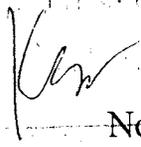


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BY  No. 34210-3-II

COURT OF APPEALS, DIV. II
OF THE STATE OF WASHINGTON

In re the Estate of DORIS LANE BEARDEN, Deceased.

JEROME BEARDEN, Petitioner,

and

GARLAND BEARDEN, Respondent.

APPELLANTS' OPENING BRIEF

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ASSIGNMENTS OF ERROR & ISSUES

Assignment of Error #1: The trial court erred on November 18, 2005, in removing Jerome as personal representative.

Issue #1: Did the trial court err on November 18, 2005, in removing Jerome as personal representative?

Issue #2: Does the trial court's order of July 14, 2006, reappointing Jerome render moot this review?

Issue #3: Should this court award Jerome attorney fees and costs incurred in this proceeding?

STATEMENT OF THE CASE

Doris Bearden ("Doris") died on August 24, 2005, leaving two adult children, petitioner Jerome Bearden ("Jerome") and his brother, Garland Bearden ("Garland"), the respondent Clerk's Papers (CP) 1. On September 30, 2005, Jerome filed a petition for letters of administration, asserting at its paragraph 2, "No valid Will of Decedent has been found." *Id.* He designated Tommie Frazier as his resident agent. CP 7. After Jerome posted a bond on October 21, 2005 (CP 8), the trial court granted him letters of administration.¹

On October 27, 2005, Garland filed a petition to revoke the letters of

¹ The record includes no copy of the letters of administration issued October 21, 2005, because the court file copy apparently was removed when the clerk issued letters testamentary on November 4, 2005, for no copy of it remains in the court's case file.

administration and remove Jerome as personal representative. CP 9-10. In a declaration filed with the petition Garland alleged (CP 12):²

“He is unfit to serve a PR for the following reasons. a) He resides in California and is not present to administer decedent's estate
b) Filed for PR based on the premise that there was no will when he has a police report regarding having knowledge of a will.”

Garland further alleged (CP 14):

“Jerome Bearden has threatened a witness to the will filed in Early Oct and also threatened her 13 yr old Daughter on Oct 22-05 and a police report was made”

Garland had filed on October 6, 2005, under a new superior court cause number a document purporting to be an undated handwritten will signed by Doris, notarized on January 24, 2005, but lacking witnesses. CP 50-51. By that alleged will, Doris' entire estate went to Garland. *Id.* And on October 14, 2005, Garland had filed under that cause number a statement, notarized two days earlier, by Mildred Horne claiming to have witnessed events relating to Doris' alleged will of January 24, 2005.

In Garland's declaration of October 27, 2005, he also alleged (CP 13):

“I have had a Restraining order on Tommie Frazier and my mother Requested that their phone be blocked. Jerome Beardens Identity Theft Case # is for Cutting off the only phone when she was alive which was put in by me”

After Jerome obtained letters of administration, he found in Doris'

² Passages from Garland's handwritten pleadings are quoted here as accurately as possible, including his spelling and grammar mistakes. Because it is difficult to read those handwritten pleadings, persons who fail to read them very carefully are likely to misread them.

safe deposit box a will she had properly executed in 2000. CP 16-22. On November 2, 2005, Jerome filed a petition under the estate cause number to admit that will to probate.³ CP 23-24. The will provided that, other than a \$500 bequest to Roxy Schmitt, Doris' estate should be divided equally between Jerome and Garland. CP 16-22. The will also nominated Mary Frazier as personal representative and Jerome as alternate personal representative. *Id.* Frazier declined to serve as personal representative. CP 25. The trial court on November 2, 2005, admitted the will to probate and appointed Jerome as personal representative (CP 26-27), and on November 4, 2005, at 10:12 am, the court clerk issued him letters testamentary. CP 37.

