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No. 65578-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In the Matter of the Estate of VIRGIL V. BECKER, Deceased
(King County Superior Court Cause No. 08-4-04979-2 KNT)

NANCY BECKER,

Petitioner,

v.

JENNIFER C. RYDBERG, as Guardian ad Litem for Barbara Becker, a
minor child,

Respondent.

BRIEF OF RESPONDENT RYDBERG

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I. INTRODUCTION

Petitioner Nancy Becker does not have standing in the administration of the estate of her deceased husband, Virgil V. “Tory” Becker, Jr., for the reasons set forth in the Adult Children’s Brief of Respondents. Pursuant to RAP 10.1(g), Respondent Guardian Ad Litem Jennifer Rydberg hereby adopts the Adult Children’s Brief of Respondents, with the exception of part H of their Argument.¹

Nancy Becker’s fees should not be assessed against Guardian Ad Litem Rydberg under RCW 11.96A.150. Ms. Rydberg has done nothing to violate her duties to Barbara Becker, has taken no action to harm the estate, and has not asserted any frivolous arguments on behalf of Barbara Becker.

Ms. Rydberg should be awarded her reasonable attorneys’ fees on appeal and compensation for her services pursuant to RCW 11.96A.150 and RCW 11.96A.160(4).

II. ISSUES PRESENTED

The issues presented are adequately stated by the Adult Childrens’ Brief of Respondent, with the addition of the following issues.

¹ Ms. Rydberg takes no position as to whether the Adult Children should be awarded their fees from Nancy Becker, as this determination does not affect any interest of the minor, Barbara Becker.

Should Nancy Becker's request for fees against Jennifer Rydberg as Guardian Ad Litem be denied when Ms. Rydberg has done nothing to violate her duties to Barbara Becker, has taken no action to harm the estate, and has not asserted any frivolous arguments on behalf of Barbara Becker?

Should Ms. Rydberg be awarded her reasonable attorneys' fees on appeal and compensation for her services pursuant to RCW 11.96A.150 and RCW 11.96A.160(4)?

III. STATEMENT OF THE CASE

Ms. Rydberg adopts the Adult Childrens' Restatement of the Case, and adds the following.

A. Because of the filing of a will contest action, Ms. Rydberg was appointed as GAL under TEDRA, RCW 11.96A.

On the day the Will was admitted to probate, Enumclaw attorney Gail Crawford was appointed GAL to represent the interests of the minor child Barbara Becker, the sole beneficiary of the Estate. At the time of this appointment, the will contest and creditors' claims had not been filed. Accordingly, the order appointing Ms. Crawford requested her only to report to the Court on three issues regarding the trust established for Barbara under Dr. Becker's Will. CP 12-14.

By December 12, 2008, a Will Contest was filed under RCW 11.96A (“TEDRA”), and civil litigation was commenced on 14 rejected creditors’ claims asserted by the Becker Children. CP 15-29. Ms. Crawford recognized the interests of the Minor could only be served by a GAL able to handle complex litigation under TEDRA. Therefore, on January 20, 2009, on Nancy Becker’s motion, the Court appointed Ms. Rydberg as GAL. CP 30-36. Although the Order appointing Ms. Rydberg did not define her role and responsibilities, but simply referenced the existing GAL Order, Ms. Rydberg was appointed specifically because of the pending TEDRA action under RCW 11.96A. CP 30-36.

B. Ms. Rydberg acted as Barbara’s TEDRA GAL with the knowledge and approval of the parties and the trial court.

Ms. Rydberg quickly and of necessity became immersed in the litigation—in large degree at the request of, and in cooperation with, counsel for Nancy Becker. For example, when the Becker Children sought to remove Nancy Becker as PR, Ms. Rydberg brokered a deal wherein Nancy’s nonintervention powers would be limited in lieu of her removal. Ms. Rydberg was instrumental in obtaining both the appointment of a limited co-PR and retaining appropriate Estate counsel to

pursue a wrongful death action on behalf of the Estate after Nancy Becker failed to do so. CP 366-377.

C. Ms. Rydberg attempted to resolve the TEDRA action by mediated settlement.

On December 4, 2009, with the full knowledge and consent of all parties, Ms. Rydberg took part in the court ordered mediation of the Will Contest and creditor's claims. The parties agreed to mediation after Ms. Rydberg issued Notices of Mediation under 11.96A.300. No party objected the GAL's instigation and participation in mediation, and all parties expected the GAL to participate. CP 372.

Ms. Rydberg came to believe it was in the minor beneficiary's best interests to compromise the claims of the Adult Children and seek approval of the Court of the settlement over the likely objections of Nancy Becker. CP 372-374. The proposed settlement agreement would allow Barbara Becker to receive approximately 50% of her father's entire estate, substantially more than the 12.5% of her father's separate property that she might receive should the Will be invalidated.

