SUPREME COURT No: 90841-9

COURT OF APPEALS No: 44246-9-II

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE: THE ESTATE OF CATHERINE HENINGTON

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

A. Colby Parks, WSBA No. 22508
Jeffrey G. Nielsen, WSBA No. 46526
of Counsel for Respondent

A. Colby Parks, Attorney at Law, P.S.,
1008 Yakima Avenue, Suite 100
Tacoma, WA 98405
(253) 682-1960

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I. IDENTITY OF RESPONDENT

The Respondent, Roy Henington ("Mr. Henington"), by and through his attorneys of record, A. Colby Parks and *A. Colby Parks, Attorney at Law, P.S.*, respectfully requests this Court deny the Petition for Review.

II. COURT OF APPEALS DECISION

The Court of Appeals Division II, filed its opinion *In re Estate of Catherine Henington,* No. 44246-9-II on July 22, 2014 and then summarily denied Petitioner's Motion for Reconsideration re: Fees on September 3, 2014.

III. STATEMENT OF THE CASE

Catherine Henington died leaving a Last Will and Testament that named her daughter, Crystal Henington, as the sole beneficiary of her Estate. Mrs. Henington was also survived by her spouse, Roy Henington. Mr. Henington is entitled to a community property share of his late wife's estate. After protracted probate proceedings, the Superior Court closed Mrs. Henington's estate.

In closing the estate, Commissioner *pro tempore* Thomas Cena found: all notices required by law had been given; more than four (4) years had passed since the filing of creditor claims; neither Leonard Bradley ("Mr.

Bradley") or *Ford Motor Credit* initiated litigation to resolve any creditor's claim; and, all amounts due to the IRS, according to the (Successor) Personal Representative had been paid.[1]

Despite producing no evidence to support his arguments, the Petitioner, Richard Wills, an attorney and the successor Personal Representative, argued that Mr. Bradley's creditor's claims were based upon written contracts, and a 6 year statute of limitations in accord with RCW 4.16.040, rather than being based upon the 3 year statute of limitations for an oral "agreement" in accord with RCW 4.16.080. Although the Petitioner repeatedly asserted that there were written contracts, none were produced for the Superior Court. Given there was no evidence of any written agreement, and that more than three years had passed since the time of any claimed oral "agreement," Commissioner *pro tempore* Cena ordered correctly that the creditor claims of Mr. Bradley were time-barred as a matter of law and that certain fees and distributions were to be made. The estate was closed.

Then, upon the Petitioner's motion for revision to the trial court, the Honorable Katherine M. Stolz, Judge, denied the motion to revise Commissioner *pro tempore* Cena's rulings except to increase the amount of

[1] Mr. Bradley is the father of the Decedent, Catherine Henington.

fees paid to the Successor Personal Representative and correspondingly reduce the amount of remainder distributions to be made to the heirs.

On appeal, Mr. Wills argued that the trial court erred in closing the estate. On July 22, 2014, the Court filed its opinion (published in part). The Court of Appeals remanded the issue of the nature of the contracts, whether oral or written, back to Judge Stolz. The Petitioner requested attorney's fees, but Division II denied all attorney's fees. The Petitioner then sought reconsideration before Division II and the request was unanimously denied.

Petitioner now seeks review by the Supreme Court of Washington.

IV. ARGUMENT

A. None of the elements for granting a petition for review are present in this matter as established by RAP 13.4(b)

The Petition in this matter does not meet any of the criteria set forth in RAP 13.4(b) for review by the Supreme Court. There is not a significant question of constitutional law, nor is there any issue of substantial public importance that should be determined by the Supreme Court. The decision of the Court of Appeals does not conflict with any other decision of either the Court of Appeals or the Supreme Court.

Rule of Appellate Procedure ("RAP") 13.4(b) governs what types of cases will be accepted by the Washington Supreme Court on a petition for review.

A petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Petitioner's sole basis for seeking review by the Supreme Court is the argument that the denial of fees to the Personal Representative is an issue of substantial public interest.

> There is not an issue of substantial public interest in this matter, therefore the petition for review should be denied.

In deciding whether a case presents issues of continuing and substantial public interest, the Court will consider the following criteria in determining whether or not a sufficient public interest is involved:

> (1) the public or private nature of the question presented;
>
> (2) the desirability of an authoritative determination which will provide future guidance to public officers; and
>
> (3) the likelihood that the question will recur.

Matter of Swanson, 115 Wn.2d 21, 24-25, 804 P.2d 1, 3 (1990), citing Matter of McLaughlin, 100 Wn.2d at 838, 676 P.2d 444 (1984).

This case is private in nature. The only person affected by the Court of Appeals denying attorney's fees for the Personal Representative is the Personal Representative in this particular matter.

Furthermore, there are no public officers who can use any decision in this matter for guidance, leaving the first two prongs of the "substantial public interest" test unsatisfied.

