

NO. 45405-0-II



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN RE: ESTATE OF MARIE J. REESE, DECEASED.
MARILYN FRANZ, AS PERSONAL REPRESENTATIVE,
RESPONDENT

v.

BEVERLY JO GESSEL,
APPELLANT

RESPONDENT'S BRIEF

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I. COUNTER STATEMENT OF THE ISSUES

1. What address is required to be used when sending pleadings to counsel for a party to a Superior Court proceeding?
2. Is the Court required upon request to take additional testimony to support the valuation of estate property at a hearing on the Personal Representative's Final Report and Petition for Decree of Distribution?
3. What should the Court consider when interpreting a Will?
4. Should professional fees be required to be disgorged where the fees are not objected to and those fees have been approved by the Court?
5. Is a party to an appeal from a Personal Representative's Final Report and Petition for Distribution entitled to an award of attorney fees on appeal?

II. STATEMENT OF THE CASE

Marie J. Reese died June 23, 2012 (CP 11-13) and left an estate that was to be distributed pursuant to the terms of her Last Will and Testament. (CP 1-7).

Marilyn Franz, the decedent's daughter, was appointed Personal Representative of Marie J. Reese's estate on July 26, 2012. (CP 17-18). Marie J. Reese's three surviving daughters were the sole benefactors of her Will. (CP 1-7).

Marilyn Franz was provided nonintervention powers at the time of her appointment as Personal Representative. (CP 15-16). Notice of the pendency of probate proceeding was provided to Beverly Gessel at 16619 – 23rd Ave. S.E., Bothell, WA 98012. (CP 20).

Marilyn Franz, the Personal Representative prepared a detailed Inventory and it was filed with the court on December 26, 2012 (CP 25-50). A copy was sent to Beverly Gessel's attorney, Mr. Raymond V. Gessel. (CP 51).

Subsequently, Mr. Gessel filed with the court a Request for Special Notice. (CP 21-22). He served the Request for Special Notice upon the Personal Representative's attorney with a cover letter specifying Mr. Gessel's address as 1122 West James

Street, Suite 102, Kent, Washington. (RP Page 7, Line 10 - Page 8, Line 10) Notably, the Special Notice Mr. Gessel provided had a different address of 1048 West James Street, Suite 102, Kent, Washington. It was a different address than what was set forth in the letterhead of his correspondence.

Significantly, Beverly Gessel made a formal demand for the Inventory on December 4, 2012 through her attorney. The demand was set forth in correspondence from Raymond Gessel with a return address of 1122 West James St., Suite 102, Kent, Washington. (RP Page 7, Lines 10-16) In response a copy of the Inventory was sent to the aforementioned address and a certificate of mailing was filed with the court. (CP 51).

The Inventory filed with the court included the decedent's former residence and two other parcels of real property. Additionally, the Inventory included Trust property which was not technically part of the estate, but had to be valued in order to distribute the estate assets. (CP 25-50). The fair market value "as of the date of death" of the estate real property and the Trust real property were established by an appraisal (RP Page 16, Line 22 – Page 17, Line 4). The Inventory was neither challenged nor

contradicted or avoided by any credible evidence. It was not even objected to until after the Personal Representative petitioned the court for a Decree of Distribution eight months after a copy of the Inventory was provided to Beverly Gessel's attorney. (RP Page 16, Line 21 - Page 17, Line 9)

Marie J. Reese's Will provided that each of her three children would participate in the distribution of her estate. (CP 1- 7). Her daughter, Janice Marie Sanger, received specific bequests of parcels of real property. Her daughter, Marilyn Franz, was awarded one specific piece of property which was Marie's former residence. Her daughter, Beverly Gessel, was awarded the beneficial interest in a Trust over which Marie J. Reese had a power of appointment. That beneficial interest became Beverly Gessel's property because of Marie J. Reese exercising her power of appointment in her Will. In addition, Beverly Gessel was designated as the residuary legatee and provided an equalizing lien against real property devised to Marilyn Franz. (CP 1-7).

