

NO. 38243-1-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE ESTATE OF DOROTHY P. METTLE

RESPONDENT'S BRIEF

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STATE OF WASHINGTON
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I. IDENTITY OF RESPONDENT

Respondent, Gregg Mettle, in his capacity as the court appointed Personal Representative of the Estate of Dorothy P. Mettle and the Trustee of the Dorothy P. Mettle Revocable Living Trust, by way of Response to Appellant's Incomplete Brief states as follows.

II. RESPONSE TO ASSIGNMENT OF ERRORS

Appellant, Guy Mettle ("Guy ")¹, appeals numerous issues arising out of the Pierce County Superior Court, the Honorable Thomas P. Larkin's Order and Decree Approving Trustee's Interim Accounting and Order Approving Final Account and Decree of Distribution. Guy also appeals the Superior Court's Order on Motion for Reconsideration, which sought reconsideration of the foregoing described orders.

Guy's appeal brief identifies so many "assigned errors" and issues relating thereto that it is impossible to identify and respond to all of them in this response. Further, many of Guy's contentions have no logical connection with the Orders he appeals. The Respondent, Gregg Mettle ("Gregg"),² as trustee and personal representative, contends that each and every assignment of error and issue relating thereto is completely devoid of merit and without any legal support or authority whatsoever. Gregg

¹ Respondent refers to appellant, Mr. Guy Mettle, as "Guy" throughout its brief for the sake of clarity, given that respondent's last name is also Mettle. No disrespect is intended by this informal reference.

² Respondent refers to Trustee and Personal Representative, Gregg Mettle, as "Gregg" throughout this brief for the sake of clarity, given that appellant's last name is also Mettle.

sets forth the following response to those assignments of error presented by Guy that appear to have some connection with the administration of the estate and trust at issue.

Response to Assignments of Error/Issues Relating Thereto

1. The trial court did not err in entering its Order Approving Final Account and Decree of Distribution.

2. The trial court did not err in approving the personal representative's activities.

3. The trial court did not err in finding that the professional fees and costs incurred and paid by the personal representative were reasonable.

4. The trial court did not err in entering its Order and Decree Approving Trustee's Interim Accounting.

5. The trial court did not err in finding that the Trustee's activities and accounting were reasonable.

6. The trial court did not err in finding that estate/trust's attorney's fees were reasonable.

7. The trial court did not err in authorizing the Trustee's interim distribution and conditioning its distribution upon the exhaustion the appeal period or any appeal.

8. The trial court did not err in denying Guy's requested relief including, but not limited to, removal of Gregg as trustee and personal

representative, removal of attorney Petrich, blocking distributions to personal representative and trustee and other actions against Gregg.

9. The trial court did not err in denying Guy's Motion for Recusal.

10. The trial court did not err in denying Guy's Motion for Reconsideration.

11. The trial court did not err in finding that Gregg fulfilled his duties as personal representative and trustee.

III. STATEMENT OF THE CASE

This case involves the estate of decedent Dorothy P. Mettle ("Estate"). Mrs. Mettle, a resident of Pierce County, Washington, executed her Last Will and Testament on September 15, 1997 and a First Codicil dated September 26, 2000 ("Will"). CP 4, 7-13.

Mrs. Mettle died on December 10, 2002. CP 4, CP 140. At the time of her death, Mrs. Mettle's gross estate consisted of assets held in her name and held in the name of her revocable trust, the Dorothy P. Mettle Revocable Living Trust ("Trust"), also dated September 15, 1997 and amended on September 26, 2000. CP 130. The combined value of the Trust and Estate at the time of her death was approximately \$954,614. CP 331. Mrs. Mettle is survived by three sons, Guy, Gregg and John, all of whom are equal beneficiaries of the Trust. CP 5, 7, 124.

Dorothy's son, Gregg, was named as personal representative of the Estate. CP 11. Gregg was also named as the successor trustee of the Trust. CP 130. Mrs. Mettle's Will provides that the Estate is to be administered without intervention of the court. CP 8.

