

No. 72657-9

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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In Re the Matter of:  
The Beverly C. Morgan Family Trust dated April 3, 1985  
as Amended and Restated in its Entirety on November 6, 2013

NANCY SHURTLEFF,  
RESPONDENT

v.

THOMAS E. MORGAN,  
APPELLANT.

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2015 APR 27 AM 10:12

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**REPLY BRIEF OF APPELLANT  
THOMAS E. MORGAN**

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## TABLE OF CONTENTS

I.	THE MOTION FOR ATTORNEYS' FEES WAS NOT, AND COULD NOT BE, DIRECTED AT APPELLANT AS AN INDIVIDUAL BENEFICIARY BUT RATHER AS TRUSTEE OF THE TRUST.....	1
II.	NANCY'S ARGUMENT THAT APPELLANT BREACHED A FIDUCIARY DUTY IS ERRONEOUS .....	3
III.	NANCY FAILS TO CITE ANY CASE SUPPORTING HER ARGUMENT THAT SHE IS ENTITLED TO ATTORNEYS' FEES IN A CASE IN WHICH SHE VOLUNTARILY DISMISSED AND, INSTEAD, HAS CHOSEN TO PROSECUTE IN CALIFORNIA.....	4
IV.	NANCY CHOSE TO FILE HER PETITION IN WASHINGTON BUT COULD ALSO HAVE FILED IT IN CALIFORNIA .....	5
V.	APPELLANT DID NOT HAVE AN OPPORTUNITY TO CHALLENGE THE REDACTED ATTORNEYS' FEES .....	7
VI.	CONCLUSION .....	8

## TABLE OF AUTHORITIES

### CASES

<i>Berryman v. Metcalf</i> , 177 Wn.App.644 (2013) .....	8
<i>Cook v. Brateng</i> 321 P. 3d 1255 (2014).....	4, 5
<i>Galdjie v. Darwish</i> (2003) 113 Cal.App.4th 1331, 1344 .....	2
<i>Greenspan v. LADT, LLC</i> (2010) 191 Cal.App.4th 486, 496 .....	2
<i>Portico Mgmt. Group, LLC v. Harrison</i> (2012) 202 Cal.App.4th 464, 474 .....	2
<i>R.A. Hanson Co., Inc. v. Magnuson</i> 79 Wn.App. 497, 502 (1995) .....	8
<i>Seventh Elect Church v. Rogers</i> , 102 Wn.2d 527, 531 (1984) .....	8

### STATUTES

<i>CP 102-103; 509-511</i> .....	5
<i>RCW 11.96A.150</i> .....	4, 7

Appellant Thomas E. Morgan, as Trustee of the Beverly C. Morgan Family Trust (hereinafter “Trustee”) and as an individual, respectfully reiterates his request that the Court reverse the trial court’s erroneous award of 100% of the requested attorneys’ fees and costs to his sister, Respondent Nancy Shurtleff (hereinafter “Nancy”), and enter a judgment in favor of the Trustee because there is neither legal nor factual support for an award of attorneys’ fees under the facts of this case. Trustee also reiterates his request for an award his attorneys’ fees and costs on appeal.

This Reply Brief will respond to several of the significant erroneous factual assertions and legal arguments. However, to the extent there is not a reply, the point was already covered in the Opening Brief. The order of the points is insignificant and not meant to be of hierarchical importance.

**I. THE MOTION FOR ATTORNEYS’ FEES WAS NOT, AND COULD NOT BE, DIRECTED AT APPELLANT AS AN INDIVIDUAL BENEFICIARY BUT RATHER AS TRUSTEE OF THE TRUST**

Nancy argues at pages 20 and 24 that Appellant is personally liable for the attorneys’ fees award. But the Order is not against

Appellant individually.

Nancy's entire argument relies on the absolute right of the Trustee pursuant to the terms of the Trust to change the trust situs location from Orange County, California to King County, Washington as discussed in the Opening Brief. Initially, the Trustee's former attorney, not Appellant as an individual, changed the trust situs from Orange County to King County. Obviously, only the Trustee can change the trust situs. Thus, the argument that Appellant individually, and not as Trustee, is personally liable for the award of attorneys' fees is patently erroneous.

In California, a trust estate [the Trust in this case] is not a legal entity but rather is simply a collection of assets and liabilities. As such, it has no capacity to sue, be sued or defend an action. Any litigation must be maintained by, or against, the executor, administrator or trustee of the estate. [*Galdjie v. Darwish* (2003) 113 Cal.App.4th 1331, 1344; *Greenspan v. LADT, LLC* (2010) 191 Cal.App.4th 486, 496; *Portico Mgmt. Group, LLC v. Harrison* (2012) 202 Cal.App.4th 464, 474.]

Similarly, in Washington, the trustee of a trust is the proper

party with standing to sue as stated in Washington State Court Rules, Superior Court Civil Rules 17.

Consequently, Nancy's argument at page 24 is erroneous to refute the cases cited by Appellant to the effect that no Washington appellate court has ever awarded attorneys' fees against a trust under the circumstances of this case.

## **II. NANCY'S ARGUMENT THAT APPELLANT BREACHED A FIDUCIARY DUTY IS ERRONEOUS**

At page 24-25, Nancy argues that Appellant breached his fiduciary duty. Nancy cites cases where there was a trial on the issue of breach of fiduciary duty raised by the pleadings. Here, there was no trial on Nancy's petition. Instead, she voluntarily chose to dismiss her claims against Appellant. So, the comment at page 25 that "Appellant's brief fails to address the pertinent line of cases" is because there was no trial where Appellant could produce witnesses and documents on any claimed issue of breaching a fiduciary duty as occurred in the cases cited in Respondent's Brief.