The Will provides a formula for determining the amount of the equalizing lien. Specifically, the Will states that

[t]he total combined value of my bequest and/or devise to both Beverly Jo Gessel and Marilyn Ann Franz shall be divided by two and that amount shall be a lien in favor of Beverly Jo Gessel against my former residence....

An Order approving the Personal Representative's Final Report and Petition for Nonintervention Decree was entered on August 30, 2013. (CP 110-111). This appeal is being brought by Beverly Gessel based upon the hearing on the Personal Representative's Final Report and Petition for Decree of Distribution and the aforementioned Order. The estate has been fully distributed pursuant to the Decree of Distribution.

III. POINTS AND AUTHORITIES WITH ARGUMENT

1. **“Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address...” CR 5(b)(1).**

A hearing on a Personal Representative's Final Report and Petition for Decree of Distribution requires twenty days prior notice. RCW 11.96A.110. Proof of service or mailing is required to be provided by affidavit or declaration filed at or before the hearing. *Id.*

Marilyn Franz, as Personal Representative of the Estate of Marie J. Reese, filed her Final Report and Petition for

Decree of Distribution after Order granting Nonintervention Powers on July 30, 2013 pursuant to RCW 11.68.100(1)(a). (CP 52-63). A Notice of Hearing Final Report and Petition for Decree of Distribution after Order granting Nonintervention Powers accompanied the Report and Petition upon filing. (CP 73). Additionally, two Certificates of Mailing regarding Notice of Hearing were filed with the Court. (CP 74; 75-76).

The first Certificate of Mailing regarding Notice of Hearing establishes that Beverly Gessel was sent the Notice of Hearing Re: Final Report and Petition for Decree of Distribution at the same address as the Notice of Appointment and Pendency of Probate had been sent a year prior to the Final Report being filed. (CP 51).

Beverly Gessel's attorney responded to the Notice of Appointment and Pendency of Probate provided to Beverly without objection as to service of the notice. (CP 21-22). Nonetheless, Beverly Gessel objected to the service by mail of the Personal Representative's Final Report and Petition for Decree of Distribution being sent to the same last known address that had been used in the past.

Similarly, Notice of the Hearing on the Final Report and Petition for Decree of Distribution were also sent to Beverly Gessel's attorney at his last known address. Raymond Gessel used two different addresses during this probate proceedings. On Mr. Gessel's pleadings his address was specified as 1048 West James St., Suite 102, Kent, Washington 98032 but the letterhead associated with all of his correspondence was specified as 1122 West James St., Suite 102, Kent, Washington.

The Personal Representative's most recent contact with Mr. Gessel's office prior to the hearing on the Personal Representative's Final Report and Petition for Decree of Distribution was by way of correspondence from Mr. Gessel which included a demand for the Inventory in December of 2012. In compliance with CR 5(b)(1) the Personal Representative provided Beverly Gessel's attorney, Raymond Gessel, with twenty-six days prior notice of her Final Report and Petition for Decree of Distribution exclusive of the three day mail rule. CR 5(2)(a). That notice was sent to his last known address. Therefore, service was properly provided to Beverly Gessel and there is no proper basis upon which to object to service of the Final Report and Petition for Decree of Distribution.

2. **The court may take such testimony as to it appears proper or necessary to determine whether the estate is ready to be closed and whether the transactions of the Personal Representative should be approved at a Hearing on the Personal Representative's Final Report and Petition for Decree of Distribution. RCW 11.76.050**

RCW 11.68.100 provides that "[w]hen the estate is ready to be closed upon application by the Personal Representative who has nonintervention powers, [the court] shall have the authority and it shall be its duty, to make and to caused to be entered a decree which (a) [f]inds and adjudges the heirs of the decedent or those persons entitled to take under his Will and distributed the property of the decedent to persons entitled thereto...." (emphasis added). In this case the estate was ready to be closed since creditors' claims had been provided for and addressed in the Final Report. A detailed accounting of all funds collected and property acquired was also provided in the Final Report. No heir had taken issue with the inventory or actions of the personal representative until the hearing on the Personal Representative's Final Report and Petition for Decree of Distribution. It had been over a year since the Personal Representative had been appointed and eight months since the Appellant had demanded an inventory of the estate. All

beneficiaries had been provided ample time within which to challenge the inventory or to petition the court to remove the Personal Representative for any alleged impropriety.