Immediately prior to her death, Mrs. Mettle's affairs were under the supervision of the guardianship court in Pierce County Superior Court Cause No. 00-4-01533-2. CP 330-333, 477. Gregg and his brother, John, were Mrs. Mettle's court appointed co-guardians. CP 342, 477. Additionally, at the time Mrs. Mettle was declared incapacitated, Gregg became the acting successor Trustee of the Trust. CP 130, 478. All personal property in Mrs. Mettle's Estate was disposed of in the guardianship action. CP 336. The co-guardians' Final Report was approved on September 5, 2003. At the close of the guardianship, the Estate's only asset was a Columbia Bank account, and the only Trust asset was a Merrill Lynch account. CP 31-32, ____.³

On September 10, 2003, Gregg, by and through his attorneys, Eisenhower & Carlson and David B. Petrich, filed a Petition for an Order: 1. Admitting Will to Probate, 2. Appointing Personal Representative, and 3. Adjudicating Solvency of Estate. CP 16-18. Pursuant to the Court's Order appointing Gregg as personal representative, Gregg was granted non

³ As of the date of filing Gregg's Respondent's Brief, the record from the Trust case was not included in the Clerk's Papers. However, contemporaneous with the filing of Respondent's Brief, Gregg files a Supplemental Designation of Clerk's Papers to include the Petition to Approve Trustee's Interim Accounting and other relevant pleadings including an Order Approving Consolidation.

intervention powers. CP 17. Mrs. Mettle's Will directed that the assets in her Estate be transferred to the trustee and placed in the Trust. CP 8.

On October 6, 2004, seeking to complete the administration of the Estate, Gregg filed a Notice of Filing of Declaration of Completion of Probate as well as a Declaration of Completion of Probate. CP 33-34. Thereafter, on November 1, 2004, Guy filed a Petition for Accounting and Approval of Fees challenging Gregg's proposed completion of probate and prolonging the administration and closure of the Estate. CP 40-41. As a result, the probate was not completed, and Gregg continued to serve as personal representative. CP 33.

Approximately one month later, in December of 2004, Gregg, as trustee, distributed from the Trust, \$600,000.00, or \$200,000.00 to each of the three beneficiaries. CP 328. Gregg directed the Merrill Lynch office in Tacoma to transmit Guy's \$200,000 distribution by mailing the distribution check to Guy at his 2783 Martin Road, #203, Columbus, Ohio address. CP 482, 539-40. This was the address to which Guy's attorney at the time, Beth Jensen, directed the check to be mailed. CP 541. Apparently, the distribution check did not reach Guy as the address provided to Gregg was incorrect. *Id.* The distribution check mailed in December 2004, was never negotiated. *Id.* Gregg, by and through his attorney, Mr. Petrich, communicated three options for providing Guy with his distribution. *Id.* Eventually, Guy received the \$200,000 distribution check and negotiated it.

At that time, Mr. Petrich willingly worked with Guy's attorney, Ms. Jensen to provide the Merrill Lynch statements and other information reflecting the amounts held in the Trust as well as matters relating to the Trust and Estate. CP 539, 545-46, 548-51, 554-55.

During Gregg's administration of the Estate, two significant legal issues arose relating to the payment and potential payment of taxes from the Estate, causing Gregg to wait for their resolution before closing the Estate. The first issue involved Gregg's payment of estate taxes to the Department of Revenue in the amount of \$30,000. CP 26, 29, 31, 547.

Specifically, after payment of such taxes, attorney Petrich became aware that the Washington State Supreme Court granted direct review from the trial court to determine issues relating to the payment of estate taxes to the state, which impacted Mrs. Mettle's Estate. CP 547; *See Estate of Hemphill v. Washington State Department of Revenue*, 153 Wn.2d 544, 105 P.3d 391(2005). Ultimately, given the ruling in *Estate of Hemphill, supra*, in September of 2005, the Estate received a refund of estate taxes previously paid to the Department of Revenue in the amount of \$27,445. CP 52. 482, 539-41, 548.

The second legal issue delaying closure of the Estate involved Gregg's decision to wait until the statute of limitations had expired with respect to the decedent's individual federal income tax returns before making additional Trust distributions. CP 481. This statute of limitations expired on or about April 15, 2006. CP 481.

There is no question that the most significant source of delay in closing the Estate and making all distributions from the Trust rests with Guy. From the time the court appointed Gregg as personal representative and trustee, three different attorneys entered notices of appearance (and subsequently notices of withdrawal) in the estate matter on Guy's behalf. Attorney Beth Jensen entered a Notice of Appearance on December 9, 2003 and a Notice of Intent to Withdraw on March 7, 2005. CP 23, 42-43. Attorney Terrence Posey entered a Notice of Appearance on June 14, 2005 and a Notice of Withdrawal on March 7, 2008. CP 46, 49-50. Finally, the Spencer Law Firm entered a Notice of Appearance on June 3, 2008 and withdrew pursuant to Court order on June 6, 2008. CP 295, 355-56.