On November 3, 2005, Garland filed with the deputy clerk in the court's Department 17, Judge Ronald Culpepper, a letter from Garland to Judge Culpepper (CP 28-32) alleging assorted wrongs to Garland by Tommy Frazier and Jerome, and a photocopy of Doris' alleged January 24, 2005, will to which the October 14, 2005, statement of Mildred Horne was by then directly attached. CP 33-36. Both filed documents had cover

³ While not readily evident from the record, the petition and related papers filed November 2, 2005, were presented in chambers to a court commissioner by staff of the court clerk's office, to which Jerome had mailed such documents and proposed order with the requisite fee for such a presentation. The clerk's office's practice when presenting to judicial officers *ex parte* pleadings and proposed orders is to provide them along with the court's case file, so Commissioner Gelman would have had before him Garland's pleadings seeking Jerome's removal when he signed the order admitting the will and appointing Jerome as personal representative with nonintervention powers and directing that he be issued letters testamentary. CP 26-27.

sheets prepared by the deputy clerk in Department 17. CP 28 and 33. On November 4, 2005, Judge Culpepper held a hearing on Garland's motion to revoke that was filed October 27, 2005, and the Judge reportedly denied that motion. CP 41. But at that hearing the Judge also set a hearing date for November 18, 2005, on his motion calendar (CP 39), and entered an order consolidating the case file under which Garland had filed Doris' alleged 2005 handwritten will with the estate administration case file. CP 38.

On November 10, 2005, Garland filed a handwritten pleading titled "Petition to Revoke Letters of Administration and Remove Personal Representative" in which he wrote:

"The personal representative appointed by the Court is not qualified to serve as personal Representative because he is not Familiar with the Requirements of acting as a personal Representative IN ADDITION TO OBTAINING NON INTERVENTION POWERS WITHOUT COMPLYING WITH THE LAW. THE PERSONAL REPRESENTATIVE HAS FAILED TO PROVIDE NOTICE OF THE PROBATE PROCEEDINGS AS REQUIRED BY RCW 11.28.237. He is unfit to serve as PR for the Following Reason A) He Resides in California and is not present to administrate Decedent's estate"

Judge Culpepper heard argument on Garland's petition on November 18, 2005. Garland was represented by counsel but Jerome appeared pro se. CP 47. In his oral ruling, Judge Culpepper stated the following:

THE COURT: [Jerome], let me interject here. You say that you and your brother aren't warring. Obviously you are warring. I understand your frustration. You're at least now the PR and your brother has got some - I saw one of these restraining orders. Silly would be generous.

....
... [A]re you qualified to be the personal representative?
Yes, you're qualified; you seem to be a bright guy, trying to do what's right. But it's clear to me that this will not work. You and your brother have some serious disputes. Your brother has these restraining orders interfering with your ability to be the PR. You live in California.

I think at this time it makes no sense for you to remain as PR. As a practical [matter], some neutral party should be appointed.

....
... I'm not removing you because you're not qualified. You seem like a bright guy. You probably could do a good job; however, the problems you've got with your brother make it impossible.

Report of Proceeding (RP) at 13-15.

At the conclusion of that hearing, Judge Culpepper entered an order removing Jerome as personal representative, revoking the letters testamentary and appointing Robin Balsam, a local attorney, as personal representative. CP 45.

On December 19, 2005, Jerome, represented by counsel, filed a Notice for Discretionary Review of Judge Culpepper's order entered November 18, 2005. CP 48-49. On March 3, 2006, Commissioner Schmidt of this appellate court entered an order granting Jerome's motion for discretionary review, finding that Judge Culpepper had committed probable error that substantially altered the status quo. RAP 2.3(b).

On January 6, 2006, the trial court appointed Michael B. Smith, a local attorney, as personal representative, because Ms. Balsam had declined Judge Culpepper's appointment. Mr. Smith resigned on June 23,

2006, and the trial court appointed Mack Leviense, a local attorney, as personal representative. Mr. Leviense declined the appointment on June 30, 2006, and he urged the court to reappoint Jerome. On July 14, 2006, the trial court reappointed Jerome as personal representative with nonintervention powers. Jerome will promptly designate the record noted in this paragraph as supplemental clerk's papers.