Since there was no trial, it is legally impossible to argue that Appellant breached any fiduciary duty because that issue was never

tried. It is absurd to assert that a motion for attorneys' fees, after Nancy has requested to dismiss the case, can be a trial on the merits of a claimed breach of fiduciary duty. Nancy will have her opportunity in California to put on evidence to prove that the Trustee breached any fiduciary duty to her.

The nail in this argument's coffin is the trial court's interlineation in the Order that the change of the trust situs "appears to be an action which benefited himself." Appearances are not a finding and, a fortiori, where no trial occurred which would allow the Trustee his right to due process.

**III. NANCY FAILS TO CITE ANY CASE SUPPORTING HER ARGUMENT THAT SHE IS ENTITLED TO ATTORNEYS' FEES IN A CASE IN WHICH SHE VOLUNTARILY DISMISSED AND, INSTEAD, HAS CHOSEN TO PROSECUTE IN CALIFORNIA**

Appellant cited and extensively discussed the leading case of *Cook v. Brateng* 321 P.3d 1255 (2014) in its opening brief at page 15 which discussed RCW 11.96A.150 on which Respondent cites only for a standard of review.

Nancy failed to distinguish or cite any other contrary case because there is none.

Thus, Appellant’s argument at page 14 that “Nancy did not cite, and no Washington case has held, that a petitioner, who files a trust petition, voluntarily dismisses it before a hearing or trial, and provides no benefit to the Trust is entitled to attorney’s fees and costs” remains unchallenged.

To circumvent the *Cook* case, Nancy falsely claims at page 24, that the Order “awarded attorneys’ fees and costs from Appellant’s personal funds” against Appellant individually. Obviously, Appellant as the Trustee—not as an individual—had the sole right under the Trust to change the trust situs.

#### **IV. NANCY CHOSE TO FILE HER PETITION IN WASHINGTON BUT COULD ALSO HAVE FILED IT IN CALIFORNIA**

Nancy argues that the unauthorized change of trust situs to Washington required that the original jurisdiction was in Washington. By the time that Nancy filed her motion for attorneys’ fees, she knew that the January 30, 2014 Probate Notification which designated King County as the principal place of administration had been mistakenly done by Trustee’s former California trust counsel *without* Trustee’s advice or consent. (CP 102-103; 509-511).

Nancy's fallacious statement at page 2 that Trustee "unilaterally, and admittedly without evaluation of what was in the beneficiaries' best interests, changed the principal place of administration," must be dismissed for three reasons.

First, if her statement were true—which it is not—there was no way for Nancy to know that Trustee changed the principal place of administration "without evaluation."

Second, when considering that the Trustee, as a beneficiary, is entitled to about 90% of the Trust's assets, it is unclear how changing the principal place of administration was not "in the beneficiaries' best interests."

Third, Appellant never had the benefit of due process in a trial where Nancy's claim could be tested.

Only after losing her Motion to Dismiss Trustee's Orange County Petition, did Nancy "voluntarily file a similar, but not identical petition in California" and "voluntarily move to dismiss her King County action" as stated at page 2. Moreover, although the Orange County court did not expressly order that Nancy file a more expansive petition, Nancy filed a petition that was more expansive

than the one filed in Washington, while maintaining the claims made in the Washington petition, and Trustee did not object.

**V. APPELLANT DID NOT HAVE AN OPPORTUNITY TO CHALLENGE THE REDACTED ATTORNEYS' FEES**

Nancy argues at page 1 that this Court should affirm the trial court's decision "absent a finding that the trial court abused its discretion by acting in an untenable or unreasonable manner." Nancy further argues that "the record before this Court, and the trial court's assurance that it reviewed the entirety of the pleadings filed when determining that a fee award was equitable pursuant to RCW 11.96A.150, belie any assertion that the trial court awarded fees and costs without sufficient analysis or opportunity for Respondent to meaningfully object."

Nancy's argument is erroneous for at least three reasons.

First, because the trial court denied Trustee the opportunity to present his arguments and Nancy's Motion for Attorneys' Fees was decided without oral argument, it cannot be stated that Trustee had the opportunity to "meaningfully object" to the \$41,573.64 in attorneys' fees, \$242.49 in court filing fees, and \$1,159 in costs

requested by and awarded to Nancy.

Second, at page 31, Nancy seeks to distinguish *Seventh Elect Church v. Rogers*, 102 Wn.2d 527, 531 (1984) and *R.A. Hanson Co., Inc. v. Magnuson* 79 Wn.App. 497, 502 (1995). However, Nancy alone decided to provide 137 words, mostly verbs, for the 55 entries impliedly claiming that the remaining words contained confidential communications protected by the attorney-client privilege. Nancy acted as the sole arbiter of whether those words contained confidential communications as opposed to description of legal services. Thus, Appellant was kept in the dark just like this appellate court.

Lastly, Nancy's attempt to distinguish *Berryman v. Metcalf*, 177 Wn.App.644 (2013), which requires trial courts to consider and enter findings on specific objections to attorneys' fees, is unavailing by arguing that the dispute arose in a personal injury case. Nancy impliedly argues that a trust case like this one is insulated from the policy considerations stated in *Berryman*.

## **VI. CONCLUSION**

Trustee requests that the order of attorneys' fees be reversed,

that judgment be entered in favor of the Trustee, and that he be awarded his attorney's fees and costs on appeal.

DATED this 27th day of April 2015

Moen Law Offices, P.S.

By:   
Bruce R. Moen, WSBA # 6640  
Attorney for Appellant Thomas E. Morgan, Trustee

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 27, 2015, I caused true and correct copies of the foregoing Reply Brief of Appellant Thomas E. Morgan to the parties to this action as follows:

Karen R. Bertram	<input type="checkbox"/> First Class Mail
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DATED: April 27, 2015.

  
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Sarah Elkin