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003)). This is a deferential standard, which views reasonable

inferences in a light most favorable to the prevailing party. *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 788, 903 P.2d 986 (1995). If there is substantial evidence, then "a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently." *Sunnyside Valley*, 149 Wn.2d at 879-80.

Therefore, if there is substantial evidence to support the trial court's finding of fact #14 then all other issues are moot and the decision must be affirmed. The trier of fact determines the credibility of witnesses. *See, In re City of Seattle*, 57 Wash. 290, 106 P. 901 (1910). In this case the trial judge determined that Marcus was a credible witness when he was describing his expertise and when he said he had talked to both co-personal representatives and the estate attorney about why he did not get any land. (CP 200, 201, findings 7, 14; CP 202, conclusion 4).

The decision is also appropriate in the interest of finality.

*See also Reed v. Campbell*, 476 U.S. 852, 855-56, 106 S.Ct. 2234, 90 L.Ed.2d 858 (1986) ("After an estate has been finally distributed, the interest in finality may provide an additional, valid justification for barring the belated

assertion of claims, even though they may be meritorious and even though mistakes of law or fact may have occurred during the probate process.").

#### **E. ATTORNEY'S FEES**

The personal representative should be awarded his attorney's fees on appeal. While petitioners are entitled to bring the appeal and present their issues, this case is fairly simple in the final analysis. The petitioners knew in 2003 the probate was done and they got cash instead of land. Marcus testified that he asked about it and the trial exhibit 18, page 11, shows Jay consulted another attorney. It is very reasonable to infer that they conferred with each other.

The statutory basis for attorney's fees states in part:

**(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. 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. 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.**

**(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates ...**

RCW 11.96A.150 (emphasis added).

These petitioners waited well over a decade, then brought this challenge to their uncle. It cost the uncle a substantial amount of time and money. (CP 73, ¶ 3).

Moreover, this case did not benefit the estate. As for the argument that Uncle Michael took what was not his, Marcus testified that he did not get what he had coming in cash and land. He said Grandma Mary had coffee cans of cash in her home. All that would go to Michael and Charles under the will. Marcus also testified that he thought all of the four acres were supposed to go to Charles' trust and he would end up with one acre. (RP 52). This is obviously contrary to the will which very clearly stated:

All the rest and residue of the property, real and personal, which I may own at the time of my death I give, devise and bequeath in equal shares to ROBERT MAIURI, MICHAEL MAIURI and ROBERT MAIURI as Trustee for CHARLES MAIURI.

Ex. 1, Article VI.

A reasonable person could conclude that the petitioners were not all that interested in following the will either. In 2003 they think they were not treated appropriately, consulted an attorney, and then did nothing for over a decade. This is evidence that they waived their rights, contrary to Appellant's Brief at page 20. Petitioners have the burden of proof. They have not proven that this case was not

resolved with a non-pro rata distribution. It looks like, smells like and feels like a non-pro rata distribution. The personal representative does not need anyone's permission for a non-pro rata distribution, whether from an estate or from a trust.

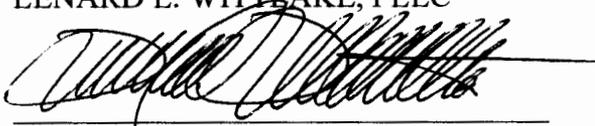
The idea of a non-pro rata distribution in this case is not the fanciful manufacture of counsel. It is what the evidence shows and it is explicitly authorized by RCW 11.68.090 referring to a trustee's powers under RCW 11.98.070(15) and recognized by this Court in *In re Estate of Ehlers*, 80 Wn.App. 751, 763, 911 P.2d 1017, 1024 (1996). While the trial judge's observation that some kind of TEDRA agreement would have been appropriate reflects best practices, *RP 135-6*, the personal representative with non-intervention powers does not need anyone's permission for a non-pro rata distribution. The case should be affirmed and Michael should be awarded attorney's fees on appeal.

#### F. CONCLUSION

There is substantial competent evidence to support the ruling. Therefore, it is proper to affirm the judgment below.

Respectfully submitted this 5<sup>th</sup> day of April, 2017.

LENARD L. WITTLAKE, PLLC

By: 

Lenard L. Wittlake, WSBA #15451  
Attorney for Respondent Michael Maiuri

**FILED**

**APR 06 2017**

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

7 DIVISION III

8 In the Matter of the Estate of  
9 MARY TERESA MAIURI,  
10 Deceased.

No. 347494

CERTIFICATE OF SERVICE  
(RESPONDENT'S BRIEF)

11  
12 SHELLIE STILTZ declares under penalty of perjury under the laws of the State of  
13 Washington: That I am a citizen of the United States, over the age of 18 years, and  
14 that on April 5, 2017, a true and correct copy of the RESPONDENT'S BRIEF, as well  
15 as a copy of this CERTIFICATE OF SERVICE, were hand-delivered to:

16 Michael de Grasse  
17 Attorney at Law  
18 59 S. Palouse St.  
19 Walla Walla, WA 99362

20 Signed at Walla Walla, WA, this 5th day of April, 2017.

21 *Shellie Stiltz*  
22 SHELLIE STILTZ