Beverly Gessel, however, asserted formally for the first time at the hearing on the Personal Representative's Final Report and Petition for Distribution that the Personal Representative's valuation of estate assets was wrong. In her affidavit she alleged the Personal Representative's appraisals were wrong without providing a credible basis for her objection as to the valuation of estate property. (CP 87-109). She does allege the Personal Representative acted improperly by not preserving the decedent's residence's second well. That unfounded allegation however, is a matter that goes to value and no expert testimony as to value was provided by Beverly Gessel. The affidavit is based upon hearsay evidence and provides to expert opinion evidence.

Moreover, the Declaration submitted by Beverly Gessel's attorney, Raymond Gessel, does not even address the valuation of specific estate assets. (CP 82-86). It simply states he was not provided a copy of the Estate's appraisals. Notably, he

concedes that the Estate is under no obligation to share appraisals with the decedent's heirs. (RP Page 2, Line 9).

Beverly Gessel's declaration submitted in opposition to the Personal Representative's Final Report and Petition for Decree of Distribution provides no creditable evidence of an error in the valuation of estate assets. Beverly Gessel's declaration contains conclusionary opinion evidence. It is submitted by a layman who is not qualified to provide such evidence.

"The Court may take such testimony as to it appears proper or necessary to determine whether the estate is ready to be settled and whether the transactions of the Personal Representative should be approved." RCW 11.76.050. The Court had before it a report certified under penalty of perjury by the Personal Representative. It contained a detailed accounting of cash and property based upon an inventory with values established as of the date of death as required by statute. RCW 11.44.015.

Beverly Gessel's affidavit asserts that the Personal Representative manipulated circumstances after the decedent's date of death in order to obtain a lower value awarded to her. The values, however, are required to be as of the date of death, *id.*

Thus, nothing after the date of death should or did in this case effects the value of assets of the estate and her aspersion cast upon the Personal Representative is misplaced and have no relevance.

Moreover, the inventory in probate proceedings is presumed to be correct, and the burden of proof rest upon one challenging it. In re Shaner's Estate, 41 Wn2d 236, 242, 248 P2d 560 (1952). Clearly, there is a rational basis for the Court to have decided the Reese Estate was ready to close and that the transactions of the Personal Representative should be approved. Therefore, the Court is not required to take additional testimony to support the valuation of estate property and in this case appropriately entered its Decree of Distribution.

- 3. The primary duty of the Court in interpreting a Will is to ascertain the intent of the testator which is, to the extent possible, derived from the four corners of the Will and by reading the Will in its entirety. Estate of Elmer, 91 WnApp 785, 789, 959 P.2d 701 (Div. III 1998).**

The intent of a testator, if possible, must be derived from the four corners of the Will and the Will must be considered in its entirety. In re Estate of Bergau, 103 Wn. 2d 431, 435, 693 P.2d

703 (1985). In Marie Reese's Will there is no ambiguity. When read as a whole it is obvious that Marie Reese intended to effect an equal distribution between her daughters, Marilyn Franz and Beverly Gessel.

The Will is unambiguous when it states at paragraph 5.2, "I give, devise, and bequeath one-third of my estate... to my daughter, Janice Marie Sanger." The Will is not ambiguous when it states "[t]he total combined value of my bequest and/or devise to both Beverly Jo Gessel and Marilyn Ann Franz shall be divided by two and that amount shall be subtracted from the total value of Marilyn's interest in my estate, which amount shall... be payable" to Beverly Jo Gessel. The obvious intent of Marie Reese was to effect an equal distribution between her three daughters. Where a testator's intention is clearly manifested from the whole Will, technical rules of construction are not necessary. Bank of California v. Alger, 7 Wn.2d 179, 191, 109 P.2d 548 (1941).

