

No. 317579

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

IN RE THE ESTATE OF MARGARET WIMBERLEY

JAMES WIMBERLEY

Appellant,

v.

STEPHEN W. TREFTS, Northwest Trustee & Management Services; and
CARROLL WESLEY WIMBERLEY,

Respondents.

RESPONDENT STEPHEN W. TREFTS' BRIEF

CAM C. MCGILLIVRAY, WSBA No. 38330
Northwest Trustee & Management Services
7307 N Division St, Suite 303
PO Box 18969
Spokane, 99228-0969
(509) 466-3024

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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The trial court properly accepted Margaret’s date of death (August 2, 2010) as the start date of Northwest Trustee’s accounting because it would be costly and time-consuming for Northwest Trustee to prepare an accounting from C.W.’s date of death (January 20, 2002); a longer accounting period would be more costly and likely yield inconsequential results.

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I. INTRODUCTION

STEPHEN W. TREFTS d/b/a NORTHWEST TRUSTEE & MANAGEMENT SERVICES (“Mr. Trefts”) is the Successor Personal Representative of the Estate of Margaret Wimberley (Yakima County Superior Court Case No. 10-4-00415-3) and Successor Trustee of the Wimberley Family Trust. Mr. Trefts was appointed in said capacity by the trial court after Appellant James Wimberley (“Jim”)¹ was removed for multiple breaches of fiduciary duty both as Personal Representative of his mother’s estate and Trustee of the Wimberley Family Trust. In particular, the trial court found that Jim had continued to reside at the Trust-owned home located at 386 Fromherz Drive, Yakima, Washington (“Fromherz Property”) from the date of Margaret’s death on August 2, 2010 without paying rent to the Trust estate. Further, Jim charged utilities and other incidental costs for which he was personally responsible for to the Trust during his residency. Finally, Jim wrongfully exercised his fiduciary powers to quitclaim a 100% interest in the Fromherz Property to himself. When removing Jim, the trial court expressly found that *In re the Estate of Jones*,

¹ The first names “Wes”, “Jim”, “C.W.”, “Margaret”, and surname “Mr. Trefts” are used to clarify persons or parties’ identities as recommended by RAP 10.4(e). No disrespect is intended.

152 Wash. 2d 1, 93 P. 2d 147 (2004) was factually and circumstantially indistinguishable. Jim was removed on March 2, 2012.²

The trial court ordered Jim to turn over assets and account information at Mr. Trefts' request, and initially ordered Mr. Trefts to prepare an independent accounting from the date of C.W. Wimberley's ("C.W.") death, which was January 20, 2002. C.W. was Jim and Respondent Carroll Wesley Wimberley's ("Wes") father. At the time Jim was removed, C.W. had been dead for over ten years.

Jim failed to turn over records as mandated by the Removal Order, and failed to cooperate with Mr. Trefts' repeated requests for information. This culminated in Mr. Trefts having to file his *Preliminary Accounting and Petition for Instructions* ("Petition for Instructions") nearly a year later on February 1, 2013. This was required so that Mr. Trefts could comply with his statutory duties and move towards closing the estate. A hearing was initially set for April 19, 2013. Jim retained new counsel. As a courtesy, Mr. Trefts agreed to re-set the hearing for May 24, 2013. Counsel presented argument on that date. On June 4, 2013 Judge Michael McCarthy issued a letter ruling on which is the subject of this appeal.

² The Removal Order also mandated removal of attorney Richard Greiner as Trust Protector. Attorney Greiner continued to represent Jim after they were both removed on March 2, 2012, and he did not withdraw from the case until March 19, 2013. CP 79-81. This leads to the issues of (1) whether Jim was paying attorney Greiner with Trust funds after he was removed; and, (2) whether Jim will be required to reimburse the Trust.