The final element of this examination is to decide the likelihood this question may recur. In the case at bar, recurrence of these facts is unlikely. Petitioner asserts the Court of Appeals' denial of fees establishes a precedent and that all Personal Representatives will be forced to assume "risks" when appealing a decision made by the trial court. This is an exaggeration of the implications of the denial of fees on appeal. In this matter, as is the case in every probate preceding, the denial (and issue) of fees in this case was very carefully tailored to the facts of this particular case. The specific and individualized ruling regarding fees in this case is so fact specific that there is little or no chance that these facts will recur.

Therefore, none of the criteria for finding a substantial public interest in this matter are present, and review should be denied.

B. Several RCW provisions give the Court discretion to award attorney fees to any party from the estate's assets in an amount it deems equitable.

The award of attorney's fees is discretionary in nature. RCW 11.96A.150 (1) gives the Court discretion to award attorney fees to any party from any party or from the estate's assets in an amount it deems equitable. RCW 11.96A.150 states in relevant part:

> "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 no probate asset that is the subject of the proceedings." RCW 11.96A.150.

The statute further provides:

> "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." RCW 11.96A.150.

Because 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 probate court, directing only that the award be made "as justice

may require." In re Estate of Black, 116 Wn.App. 476, 489, 66 P.3d 670, 677 (2003), citing: In re Estate of Burmeister, 70 Wn.App. 532, 539, 854 P.2d 653 (1993).

In awarding attorney fees, the Court may consider any and all relevant factors, including whether the litigation benefits the estate. RCW 11.96A.150(1). Accordingly, upon weighing the specific facts of the present case, the Appellate Court correctly denied attorney's fees in accordance with the powers expressly granted by RCW 11.96A.150(1).

Petitioner argues the Court must award attorney's fees to a Personal Representative who appeals a lower court ruling with any modicum of success, no matter how small. However, forcing the court to award fees for an appeal that does not benefit the estate is contrary to several established statutory provisions.

RCW 11.48.210 speaks, in part, to the discretionary nature of awarding fees:

> "An attorney performing services for the estate at the instance of the personal representative shall have such compensation therefor out of the estate as the court shall deem just and reasonable (emphasis added) RCW 11.48.210.

Petitioner argues this statue supports the argument the Court is bound to authorize fees to be paid from an estate. However, Petitioner

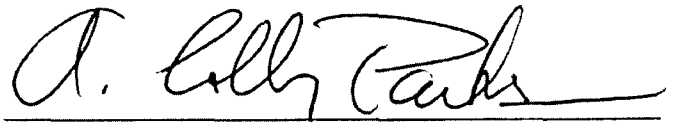
relies solely upon the language, "out of the estate," without further discussing the language of the statute which expressly states "as the Court deems just and equitable." In the present case, the Court of Appeals drafted its opinion and refusal of fees in accord with the details of this case. Furthermore, it is illogical to argue the legislature intended to obligate the probate court to award fees through the very statutes granting the court's discretion.

Accordingly, Petitioner has failed to satisfy the requirements of RAP 13.4(b) and the petition for review should be denied.

V. CONCLUSION

The legislature expressly granted the discretion to the probate court on issues regarding fees. The probate court may award fees as it deems just and reasonable. There is no issue of substantial public interest as established by RAP 13.4 and the Petition should be denied.

Respectfully submitted this day, November 7, 2014.



A. COLBY PARKS, WSBA No. 22508,
of Attorneys for Respondent Henington

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, under penalty of perjury under the laws of the State of Washington, that on November 7, 2014, I caused to be served a true and correct copy of Respondent's Answer to Petition for Review on counsel for the Appellant and other interest parties by first class mail with courtesy copy by first email if an email address has been provided:

SERVED PERSONS:

Mona K. McPhee
McPhee Law Office
2400 NW 80th STREET #295
Seattle, WA 98117

IRS
915 2nd Ave
Seattle, WA 98174

Crystal Henington
6870 Riverland Dr. #62
Redding, CA 96022

Leonard Bradley
1524 33rd Avenue Court
Puyallup, WA 98373

Richard Wills
Attorney at Law
20122 163rd Avenue NE
Woodinville, WA 98072

DATED this 7th day of November, 2014.

Jeffrey G Nielsen, WSBA No. 46526

OFFICE RECEPTIONIST, CLERK

To: A. Colby Parks
Subject: RE: Henington 90841-9

Rec'd 11/10/14

From: A. Colby Parks [mailto:colby@tacomacounsel.com]
Sent: Friday, November 07, 2014 5:00 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Henington 90841-9

Reply Attached for Filing.
Estate of Henington
A. Colby Parks, WSBA NO. 22508

Thank you.

A. Colby Parks

Law Office of A. Colby Parks, Attorney at Law, P.S.
Dedicated to your family enterprise.
1008 Yakima Avenue, Suite 100
Tacoma, WA 98405
(253) 682-1960
www.tacomacounsel.com

WealthCounsel MEMBER

EstatePlanning.com