Beverly Gessel argues that Marie Reese intended an unequal disposition between her daughters. It is asserted that an equalization was intended to be limited to the property she received, subject to trust and the real property that was awarded to

Marilyn Franz. In order to accept this position, however, you have to totally ignore the fact that the Will says at paragraph 5.4 “the total combined value” of my bequest and/or devise to both Beverly Jo Gessel and Marilyn Franz shall be divided by two and that amount will be subtracted from the total value of Marilyn’s interest”. That amount must be used to determine what the amount of cash Beverly Gessel would receive in addition to the trust property in order to equalize the total distributions between Beverly Gessel and Marilyn Franz.

Beverly Gessel’s position is inconsistent with the express terms of Marie Reese’s Will. Marie Reese wanted Janice Marie Sanger to get one-third of her estate and if her remaining two daughters received an equal disposition they would each receive a third of their mother’s estate. Thus, there is a rational basis for the Courts to have used the total combined value of all assets awarded to Beverly Jo Gessel and Marilyn Franz.

Notably, the standard on review of an error assigned to a Court’s interpretation of a Will and the testator’s intent is whether an abuse of discretion has occurred. Estate of Elmer, supra, at 790. A review of the Trial Court’s decision for abuse of

discretion is determined by whether it is manifestly unreasonable, exercised on untenable grounds or for untenable reason. In re Estate of Niehenke, 117 Wn.2d 631, 647, 818 P.2d 1324 (1991).

No such abuse of discretion in this case can be established.

4. **The Court reviewed the reasonableness of attorney fee and since those fees were approved and no obligation was made to the fees awarded the fact that notice of the intent to pay fees was not provided is not an appropriate base to ask that fees be disgorged.**

The appellant cites two statutes and one Court rule for the proposition that if “notice of intent to pay attorney fees” is not provided prior to payment of attorney fees the fees must be disgorged. None of those rules support the proposition.

First, SPR 98.12W is cited in its entirety. The rule provides that before professional fees shall be approved the amount of compensation must be set forth and notice provided to interested parties on application for the fee approval, “unless” such application is filed with or contained in a report or final account. In this case the application for approval of fees is contained in the Personal Representative's Final Report and the Court approved the

amount of the fees without objection to the amount of fees. SPR does not provide for disgorgement of fees or even mention it.

Next, RCW 11.48.210 is cited for the proposition that if prior notice of intent to pay attorney fees is not provided the Court is required to order the attorney to disgorge his fees. A review of RCW 11.48.210, however, makes it clear that attorney fees may be allowed at the hearing on the Personal Representative's Final Account. The statute states "[s]uch compensation may be allowed at the final account." It goes on to note that if the Court finds the Personal Representative fails to discharge his or her duties in any way or presumptively by not apply for approval of attorney fees the Court can deny the Personal Representative compensation or reduce the amount of compensation. The statute does not in any way suggest that the Court is required have the Personal Representative and Estate Attorney disgorge fees paid.

Notably, in this case no fees for services of the Personal Representative were before the Court and over four thousand dollars of a total of twelve thousand seventy four 14/100 dollars (\$12, 074.14) of attorney fees remained outstanding at the time of the hearing. (CP 64-72; RP Page 37, Line 16). There was

no prejudice of Beverly Gessel's right to challenge fee and she did not object to the amount of fees that were requested to be approved. (RP Page 42, Lines 8-12) Her objected was solely on the basis that prior notice of the intent to pay attorney fees was not provided before a portion of the attorney fees were paid.

Finally, RCW 11.28.240 is cited for the proposition that the Court is required to order disgorgement of attorney fees if prior notice of intent to pay those fees is not provided prior to payment. RCW 11.28.240 provides that a lawyer for any person interested in the estate may serve upon the Personal Representative a written request stating that the person "desires" special notice of the Personal Representative's intent to pay attorney fees. The statute does not address disgorgement of fee. It is a request not an order. Therefore, the objection based upon a failure to provide prior notice of the intent to pay attorney fees is not well founded. Moreover, asserting disgorgement is required if prior notice of a Personal Representative's intent to pay attorney fees before actual payment is made is not supported by statute, special rule or case law.