II. ASSIGNMENT OF ERROR

A. Statement of Error

In the interest of avoiding duplicative litigation and preserving the Trust, Mr. Trefts hereby adopts by reference *Respondent Carroll Wesley Wimberley's Brief*, submitted April 16, 2014, in its entirety. See RAP 10.1(g)(2). Since Mr. Trefts prepared and submitted the accounting at issue, it is his position that he should submit a separate brief to support his position to choose the date of Margaret's death on August 2, 2010 as the accounting's start date.

B. Re-Statement of the Issue Pertaining to Assignment of Error

The legislature vested the trial court with full and ample authority to administer trusts and estates, which includes questions relating to Mr. Trefts' accounting. Due to the passage of time and lack of cooperation from Jim, Mr. Trefts was unable to construct a meaningful accounting from the date of C.W.'s death on January 20, 2002. Alternatively, Mr. Trefts petitioned the trial court for an order allowing him to utilize August 2, 2010 as the start date. The trial court in its broad discretion granted the order. Did the trial court properly accept the date of Margaret's death as the start date for the accounting?

III. STATEMENT OF THE CASE

Mr. Trefts was appointed due to Jim's failure to adhere to his fiduciary duties as trustee and personal representative. On March 2, 2012 the trial court entered its *Order Removing James Wimberley as Trustee of the Wimberley Family Trust and as Personal Representative of the Estate of Margaret Wimberley, Freezing Assets, and Appointing a Successor Trustee* (hereinafter, the "Removal Order"). CP 4-8. The Removal Order contained the provisions relevant to the accounting at issue:

[Jim] shall turn over all Trust and Estate assets, account information, accounts, and access to those accounts to [Mr. Trefts], including a list of all Trust Assets previously distributed (including the date of distribution and to whom the asset was distributed, and a copy of the receipt) **when requested by [Mr. Trefts]**. (Emphasis added). CP 7.

An independent accounting shall be done of the Wimberley Family Trust assets from the date of C.W. Wimberley's death to the present. [Mr. Trefts] may either have his organization complete this accounting or he may hire an accounting to complete this accounting . . . **Following the accounting and review, [Mr. Trefts] shall propose distribution** of the Wimberley Family Trust assets and any assets held by the Estate of Margaret Wimberley. (Emphasis added). CP 7-8.

During the year following entry of the Removal Order, Mr. Trefts attempted to work with Jim and his attorney, Richard Greiner, to complete the mandatory accounting. This accounting was necessary so that Mr. Trefts could propose a distribution of the Trust estate. CP 8. Mr. Trefts

marshalled account and asset information and completed his accounting based upon that information. The accounting period started at the date of Margaret's death on August 2, 2010 and ended when Mr. Trefts took over administration of the Trust estate in May 2012. The accounting spreadsheets were dated August 28, 2012. CP 39-51. The accounting is categorized as follows: (a) financial activity from date of death to date of succession (CP 39-45); (b) expense allocation from date of death to date of succession (CP 46-50); and, (c) a one-page reconciliation of distributions from date of death to date of succession (CP 51). The reconciliation page showed the valuation of the home located at 386 Fromherz Drive, Yakima ("Home") at \$300,000, and the Building Fund ("YFS 5734") at \$2,488.77. CP 51. The reconciliation page also showed that Jim over-distributed \$254,437.91 to himself. CP 51.

Mr. Trefts provided Jim and Wes with its accounting by way of a letter, dated September 28, 2012. CP 58-63. This letter listed outstanding issues which needed resolution so that Mr. Trefts could make accurate distributions. Specifically, Mr. Trefts needed Jim to confirm whether payments stemming from C.W.'s asbestos lawsuit settlement were actually paid into the estate. CP 61. He also needed supporting documentation from Jim in order to verify whether certain expenses charged to the estate accounts were bona fide estate expenses or Jim's personal expenses. CP

61. Finally, Mr. Trefts needed Jim to confirm expenses so that he could file an estate tax return, and also confirm whether Jim had filed such returns during his tenure as personal representative. CP 62. Mr. Trefts requested that Jim provide the following information within 60 days of the receipt of the accounting:

- a) Documentation of loans made from Trust estate assets;
- b) Verification of asbestos payments;
- c) Clear evidence that certain expenses were bona fide estate expenses;
- d) Income and expense information for the 2011 tax return;
- e) Confirmation whether trust or estate tax returns were in fact filed; and
- f) Schedule an inventory of property so that Mr. Trefts could make a fair and equitable distribution. CP 62-63.

