

NO. 70210-6-1 (Consolidated with Nos. 70193-2-1 and 70317-0-1)

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

In re Estate of
CALVIN H. EVANS, SR.,
Deceased,

The Estate of Calvin H. Evans, Sr.,
Appellant

v.

Sharon Eaden, Vicki Sansing, Kenneth Evans,
Lindsey Evans, Cory Evans, Jesse Evans and
Calvin Evans, III,
Respondents

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COURT OF APPEALS
STATE OF WASHINGTON



APPELLANT'S OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

This appeal by the Estate of Calvin H. Evans, Sr. (referred to herein as the “Estate”) is relatively simple and straightforward. The underlying controversy started as a will contest by three of the testator’s children, respondents Sharon Eaden, Vicki Sansing and Kenneth Evans (collectively referred to herein as the “Petitioners”). The trial resulted in a finding of financial abuse of the testator by his other child, Calvin Evans, Jr., (“Cal, Jr.”), and concluded with a second TEDRA action by the Petitioners seeking to disinherit Cal, Jr.’s children, respondents Lindsey Evans, Cory Evans, Jesse Evans and Calvin Evans III (collectively referred to herein as the “Respondents”).

Although the Petitioners were unsuccessful in their attempt to convince the trial court to carve out an exception to the state’s anti-lapse statute to disinherit the Respondents, the court nevertheless granted their request for attorneys fees and costs and assessed them against the Estate. It also denied the Respondents’ request to recover attorneys fees from the Petitioners personally but did award attorneys fees to them from the Estate.

The Estate therefore appeals the trial court's assessment of attorneys fees against the Estate in the second TEDRA proceeding in which its position was the prevailing position.

II. ASSIGNMENTS OF ERROR

The trial court erred in holding that:

1. The Petitioners were entitled to an award of attorneys fees and costs.
2. The Petitioners' attorneys fees award should be assessed against the Estate.
3. The Respondents were not entitled to an award of attorneys fees and costs against the Petitioners personally.
4. The Respondents were entitled to an award of attorneys fees and costs against from the Estate.

III. STATEMENT OF THE CASE

Cal Evans, Sr. passed away on April 5, 2011. CP 2. His March 7, 2006 will was filed for probate on April 29, 2011. CP 2. On July 14, 2011, the Petitioners filed the first TEDRA petition

challenging the validity of the will, alleging lack of testamentary capacity, fraudulent misrepresentations and undue influence on the part of Cal, Jr. CP 17. The petition further sought to declare Cal. Jr. a financial abuser under RCW 11.84.020, to hold that he predeceased his father and to have the Estate pass under the laws of intestate succession. CP 17.

Following a lengthy trial, the trial court upheld the will but determined that Cal, Jr. was an abuser of a vulnerable adult under RCW 11.84.020 and held that he was deemed to have predeceased the testator under the statute. CP 49. He was, accordingly disinherited and not allowed to receive any inheritance under the testator's will. CP 49.

The trial court further held that under the state's anti-lapse statute, RCW 11.12.110, the specific bequests to Cal Jr., as well as his share of the residuary trust in the will, passed to his issue, the Respondents. CP 49, 117, & 132.

The Petitioners then brought a second TEDRA action to challenge the trial court's application of the anti-lapse statute to Cal Jr.'s children. CP 93. The Estate opposed that action. CP 101. Although the trial court denied their petition, CP 117 & 132, the

Petitioners moved for an award of attorneys fees against the Estate in the amount of \$30,607.99. CP 118 & 123-125. The Respondents also moved for an award of attorneys fees from either the Estate or the Petitioners personally in the amount of \$9,289.40. CP 118 and 119. The Estate opposed both motions. CP 127.

The trial court denied the Respondents' request for attorneys fees against Petitioners personally but awarded the requested attorneys fees and costs to both parties and assessed each against the Estate. CP 133.

Cal, Jr. has appealed the trial court's finding in the first TEDRA action that he is a financial abuser under RCW 11.84.020, CP 90, the Petitioners have appealed the denial of their petition seeking to disinherit Cal, Jr.'s children, CP 135, and Appellant has appealed the trial court's assessment of attorneys fees against it in the second TEDRA action. CP 149.

IV. ARGUMENT

A. Attorneys Fees Awards are Entirely Within the Court's Discretion

RCW 11.96A.150 provides that both the trial court and this Court have the authority to award reasonable costs and attorney fees in a TEDRA proceeding and that such an award is entirely discretionary with the Court¹.