The effect of Judge Culpepper's order removing Jerome has been an eight-month delay in the settlement of Doris' estate, for until Jerome's reappointment no action was commenced to remove Garland from the estate's residence to permit its sale, though its foreclosure is imminent, now scheduled for September 8, 2006. And Mr. Smith has requested a fee of \$11,280 for his services as personal representative, at \$200 per hour, though it has not yet been approved.

ARGUMENT

1. The trial court erred on November 18, 2005, in removing Jerome as personal representative.

The law concerning judicial removal of a personal representative is set forth in the recent case of *In re Estate of Jones*, 152 Wn.2d 1, 93 P.3d 147 (2004), and in the cases cited in that opinion.

RCW 11.28.250 provides:

“Whenever the court has reason to believe that any personal

representative has wasted, embezzled, or mismanaged, or is about to waste, or embezzle the property of the estate committed to his charge, or has committed, or is about to commit a fraud upon the estate, or is incompetent to act, or is permanently removed from the state, or has wrongfully neglected the estate, or has neglected to perform any acts as such personal representative, or for any other cause or reason which to the court appears necessary, it shall have power and authority, after notice and hearing to revoke such letters.”

The *Estate of Jones* opinion held that the catchall phrase in RCW 11.28.250 “for any other cause or reason which to the court appears necessary” was incorporated into RCW 11.68.070, which allows a court to remove or restrict the powers of a nonintervention personal representative.

In *Estate of Jones* at page 11, the supreme court stated:

“RCW 11.68.070 is not ambiguous and plainly incorporates all of the reasons for removal listed in RCW 11.28.250 into the nonintervention statutory scheme. A plain reading of both statutes shows that the purpose of the statutes is to provide protection to beneficiaries and other interested parties when a personal representative breaches his fiduciary duties. . . . [T]he catchall phrase does not mean that the court may remove a representative on a whim. The rule of *ejusdem generis* states that when general terms are in a sequence with specific terms, the general term is restricted to items similar to the specific terms. [Citation omitted.] Therefore, the court may remove a personal representative under the “for any other cause” provision only if the conduct is similar to the other grounds listed in the statute.” [Emphasis added.]

Standard of Review. Concerning the standard of review applied by appellate courts to trial court rulings removing personal representatives, the *Estate of Jones* court said, at page 8, “Where the findings do not

support the removal of a personal representative, the removal is arbitrary and improper.” It repeated that standard at page 10, saying, “The superior court must have valid grounds for removal and these grounds must be supported in the record.”

The *Estate of Jones* court cited *In re Estates of Aaberg*, 25 Wn. App. 336, 607 P.2d 1227 (1980), in which the appellate court stated at page 339, “Although the trial judge is given broad discretion as to the grounds upon which he may remove an executor, the grounds must be valid and supported by the record.” For the same point it cited *In re Beard’s Estate*, 60 Wn.2d 127, 372 P.2d 530 (1962), in which it had stated at page 132:

“[A]lthough a superior court has a very wide discretion as to the grounds upon which it may remove an executor or administrator, with which this court should not ordinarily interfere, the grounds must be valid and supported by the record.”

The *Estate of Jones* court also cited *Estate of Ardell*, 96 Wn. App. 708, 980 P.2d 771 (1999), in which the appellate court stated, at page 720, “Because the findings simply do not support the removal of the personal representative for the reasons allowed by RCW 11.68.070, RCW 11.28.250, or RCW 11.48.210, the court’s decision was arbitrary.”

The *Estate of Jones* court cited *In re Coates’ Estate*, 55 Wn.2d 250, 347 P.2d 875 (1959), in which the court reversed the trial court’s order removing a nonintervention executor, saying at page 260:

“It is significant that the trial court *did not* find that appellant had

been “recreant to its trust” or “had not discharged the trust imposed upon . . . [it] faithfully.” However, even if it be assumed *arguendo* that such finding is implicit in that which the court actually made, the record is devoid of factual support therefor.”