D. Nancy Becker was removed as Personal Representative of the Estate because of her conflicts of interest.

On December 15, 2009, the GAL joined the Adult Children in their motion to appoint a Limited Co-PR for the purpose of evaluating the CR2A Agreement. CP 243-246. Ms. Rydberg also took other measures to

protect the Minor's interests against the now hostile PR, including recording Lis Pendens against certain real property and petitioning the Court for a Report of Affairs under RCW 11.68.065 and RCW 11.28.240. CP 374. This Motion was followed by the GAL's successful motion of February 1, 2010 to remove Nancy Becker as PR for her many and significant conflicts of interest with the Estate. The Court removed Nancy Becker by Order entered March 12, 2010. CP 920-24. Nancy Becker had several direct, irreconcilable conflicts with the Estate. The trial court found Nancy Becker had asserted groundless claims against and had several direct, irreconcilable conflicts with the estate that necessitated her removal as PR:

- Nancy Becker contended she retained a separate property interest in three pieces of real property contributed into an LLC owned by her and her late husband, though the LLC Agreement specifically provided otherwise. CP 921.
- Nancy Becker had failed to engage an appraiser to determine the value of the LLC and to pay the estate the value of her deceased husband's interest as required by the LLC Agreement. CP 921.

- Nancy Becker asserted an interest in real property she had quitclaimed to her deceased husband as his separate property. CP 922.
- Nancy Becker admitted she had commingled estate assets with her own assets. CP 922.
- Nancy Becker admitted she had used estate assets for her own benefit and failed to reimburse them to the estate. CP 922.

E. The trial court determined that Nancy Becker did not have standing, and Nancy Becker sought discretionary review.

With Nancy Becker removed as PR, her standing to participate in further proceedings was doubtful. Ms. Rydberg properly raised this question by motion to the trial court, and on May 10, 2010, the trial court ruled that Nancy Becker lacked standing as to some of the actions and issues before it. CP 230-233. This is the order currently under discretionary review.

F. The trial court confirmed Ms. Rydberg serves as the Minor's TEDRA GAL and directed her to submit her fee request.

The GAL and Becker Children filed their Motion for Approval of the CR2A Agreement, and hearing was held June 11, 2010. At hearing, the Court declined to rule on the substance of the motion. Instead, the

Court recognized that the PR's decision to retain Nancy Becker's former counsel was improper, and ordered Ms. White to find replacement counsel. See June 11, 2010 Order Regarding Minor Settlement, Attorney Representation and Stay. CP 276-278; VRP 1-43.

At the June 11th hearing, the Court recognized that the GAL had been serving the role of a TEDRA GAL. The Court's June 11, 2010 Order Sealing Redacted Interim Report of Guardian Ad Litem and GAL's CR 2A Litigation Analysis states, "The Guardian ad Litem was retained by the Court to represent the interests of the minor beneficiary of this Estate." CP 279-282.² Being informed that the unpaid GAL's fees and costs were then approximately \$100,000, the Court orally directed that the Guardian ad Litem should be paid for the role she has assumed in this case and that a substantial portion of these fees should be immediately paid. VRP 32-33. The Court's June 11, 2010 Order Regarding Minor Settlement, Attorney Representation and Stay directed that the request for GAL fees be submitted to the court on a 6-day motion without oral argument. CP 277. The Court also ordered the GAL to obtain legal counsel and

² When informed that the scope of Ms. Rydberg's authority to act as GAL was being challenged, Judge Cayce stated, "They have to file a motion if they object to the scope of your assumed duties." VRP 16:13-15.

stayed proceedings until it had approved counsel for both the PR and GAL. CP 276-278.

G. The trial court approved the GAL's engagement of counsel.

The Court approved the PR's retention of attorney Pat Char of K&L Gates. On July 23, 2010, the Court approved the GAL's retention of Lance Losey of Ryan, Swanson & Cleveland, and Jeff Downer of Lee Smart, and directed the GAL to submit her fee requests to the court. CP 342-351. The trial court subsequently approved the payment of the GAL's fees and legal expenses, but that order was vacated by this court under RAP 7.2. CP 503-503.

IV. ARGUMENT

Ms. Rydberg adopts parts A-G of the Argument section of the Adult Children's Brief of Respondent. Ms. Rydberg submits the following additional argument.