5. The Estate is entitled to an award of attorney fees incurred when on Appeal from a Final Report and Petition for Decree of Distribution is affirmed on Appeal.

RCW 11.96A.150 provides:

Either the Superior Court or the Court of Appeals may, in its discretion, order costs, including reasonable attorney fees, to be awarded to any party: (a) from any party to the proceeding; (b) from the assets of the estate or trust involved in the proceeding; or (c) from any nonprobate asset that is the subject of the proceeding. The Court may order the cost to be paid in such amount and in such manner as the Court determines to be equitable.

This statute allows broad discretion to the Appellate Court to determine the fees allowable as "equitable". Marilyn Franz has incurred attorney fees personally, since this appeal has been pursued after a full distribution of the estate has been made and before the Notice of Appeal was filed. Any funds remaining in the estate were distributed to Beverly Jo Gessel as required by Marie Reese's Will and the Decree of Distribution.

This appeal was filed thirty-one (31) days after the Decree of Distribution was filed in the Superior Court. It was filed after Beverly Gessel received her entire inheritance including the equalizing cash provided for under Marie Reese's Will. She

accepted the benefit of the inheritance and then inconsistently took issue with the distribution.

The estate was benefited by Marilyn Franz personally paying for its representation on Appeal. The estate was benefited by the Personal Representative's efforts to preserve the distribution of the estate on the most efficient and expeditious means possible. It is only equitable for the estate to obtain an award of attorney fees and for Marilyn Franz to be reimbursed for the fees she has incurred on appeal.

IV. CONCLUSION

The Court appropriately completed the Marie Reese probate by hearing the matter at the time noted for the Probate Calendar and entering the Order approving the Personal Representative's Final Report and Petition for Distribution. Service of pleading complied with the applicable Court rules and statute.

The Court was required to take such testimony at the hearing on the Personal Representative's Final Report and Petition for Decree of Distribution as appears proper. The accounting and valuation of assets set forth in the Final Report were supported by creditable evidence and there was no creditable basis provided by

Beverly Gessel as to why the Court should not have entered its Order which completed the probate proceeding.

The decedent's Will was clear and without ambiguity. Marie Reese wanted to divide her estate equally between her three daughters.

The attorney fees incurred by the estate were fair and reasonable. There is neither a reason for, nor a statute which would require disgorgement of those fees.

The estate has incurred additional attorney fees for this appeal. It is fair and equitable for the estate to be awarded attorney fees on appeal so that the Personal Representative can be reimbursed for the fees she has personally advanced for the estate.

RESPECTFULLY SUBMITTED this 21st day of April, 2014.

THE NORBUT LAW FIRM, PLLC


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Attorney for Respondent

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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

IN RE:

ESTATE OF MARIE J. REESE,

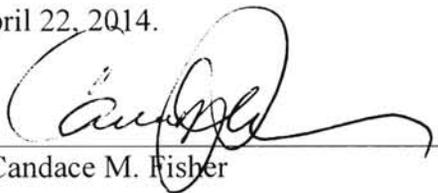
Appellate Case No. 45405-0-II

PROOF OF SERVICE OF
RESPONDENT'S BRIEF

PROOF OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that she deposited the **RESPONDENT'S BRIEF** in the U.S. Mail, First Class Mail, postage prepaid to: **Appellant/Appellant's Counsel, RAYMOND V. GESSEL, at 1048 West James Street, Suite 102, Kent, WA 98032;** and to **Janice Sanger, Pro Se, 630 Valley Mall Pkwy, PMB 246, East Wenatchee, WA 98803,** on the 22nd day of April, 2014.

Signed at Poulsbo, Washington, on April 22, 2014.


Candace M. Fisher