Conflict of Interest Not Present. The *Estate of Jones* court noted in its footnote 14 that “a conflict of interest may disqualify a person from acting as the personal representative.” But the Oregon intermediate appellate case it cited for that proposition was an egregious case in which the personal representative was faced with deciding whether she should sue herself on behalf of the estate, and how she should divide accident settlement proceeds between herself and the estate. *Wharff v. Rohrback*, 152 Or. App. 68, 952 P.2d 87 (1998). No such conflict of interest existed simply by virtue of the fact that the Jerome is himself one of the beneficiaries. Even though Jerome as personal representative might take an adversarial position on behalf of the estate with respect to Garland, that would not be a disqualifying conflict of interest. In the case of *In re Estate of Vance*, 11 Wn. App. 375, 382, 522 P.2d 1172 (1974), the appellate court agreed with the trial court’s refusal to remove the decedent’s nominated personal representative based upon an alleged conflict of interest, agreeing with the trial court’s conclusion of law that read:

“A decedent has the right to designate who will administer an estate and is not inhibited by an actual or potential conflict of interest, but can designate someone to act in circumstances that will involve the conflict relationship, and that is within the right of the decedent. There can be a conflict situation which is not

sufficient to justify removing executors unless there is also misconduct involved. An apparent or alleged conflict of interest situation is not sufficient to grant the remedy sought by the Petition herein.”

No Supporting Record. As noted above, a removal order must be supported by evidence and by factual findings in the record. The record here does not support the removal order. Judge Culpepper mentioned at the removal hearing that “[Y]our brother has got some — I saw one of these restraining orders. Silly would be generous.” (RP 13) and “Your brother has these restraining orders interfering with your ability to be the PR.” RP 14. But the record does not reflect any such restraining order or orders. It appears that Judge Culpepper — improperly conducting his own investigation — had reviewed some unidentified records of some unidentified court proceedings and had recognized Garland’s pattern of seeking restraining orders, upon frivolous grounds, against Jerome. Even though Judge Culpepper had recognized that Garland’s restraining orders were unfounded, he should not have independently searched through court records to find them and considered them as a factor in making his decision. Courts may not take judicial notice of records of other independent and separate judicial proceedings even though they are between the same parties. *Swak v. Dep’t of Labor & Indus.*, 40 Wn.2d 51, 54, 240 P.2d 560 (1952); *In re the Adoption of B.T.*, 150 Wn.2d 409, 78 P.3d 634 (2003).

Animosity by Garland Not Grounds for Removal. Judge

Culpepper explained that his decision to remove Jerome as personal representative was because, “You and your brother have some serious disputes,” (RP 14) and “the problems you’ve got with your brother make it impossible.” RP 15. But RCW 11.28.250 does not permit removing a personal representative simply because of animosity toward the appointee by an estate beneficiary. To the extent that Jerome has long standing differences with Garland, that was almost certainly known to their mother, Doris, before she appointed Jerome as her personal representative.

Concerning the right of a testator to appoint their chosen individual to serve as personal representative of their estate, the state supreme court declared in *State ex rel. Lauridsen v. Superior Court*, 179 Wn. 179, 37 P.2d 209 (1934), at 207:

“[W]e hold that, in the absence of fraud connected with the will or the estate, and in the absence of any statutory disqualification, the right of the testator to appoint an executor of his will may not be superseded by the court by appointing an administrator in his place.”

Out of State Residency. Judge Culpepper also stated to Jerome that a reason for his removal as personal representative was that, “You live in California.” RP 14. The fact that Jerome resides in California is not a lawful disqualifying factor. RCW 11.36.010 provides,

“A nonresident may be appointed to act as personal representative if the nonresident appoints an agent who is a resident of the

county where such estate is being probated or who is an attorney of record of the estate, upon whom service of all papers may be made.”

The record reflects that Jerome appointed a resident agent who had accepted that appointment. CP 7.