Wes responded to Mr. Trefts' request. Jim did not. Jim's lack of response culminated in Mr. Trefts sending a follow-up letter dated November 9, 2012. CP 64-65. This letter was a reminder to Jim that his assistance was needed so that Mr. Trefts could prepare a more accurate accounting. CP 64-65. In the event that Jim failed to comply by November 29, 2012, Mr. Trefts would file a petition for instructions and request an order compelling Jim to reimburse the Trust estate by \$254,437.91 plus interest, and allow Wes and Mr. Trefts or his agents to enter onto the property located on Fromherz Drive and other locations where personal property was located. CP 64.

After having approximately 60 days to review the accounting, Jim responded by way of a letter dated two days before the deadline. CP 66-67. Jim acknowledged the thoroughness of the accounting, but failed to provide all of the information Mr. Trefts had requested with particularity in his September 28, 2012 letter. CP 66; CP 62-63. Furthermore, Jim refused to accommodate Mr. Trefts' request that Wes be allowed to access Jim's house for an inventory of estate property on grounds that the two brothers were "mortal enemies" and that a "physical altercation is more than a probability" if they met face to face. CP 67.

Mr. Trefts sent a reply letter to Jim, dated December 12, 2012. CP 68-71. Specifically, Mr. Trefts stated that he had valued the Building Fund at \$2,488.77 on the date of Margaret's death because there was no evidence submitted before him at that time which showed that she was incapacitated, and said amount was the Building Fund balance as of that date. CP 68. Further, Mr. Trefts stated that he would need documents of the \$50,252.52 of loans because such loans should have been referred to on Schedule A of the trust document. CP 69. There was no completed Schedule A showing loans (CP 173), and it would have been a daunting task for Mr. Trefts to reconstruct loans payments and interest. CP 69. Further, Mr. Trefts asserted that Wes had a right to be present at the inventory because he had a one-half interest in personal property of the

estate, and a one-quarter interest in the Fromherz Property. CP 70. Wes was familiar with his parents' belongings and could assist in identifying estate property. CP 70. Finally, Mr. Trefts reiterated a number of requests for information which had been ignored by Jim for nearly three months after receipt of Mr. Trefts' September 28, 2012 letter. These were as follows:

- a) Documentation of loans made to grandchildren so that they could be added as receivables to the Trust estate;
- b) Verification of asbestos payments paid into Trust estate since Margaret's death;
- c) Source documents for expenses contested by Jim were attributable to the estate;
- d) Income and expense information for the 2011 tax return;
- e) Confirmation whether trust or estate tax returns were in fact filed; and
- f) Schedule an inventory of property as soon as possible so that [Mr. Trefts] could make a fair and equitable distribution. CP 70.

Taking the Christmas season into account, Mr. Trefts graciously extended Jim's response deadline approximately another 60 days, to January 31, 2013. CP 33. On the morning of January 31, 2013, Mr. Trefts received a letter from Jim which was unresponsive. CP 33. As a result, it was Mr. Trefts' position that court action was the only resolution. CP 33. Therefore, Mr. Trefts filed his *Preliminary Accounting and Petition for Instructions* ("Petition for Instructions") with the trial court on February 1,

2013. CP 28-77. In regards to the start date for the accounting, it was Mr. Trefts' position that:

[Mr. Trefts] prepared an initial accounting, which began at Margaret's date of death, August 2, 2010. [Mr. Trefts] **was unable to reconstruct a meaningful accounting starting from C.W.'s date of death January 20, 2002.** C.W. died nearly 11 years ago, and due to the passage of time Petitioner was unable to identify which assets were held at the time of his death. Furthermore, pursuant to the terms of the Trust, **Margaret Wimberley had full discretion of her husband's trust after his death.** Finally, there is no evidence suggesting that Margaret Wimberley was incapacitated or suffered from diminished capacity. **It would be costly and time-consuming for Petitioner to attempt to prepare an accounting for such a long period of time based upon incomplete evidence. Such an undertaking would very likely yield inconsequential results.** In the best interests of the trust estate, Margaret's date of death (August 2, 2010) should be the start date for accountings. Therefore Petitioner requests that the Court accept the date of Margaret's death, instead of the date of C.W.'s death, as the start date for Petitioner's accounting. (Emphasis added). CP 30.