As the Washington State Supreme Court in *Burmeister* said, “[b]ecause of the almost limitless sets of factual circumstances that might arise in a probate proceeding, the legislature wisely left the matter of fees to the trial court, directing only that the award be made as justice may require” (emphasis added). *In re Estate of Burmeister*, 70 Wn.App. 532, 539, 854 P.2d 653 (1993). The same Court stated that “[d]iscretion is abused when it is exercised in a manner that is manifestly unreasonable, on untenable grounds, or for untenable reasons. *In re the Estate of Niehenke*, 117 Wn.2d 631, 647, 818 P.2d 1324 (1991).

B. Error 1: Petitioners Were Entitled to an Award of Attorneys Fees and Costs.

¹ Either the superior court or the court on 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 to be paid in such amount and in such manner as the court determines to be equitable. (Emphasis added). RCW 11.96A.150

Petitioners argued that they were entitled to an award of their costs and fees primarily because, although they were unsuccessful, they presented an issue of first impression to the Court, that it affected the rights of all beneficiaries, that they advanced legally supported arguments and that they argued in good faith. Although the court, in its broad discretion, is clearly entitled to consider all of these factors, the fact that their petition was denied, and they were thus the losing party rather than the prevailing party, should have been the determining factor in the decision as to whether or not to grant their request for an award of fees and costs.

The general rule in the United States is that each party pays their own legal fees, in contrast to other common law countries like the United Kingdom. The exception to the rule comes from specific agreements in contracts, equitable grounds, or in statutes that award legal fees in certain circumstances. "In Washington, "[a]ttorney fees may be recovered only when authorized by statute, a recognized ground of equity, or agreement of the parties." *Wiley v. Rehak*, 143 Wn.2d 339, 348, 20 P.3d 404 (2001) (alteration in original) (quoting *Perkins Coie v. Williams*, 84 Wn. App. 733, 742-43, 929 P.2d 1215 (1997))."

Often the language of contracts and statutes provides that the prevailing party is entitled to legal fees. Many Washington State statutes allow attorney fees to the party who “prevails” or “substantially prevails.” Division III of the Washington Court of Appeals explained the rule in *Guillen v. Contreras*, 147 Wn.App. 326, 333-334, 195 P.3d 90 (2008), which provided a review of existing law on the subject.

If one party prevails on only a marginal issue, it is not a prevailing party. *S. Kitsap Family Worship Ctr. v. Weir*, 135 Wash.App. 900, 915, 146 P.3d 935 (2006) (party that won on claim of property ownership was substantially prevailing party even though opposing party won on claim that a contractual attorney fee provision did not apply to case).

...

However, when there is one primary issue, the party prevailing on that issue is entitled to its costs and fees as the “prevailing party” even though the party lost on another issue. *Osborn v. Grant County*, 130 Wash.2d 615, 630, 926 P.2d 911 (1996).

Under the circumstances, where primary, if not the only issue was the possible disinheritance of Cal Jr.’s children and the Petitioners lost on that issue, the award of attorneys fees to the unsuccessful party appears to be manifestly unreasonable, based on untenable grounds *and* for untenable reasons. *In re the Estate of*

Niehenke, supra at 647. Accordingly, Appellant respectfully requests this Court to find that the trial court abused its discretion in awarding *any* attorneys fees to the Petitioners.

C. Error 2: Petitioners Were Entitled to an Award of Attorneys Fees and Costs Against the Estate.

If this Court, however, determines that it was not an abuse of discretion for the trial court to award attorneys fees to Petitioners, it nevertheless makes little sense to assess those fees against the Estate which, like the Respondents, supported the very position that the trial court ordered.

In considering whether or not to award reasonable costs and fees to a party or parties from an estate or trust, the litmus test in Washington has long been whether or not the estate received a substantial benefit from the litigation. *Barlett v. Betlach*, 136 Wn.App. 8, 146 P.3d 1236 (2006). “The touchstone of an award of attorney fees from the estate is whether the litigation resulted in a substantial benefit to the estate.” *Niehenke, supra at 648.* “The trial court must evaluate the particular action to determine if its benefit to

the estate was substantial. *In re Estate of Morris*, 89 Wn.App. 431, 434, 949 P.2d 401 (1998).

As in *Niehenke*, “[t]his is essentially a controversy between two rival claimants, however, and does not potentially benefit the estate.” *Niehenke, supra at 647*. The instant case was a matter of two competing groups of potential heirs fighting for the right to inherit specific portions of their father’s estate.