2. The trial court’s order of July 14, 2006, reappointing Jerome does not render moot this review.

Though Jerome was reappointed as personal representative of Doris’ estate nearly eight months after his removal, that does not render moot this review of the lawfulness of the removal order. The removal order was sought by Garland and vigorously argued on November 18, 2005, by his attorney. Both Garland and his attorney had an obligation under CR 11(a) before arguing for Jerome’s removal for their asserted reasons to confirm that their position was well grounded in fact and warranted by existing law or a good faith argument for extension, modification, or reversal of existing law. But they provided Judge Culpepper no such legal analysis, though *Estate of Jones* was a recent and controlling case. Thus, under CR 11 the trial court may impose against them an appropriate sanction, including ordering them to pay Jerome’s reasonable expenses, including attorney fees, incurred because of their petition to remove Jerome.

In addition, RCW 11.96A.150(1) provides:

“(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.”

Cases hold that the correction of a legal wrong before an appellate court’s adjudication of a challenged action does not render the challenge moot if the appellate court’s decision upon review impacts a challenging party’s recovery of attorney fees and costs or the imposition of a sanction against the other party. In *Devine v. Dep’t of Licensing*, 126 Wn. App. 941, 110 P.3d 237 (2005), the court considered a case in which the state agency wrongfully denied the appellant for over four months his right to a hearing before revoking his drivers license. The agency argued the appellate review was moot because shortly after the appellant sought review by the appellate court the agency afforded him a hearing in which he prevailed. The appellate court ruled, at 949, that the matter was not moot in part because “there remains an issue about his entitlement to attorneys fees.”

Similarly, in *Morrison v. Basin Asphalt Co.*, 131 Wn. App. 158, 127 P.3d 1 (2005), the appellate court considered the mootness of a claim that employers had failed to pay wages lawfully due, because before the matter was adjudicated the employers had paid those wages. The appellate court held, at 162, that the dispute not moot because the issue remained of

whether the employers should be liable, as a civil penalty, for twice the amount of wages withheld pursuant to RCW 49.51.050 and -.070.

In addition, both the *Morrison* court, at 162, and the court in *Welfare of B.D.F.*, 126 Wn. App. 562, 109 P.3d 464 (2005), at 569, recognized that even a moot issue is appropriately adjudicated if it presents an issue of continuing and substantial public interest, both citing *In re Marriage of Horner*, 151 Wn.2d 884, 891, 93 P.3d 124 (2004), for that point. In the case *sub judice*, the issue of on what grounds a trial court may remove a decedent's designated personal representative is of continuing and substantial public interest. There is a longstanding and widespread public interest in minimizing, except when truly necessary, judicial intervention in the administration of solvent estates, as shown by the adoption in 1974 of Chapter 11.68 ("Settlement of Estates Without [Court] Administration").

3. This court should award Jerome attorney fees and costs incurred in this proceeding.

As quoted above, RCW 11.96A.150(1) authorizes this appellate court to award costs, including reasonable attorneys' fees, to Jerome against Garland. As a result of the pleadings and advocacy by Garland and his attorney, Jerome has incurred substantial costs and attorney fees to seek this court's acceptance of review of Judge Culpepper's order, including unsuccessfully arguing for a stay of that order pending the outcome of this

review. Garland and his attorney, by failing to research and apprise Judge Culpepper of applicable Washington case law concerning the grounds for removal of a personal representative, led him to issue the removal order that has been recognized by this court's commissioner as "probable error." In the interest of justice, Jerome's costs and attorney fees to pursue this appellate proceeding should be charged against Garland's interest in the estate.

CONCLUSION

The trial court erred in removing Jerome from his position as nonintervention personal representative of the estate of his mother, Doris, pursuant to her naming of him in her duly admitted will. The reasons urged for that removal by Garland, and given by the trial court in support of that removal, were not adequate grounds under applicable Washington law. This case has not been rendered moot by the trial court's recent reappointment of Jerome as personal representative, nearly eight months after it removed him, because both the trial court and this appellate court should, in justice, award him reasonable attorney fees and costs for challenging his wrongful removal. And even if this court might regard the issue as moot in this case, the issue of judicial deference to the personal representative appointments made by decedents in their wills is of such

continuing and substantial public interest that this court should address the issue to provide authoritative guidance to the lower courts.