A. Fees should not be awarded against Guardian Ad Litem Rydberg.

There is no justification for awarding fees against Ms. Rydberg as the GAL for Barbara Becker. Ms. Rydberg has consistently acted in the

best interests of the minor, and the trial court consistently ruled favorably on her motions.³

For example, Ms. Rydberg initiated filing of the wrongful death claim when the PR failed to do so. CP 369. Ms. Rydberg also insisted that Nancy Becker return to the estate assets she improperly converted to her own use. CP 372-373. As GAL for the minor beneficiary, Ms. Rydberg was the only person other than the PR who had standing to take these actions. If not for Ms. Rydberg's actions, the estate would not have received these benefits. Eventually, Ms. Rydberg also successfully moved for the removal of Nancy Becker as PR for the Estate. As detailed above, Nancy Becker had asserted groundless claims against the estate, had failed to pay the estate for its interest in the LLC, had commingled estate funds with her own, and had converted estate funds to her own use. Her conduct created several direct, irreconcilable conflicts with the Estate. CP 920-24. Nancy Becker did not seek review of her removal, and has not denied her conflicts in this appeal. Nancy Becker's removal as PR clearly

³ Ms. Rydberg was appointed to replace the original GAL because the will contest necessitated a larger role by a TEDRA GAL. The trial court and all the parties recognized the nature of Ms. Rydberg's appointment, and Ms. Rydberg acted consistently with that appointment by bringing the several motions discussed herein. Nancy Becker's protestations are both misguided and untimely. "The Guardian ad Litem was retained by the Court to represent the interests of the minor beneficiary of this Estate." Order Sealing Redacted Interim Report, CP 280.

benefited the Estate by identifying the conflicts and preventing possible additional losses to the estate.⁴

Ms. Rydberg sought a reasonable mediated resolution of the will contest and creditors' claims that would reduce Barbara Becker's exposure to loss of her benefits under the Will and avoid further legal expenses. Nancy Becker argues that the proposed settlement was unreasonable, but she fails to acknowledge the risk that the will contest action could be successful, and Barbara would then receive only a fraction of the 50% of the estate she would receive under the proposed settlement. It is uncertain what if anything Barbara would receive from her father's estate if a prior will were admitted to probate, but she would likely receive 12.5% of her father's separate property if his estate were distributed pursuant to intestacy.⁵ In any event, the proposed settlement was subject to court approval, assuring that it would not become effective until carefully reviewed by the trial court.⁶

⁴ It is perhaps not surprising that Nancy Becker would seek some retribution against Ms. Rydberg, since it was Ms. Rydberg who forced her to return property to the estate and filed the motion which exposed her transgressions and conflicts, ultimately resulting in her removal as PR.

⁵ Under RCW 11.04.015, the spouse (Nancy Becker) would receive all community property, and separate property would be divided 50% to the surviving spouse, and 50% to the four children.

⁶ The proposed CR2A agreement has never been judicially reviewed, and its approval is not at issue on this appeal.

In requesting an award of fees, Nancy Becker notes, “It is unusual, without doubt, for fees to be awarded against a GAL.” Amended Opening Brief of Petitioner at p. 31. Indeed, Nancy Becker does not cite a single reported case of a fee award against a GAL under RCW 11.96A.150, and Ms. Rydberg can find none. Fees have been awarded against a personal representative who breached his fiduciary duties. *In re Estate of Jones*, 152 Wn.2d 1, 93 P.3d 147 (2004). However, Ms. Rydberg is a court-appointed GAL and has not breached any of her duties, and there is no finding to the contrary.⁷ Furthermore, Ms. Rydberg’s motion to determine Nancy Becker’s standing was not frivolous and does not justify a fee award. *In re Estate of Wright*, 147 Wn. App. 674, 688, 196 P.3d 1075 (Div. 1, 2008).

Nancy Becker asserts only one basis for her fee request: that she has benefitted the Estate by “aid[ing] in the prevention of the approval of

⁷ Some of Nancy Becker’s allegations of wrongdoing by the GAL are immaterial to the issues on appeal and will not be addressed. However, she spends considerable space complaining that Ms. Rydberg engaged in “ex parte contact” with the trial court. Amended Opening Brief at 10. This is untrue. Ms. Rydberg gave notice of her Motion to Seal Confidential Interim Report to the PR and other parties with standing. Ms. Rydberg did submit unredacted reports for *in camera* review, but Judge Cayce returned those unredacted reports to Ms. Rydberg without reviewing their substance. See CP 281: “*11. Judge Cayce has spent very limited time (3 minutes) looking through the unredacted GAL Report & litigation analysis for the purpose of identifying what it is, a total of about 250 pages of text.”

the CR2A Agreement.” Amended Opening Brief of Petitioner at p. 31. Obviously, the proposed settlement agreement has not yet been rejected by the court, and it is far from clear that its rejection would benefit the estate. In fact, a successful will contest action would prove otherwise. As discussed above, under the proposed settlement Barbara’s inheritance will be several times greater than her meager intestate share of the estate should the will be invalidated. Thus, rejection of the settlement agreement may result in substantial loss to the estate and to the minor beneficiary.