As the court stated in *Niehenke*, “where the services of the attorneys are rendered solely for the benefit of certain parties and are not for the benefit of the estate, attorneys’ fees should not be awarded out of the estate, even though the estate is incidentally benefited by having adverse claims decided.” *Niehenke, supra at 648*. “Where the beneficiaries are unsuccessful in their litigation and primarily pursue their action for their own benefit, the court does not abuse its discretion in denying them attorney fees. *Id.*; *In re Boris V. Korry Testamentary Marital Deduction Trust for Wife*, 56 Wn.App. 749, 756, 785 P.2d 484, review denied, 114 Wn.2d 1021, 792 P.2d 533 (1990).” *In re Estate of Ehlers*, 80 Wn.App. 751, 757, 911 P.2d 1017 (1996).

The basic test for determining whether attorney fees should be awarded out of the estate was more recently espoused in *In re Estate of Moi*, 136 Wn.App. 823, 151 P.3d 995 (2006) where the court stated at page 835:

Generally, we will not assess fees against an estate when the litigation could result in no substantial benefit to the estate. *In re the Estate of Niehenke*, 117 Wash.2d 631, 648, 818 P.2d 1324 (1991). Nelson's attempt to take a larger share of the estate did not benefit the estate, and so, we decline to award him attorney fees.

In the present case, the dispute was solely between the two competing classes of beneficiaries. The Estate, which was obligated to present its position with respect to the proposed distribution, received absolutely no benefit from the Court's ruling as to which of these beneficiaries would receive the specific bequests in question.

It should be noted that the Estate is merely a stakeholder in the probate of the estate. "[T]he personal representative's principal duties are to collect the estate assets, settle any claims by or against the estate, and then distribute the assets. RCW 11.44.066; RCW 11.48.010". *In re Estate of Morris*, 89 Wn.App. 431, 434, 949 P.2d 401 (1998). But, the estate is also "obliged to present his position in

a probate matter where there is a dispute as to distribution.” *Estate of Kvande v. Olsen*, 74 Wn.App. 65, 72, 871 P.2d 669 (1994).

The Estate, although not requesting fees itself, met all of the same requirements advanced by Petitioners and, like the Respondents, was on the prevailing side of the outcome of Petitioners’ unsuccessful motion to disinherit the children of Cal., Jr. Accordingly, even using the arguments of both Petitioners and Respondents, there is no basis for assessing fees against the Estate.

D. Error 3: Respondents Were Not Entitled to an Award of Attorneys Fees and Costs Against Petitioners Personally.

Respondents argued to the trial court that they were entitled to an award of their costs and fees because they successfully defeated Petitioners’ motion to disinherit them from the assets that had been bequeathed to their father. They sought the award of attorneys fees from either the Estate or from the Petitioners personally. In view of their favorable outcome, it is clear that Respondents also satisfied all of the same factors argued by Petitioners as justification for an award of their reasonable attorney fees and costs. The trial court should have properly exercised its discretion and awarded those fees and costs to Respondents against

the Petitioners personally as it was Petitioners' unsuccessful attempt to disinherit the Respondents that caused the latter to incur those expenses in the first place.

E. Error 4: Respondents Were Entitled to an Award of Attorneys Fees and Costs Against the Estate.

For the reasons outlined above, the trial court's award of attorneys fees and costs to Respondents should properly have been assessed against Petitioners personally and not against the Estate who supported their position throughout the second TEDRA proceeding.

V. CONCLUSION

Awarding attorneys fees and costs to the unsuccessful litigant and assessing them against the successful one is difficult, if not impossible, to justify and is arguably an abuse of the court's discretion. This Court should reverse the trial court and hold that Petitioners (respondents Sharon Eaden, Vicki Sansing and Kenneth Evans) are not entitled to an award of attorneys fees at all and that Respondents (Lindsey Evans, Cory Evans, Jesse Evans and Calvin H. Evans, III), are not entitled to an award of attorneys fees from the

Estate of Calvin H. Evans, Sr. but are entitled to an award of attorneys fees from Petitioners personally in the amount that was awarded by the trial court.

DATED this 8th day of August, 2013.

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CERTIFICATE OF SERVICE

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I, Douglas W. Elston, certify under penalty of perjury under the laws of the State of Washington that on August 8, 2013, I caused to be served on the persons below, in the manner indicated, true and correct copies of the following:

- Appellant's Opening Brief; and
- This Certificate of Service.

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