Respectfully submitted this 28th day of August, 2006.



Douglas A. Schafer, Attorney for Appellant
WSBA No. 8652

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
CERITY

**In the Court of Appeals for the State of Washington
Division II**

In the Estate of DORIS LANE BEARDEN:

No. 32410-3-II

JEROME BEARDEN,

Petitioner,

Proof of Service of —

**Appellant's Opening Brief, Report of
Proceeding, and this Proof of Service.**

and

GARLAND BEARDEN,

Respondent.

I certify that today I mailed by first class mail copies of the Appellant's Opening Brief, the Report of Proceeding, and this Proof of Service to—

Mr. Garland Keith Bearden
4808 N. Huson St.
Tacoma, WA 98407

and to the attorney recently appearing for him (as shown by the Notice of Appearance attached as Exhibit A hereto) in the trial court proceeding for this estate—

Judson C. Gray, Attorney
Gray Alvord, PS
4142 - 6th Avenue
Tacoma, WA 98406

Date: August 28, 2006



Douglas A. Schafer, WSBA No. 8652, Appellant's Counsel



FILED
IN PIERCE COUNTY SUPERIOR COURT
A.M. AUG 11 2006 P.M.
PIERCE COUNTY, WASHINGTON
BY KEVIN STOCK, County Clerk Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

In re the Estate of:) Case No.: 05-4-01442-6
DORIS LANE BEARDEN,) NOTICE OF APPEARANCE
Deceased.)

TO: THE CLERK OF THE COURT; and

TO: Douglas A. Schafer, attorney for Jerome Bearden

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that JUDSON C. GRAY, of the Law Office Gray Alvord, P.S., hereby enters an appearance in the above-entitled cause on behalf of GARLAND BEARDEN, without waiving the questions of:

1. Lack of jurisdiction over the subject matter;
2. Lack of jurisdiction over the person;
3. Improper venue;
4. Insufficiency of process;
5. Insufficiency of service of process;
6. Failure to state claim upon which relief may be granted; and/or
7. Failure to join a party under Rule 19;

NOTICE OF APPEARANCE - 1

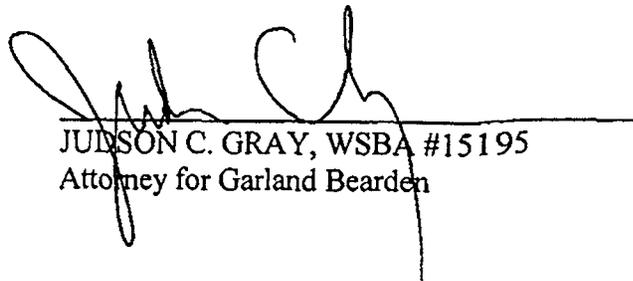
EXHIBIT A

Law Offices of
GRAY ALVORD, PS
4142 - 6TH AVENUE
Tacoma, Washington 98406
Telephone (253) 759-1141 Facsimile (253) 759-1447

1 and requests that all further pleadings and papers herein, except original process and contempt
2 citations, be served upon said Defendant by delivering a copy thereof to the undersigned
3 attorney at his address as stated below. Said appearance to be of record and to continue until
4 the termination of this lawsuit by entering a decree or of judgment, by dismissal thereof, or by
5 withdrawal of the undersigned prior to termination of this matter.

6 YOU ARE NOT AUTHORIZED to serve pleadings or papers by use of facsimile
7 unless specifically negotiated with this attorney. Where authorized, service by facsimile will
8 only be accepted Monday through Friday, 9:00 a.m. through 4:30 p.m., Pacific Standard Time.
9

10 DATED this 9 day of August 2006.

11
12 
13 JUDSON C. GRAY, WSBA #15195
14 Attorney for Garland Bearden