Furthermore, if the proposed settlement agreement is ultimately rejected in the future, and if that benefits the estate and the minor beneficiary, Nancy Becker cannot now receive the credit. No one can determine at this stage whether the settlement would have been rejected even without Nancy Becker’s input.

At this stage, there is no apparent benefit to the Estate of Nancy’s assertion of standing.

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.

RCW 11.96A150(1). Nancy Becker has failed to demonstrate, or even to persuasively speculate, how her further participation in this litigation will benefit the Estate in which she is not a beneficiary and with which she has

serious conflicts which necessitated her removal as PR, including commingling and converting estate assets.

Hypothetically, if Nancy Becker's assertion of standing were to benefit the estate somehow, it may be appropriate to award her fees from the *estate*. But there is absolutely no basis to award fees against Ms. Rydberg.

B. Ms. Rydberg should be awarded her reasonable attorneys fees and compensation for her services on appeal.

Guardians Ad Litem are not expected to serve without compensation. RCW 11.96A.160(4) specifically provides, "The guardian ad litem is entitled to reasonable compensation for services" to be paid from the Estate. Ms. Rydberg thus must be reasonably compensated for her good faith efforts on behalf of Barbara Becker, both before the trial court and before this court. This compensation should also include reimbursement for the reasonable attorneys' fees she has incurred pursuant to the trial court's directive that the GAL engage counsel to be paid by the estate. CP 342-344.

In addition, Ms. Rydberg should be awarded her reasonable attorneys' fees on appeal under RCW 11.96A.150(1). Ms. Rydberg acted in good faith when she moved for a determination of Nancy Becker's standing. The issue of Nancy Becker's standing has merit. Ms. Rydberg

has asserted only meritorious arguments, and has refrained from making arguments that might increase the cost of litigation.⁸

Ms. Rydberg was appointed Barbara's GAL by the trial court, and she has acted reasonably and in good faith to protect Barbara's interests. Once Nancy Becker was removed as PR due to her conflicts, it was appropriate to seek a determination of her standing to continue to participate in all the various aspects of estate litigation. The trial court determined that Nancy Becker did not have standing. Ms. Rydberg is now obligated to defend the trial court's ruling in this appeal. It would be manifestly unjust for Ms. Rydberg to have to pay out of her own pocket legal expenses reasonably incurred in discharging her court-appointed duties.

While this Court was considering Nancy Becker's Motion for Discretionary Review, Ms. Rydberg filed a motion to the trial court for approval of her fees and legal expenses. The trial court found her fees and expenses reasonable, and ordered them paid from the estate. CP 503-505. This trial court order was vacated by this Court under RAP 7.2 because discretionary review had been granted in the interim. Nevertheless, the

⁸ For example, Ms. Rydberg did not oppose Nancy Becker's Motion for Discretionary review of the order currently under review.

trial court's findings that the GAL has acted reasonably contradict Nancy Becker's assertions.

In the alternative, this Court should order that Ms. Rydberg be awarded her fees and expenses on this appeal, and direct the trial court to determine a reasonable amount.

C. Even if the Order regarding Nancy Becker's standing is overturned, the trial court's subsequent orders should not be vacated, since they do not affect Nancy Becker's interests.

As discussed in the Adult Children's Brief of Respondent, the trial court has taken no action that impinges Nancy Becker's rights subsequent to granting the Order regarding standing. This court should not, for no good reason, vacate trial court orders that are not the subject of this review.

Following entry of the Order regarding Nancy Becker's standing (CP 230-233), the trial court has entered a few discreet orders. The Order Regarding Minor Settlement, Attorney Representation and Stay is merely administrative and does not impact any substantive right of any party. CP 276-278. Another administrative Order by a commissioner merely referred the minor settlement issue back to Judge Cayce. CP 275. The Order Sealing Redacted Interim Report of Guardian ad Litem and GAL's CR2A Litigation Analysis & Making Confidential the Unredacted GAL

Report & Analysis merely sealed the two redacted reports from public review and returned the unredacted reports to the GAL, without addressing any substantive rights. CP 279-282. The trial court then entered an Order Approving Counsel for Guardian ad Litem which approved the GAL's attorneys and directed the estate to pay a fee deposit of \$25,000. CP 342-351. That Order reserved to the trial court the authority to approve fees, and no fees have been paid due to this appeal and the effect of RAP 7.2. Though the trial court approved the GAL's fees by a subsequent Order (CP 503-505), that order was vacated by this Court.

None of the orders entered by the trial court following its order on Nancy Becker's standing have impinged her interests or rights. If the order on standing is reversed, the subsequent orders need not be vacated.

RESPECTFULLY SUBMITTED this 15th day of July, 2011.

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