Mr. Trefts initially set the hearing for April 19, 2013. CP 78.

On March 19, 2013 (47 days after filing and 30 days before the hearing) Jim's attorney Richard Greiner withdrew and attorneys Michael Olver and Kameron Kirkevold filed a notice of appearance. CP 79-81. Mr. Trefts re-noted the hearing for May 24, 2013 so that Jim's new counsel would have ample time to prepare for the hearing. CP 82. The hearing was held on that date, and Judge Michael McCarthy issued a letter ruling on June 4, 2013 approving Mr. Trefts' accounting. CP 347. Said

letter ruling is the subject of this appeal.

IV. ARGUMENT

The legislature vested the trial court with broad general powers in probate matters. RCW 11.96A.020 provides, in relevant part:

(1) It is the intent of the legislature that the courts shall have full and ample power and authority under this title to administer and settle:

(a) **All matters concerning the estates and assets of incapacitated, missing, and deceased persons . . .**

(b) **All trusts and trust matters.**

Furthermore, RCW 11.96A.030(2) defines a matter as:

(c) The determination of any question arising in the administration of an estate or trust, or with respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, that may include, without limitation, questions relating to: (i) The construction of wills, trusts, community property agreements, and other writings; (ii) a change of personal representative or trustee; (iii) a change of the situs of a trust; (iv) **an accounting from a personal representative or trustee**; or (v) the determination of fees for a personal representative or trustee[.] (Emphasis added).

Finally, the court had broad discretion to grant the order at issue. RCW 11.96A.060 provides:

The court may make, **issue**, and cause to be filed or served, **any and all manner and kinds of orders**, judgments, citations, notices, summons, and other writs and processes that might be **considered proper or necessary** in the exercise of the jurisdiction or **powers given or intended to be given by this title**. (Emphasis added).

Mr. Trefts, as an independent third-party fiduciary, was appointed both as successor trustee of the Wimberley Family Trust and as successor personal representative of the Estate of Margaret Wimberley. CP 56. Mr. Trefts was acting under that authority when he was ordered by the court to prepare an “accounting”. CP 7-8.

The trial court is given the power and authority to administer both trust and estate matters. See RCW 11.96A.020(1)(a)-(b). A “matter” encompasses an accounting from a personal representative or trustee. See RCW.11.96A.030(2)(c)(iv). Accordingly, Mr. Trefts’ accounting clearly falls within this statutory definition and the trial court had the requisite power to issue an order change the accounting’s start date. RCW 11.96A.060.

As successor personal representative, Mr. Trefts has the duty to close the estate as quickly and rapidly as possible without sacrifice to assets. See RCW 11.48.010. Mr. Trefts has and continues to administer the Trust estate in compliance with that mandate. Furthermore, Mr. Trefts was compelled by the Removal Order to prepare an accounting for court review and a proposed distribution of the Trust estate to Wes and Jim. CP 7-8. This accounting was not optional and Mr. Trefts recognized that he needed to complete it as quickly and accurately as possible to fulfill his duties to the trial court and to the beneficiaries.

During the months immediately after Jim was removed for breaching his fiduciary duties, Mr. Trefts gathered information on all known accounts. These included accounts held in Margaret's name, as well as accounts under the Wimberley Estate and the Wimberley Family Trust, known to be in existence at the time of Margaret's death or which were created afterwards. CP 30. After careful review of this information, Mr. Trefts chose the date of Margaret's death instead of C.W.'s because he was unable to identify assets held at the time of C.W.'s death over 8½ years earlier, and concluded that it would be costly and time consuming due to the passage of time and incomplete evidence to look that far back, and that such a search would lead to inconsequential results. CP 30. For example, financial records from the date of death C.W.'s death on January 20, 2002 were likely unavailable when the Removal Order was entered by the trial court on March 3, 2012- a span of over ten years. Also, there may have been accounts when C.W. was alive which were closed after his death. It was imperative that the start date be moved forward.

Moreover, Mr. Trefts was compelled to move the accounting date forward due to Jim's intransigence to produce documents. Mr. Trefts prepared an accounting less than six months after Jim had been removed. This accounting was dated August 28, 2012 and it was provided to both beneficiaries and thoroughly explained to them in a detailed six-page letter

dated September 28, 2012. CP 39-51; CP 58-63. Cognizant that more work needed to be done, Mr. Trefts requested that both beneficiaries provide certain information within 60 days from the date they received it. CP 62-63. Wes responded. Jim did not. As a result, Mr. Trefts sent Jim a reminder letter, dated November 9, 2012 which reiterated the 60 day deadline as being November 29, 2012. CP 64-65. Jim failed to produce documents by that date, so Mr. Trefts graciously gave him until January 31, 2013. CP 68-71. Again, Jim failed to respond. CP 33. Jim had a period of over four months to provide information from the time Mr. Trefts sent him the accounting on September 28, 2013 through January 31, 2013. Instead, he chose not to. By refusing to cooperate, Jim deliberately interfered with Mr. Trefts' duties to provide a timely and accurate accounting and report back to the trial court. So, Mr. Trefts was forced to file his Petition for Instructions and ask that the trial court accept his accounting, an accounting which started on August 2, 2010.

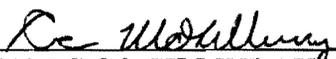
The trial court had the authority to reject Jim's objections to the accounting, approve Mr. Trefts' recommendation, and move the start date from January 20, 2002 to August 2, 2010. RCW 11.96A.060. The trial court accepted Mr. Trefts' argument that the January 20, 2002 start date was untenable and would likely have inconsequential results on the distribution. So, the trial court supplanted the earlier start date with the

later one. The trial court issued its order with full authority and within the usual course of probate proceedings. There was no error.

V. CONCLUSION

Mr. Trefts petitioned the trial court for the change of date because backtracking an additional eight and one-half years would be expensive and most likely fruitless. Further, Mr. Trefts was forced to petition the trial court to accept his accounting with its August 2, 2010 start date because Jim failed to follow Mr. Trefts' repeated requests to provide information in a timely manner. The trial court did not err in changing the start date of Mr. Trefts' accounting from C.W.'s death on January 20, 2002 to the date of Margaret's death on August 2, 2010.

RESPECTFULLY SUBMITTED THIS 9th day of May, 2014.



CAM C. MCGILLIVRAY, WSBA No. 38330
Attorney for Stephen W. Trefts d/b/a
Northwest Trustee & Management Services
Successor Trustee
Successor Personal Representative

DECLARATION OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington. On May 9th 2014 I caused to be served the document to which this is appended as follows:

Via electronic mail and First Class Mail, postage pre-paid to:

Attorneys for James Wimberley:

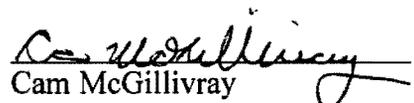
Michael Olver (molver@helsell.com)
Kameron Kirkevold (kkirkevold@helsell.com)
Helsell Fetterman, LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154

Via electronic mail and First Class Mail, postage pre-paid to:

Attorneys for Wes Wimberley:

Linda Sellers (lsellers@halversonNW.com)
Sara Watkins (swatkins@halversonNW.com)
Halvorsen Northwest
405 E. Lincoln Ave.
Yakima, WA 98901

Signed at Spokane, Washington on May 9th 2014


Cam McGillivray
Attorney for Stephen W. Trefts