Attorney Posey's declaration in support of his withdrawal, filed March 28, 2008, sheds light upon Guy's intractability in the proceedings. Paragraph 3 of Mr. Posey's Declaration states:

Mr. Mettle and I had significant differences of opinion regarding strategy for most of the time I represented him. The Petition that he refers to in his Objection to my withdrawal was finished and given to him well over a year ago. However, we have disagreed on the attachments and exhibits to file with the Petition. Prior to my Notice of Withdrawal, the last contact that I had with Mr. Mettle was a telephone conference on July 9, 2007 in which I again explained my professional opinion to him regarding the Petition. He told me that he would consider it and get back to me. He did not contact me in any way between July 9, 2007 and my Notice of Withdrawal. He also has not made a payment on his bill for my services in 14 months.

CP 160-61 (underline added).

The record reflects Guy's pattern of retaining attorneys, not cooperating with his chosen counsel and prolonging the proceedings by filing with the court repetitive, unsupported and defamatory pleadings. Guy's actions caused extreme delay in resolving the Estate and Trust. CP 87-94, 101-103, 104-154, 282-284.

On March 10, 2008, Gregg filed a Petition for Order Approving Final Accounting and Decree of Distribution. CP 51-54. On that same date, attorney Petrich filed a Declaration of David B. Petrich Regarding Attorney's Fees. CP 55-56. Thereafter, attorney Petrich filed a Revised Declaration of David B. Petrich Regarding Attorney's Fees. CP 486-87. Attorney Petrich's Declaration(s) attach every billing statement detailing all of his work in relation to the guardianship, Estate and Trust as well as the details of his billable hourly rate. CP 57-84, 489-530.

Also on March 10, 2008, Gregg filed a Petition to Approve Trustee's Interim Accounting in the Trust case, Pierce County Superior Court Cause No. 08-4-00411-5. CP _____. *See* footnote 3. The Petition to Approve Trustee's Interim Accounting detailed the Trust account for the period December 10, 2002 through December 31, 2007. *Id.* This Petition relating to the Trust reflects the following Trust activity and status:

Starting Balance:	\$888,792.22
Disbursements:	(\$600,000.00)
Appreciation:	\$92,824.24
Additions:	<u>\$12,368.35</u>
Ending Balance:	\$393,984.81

Id. The starting balance in the Trust reflects the figure reported as the ending balance in the Guardian's Final Report, which was approved by the Pierce County Superior Court in Cause No. 00-4-01533-2. *Id.*⁴ Again, the disbursement amount of \$600,000.00 reflects the three \$200,000.00 disbursement checks sent to Gregg, John and Guy as Trust beneficiaries in December 2004. *Id.* The increase to the Trust of \$92,824.24 reflects appreciation to the account, and the \$12,368.35 "addition" resulted from the transfer of Mrs. Mettle's Charles Schwab account into the Trust. *Id.* On March 31, 2008, the trial court consolidated Cause No. 08-4-00411-5 with the instant case. *Id.*

Thereafter, on June 27, 2008, the Honorable Thomas Larkin heard the Personal Representative's Final Accounting and the Trustee's Interim Accounting. Verbatim Transcript of Proceedings (6/27/08). On that same date, Judge Larkin entered an Order Approving Final Account and Decree of Distribution ("Order Approving Final Account") and an Order and Decree Approving Trustee's Interim Accounting ("Order Approving Trustee's Interim Accounting"). CP 626-628; 629-630. It is these orders that are the subject of this appeal. CP 679-718.

The Order Approving Final Account ordered that the balance of the property in the Estate be delivered to Gregg as Trustee of the Dorothy P. Mettle Revocable Living Trust. CP 626-628. The Order Approving Trustee's Interim Accounting approved the interim accounting and

⁴ Although Guy appealed the Guardian's Final Report to the Division II Court of Appeals, this appeal was dismissed on March 22, 2004 for lack of prosecution.
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ordered that the Trustee could consolidate all trust assets into a non-interest bearing account at Merrill Lynch. CP 629-630. The Order Approving Trustee's Interim Accounting also provides that the interim distribution may be delayed until either the statutory period for appealing the Order had expired or any appeal of the Order had been resolved. *Id.*

Guy filed a Motion for Reconsideration of the Superior Court's June 27, 2008 orders, which the Superior Court denied on August 1, 2008 by its Order on Motion for Reconsideration. CP 679-718, 1008-09. Thereafter, on August 26, 2008, Guy filed his Notice of Appeal to Court of Appeals Division 2 CP __.⁵ On October 2, 2008, over three months after entry of the June 27, 2008 Orders, Guy Mettle filed several motions relating to the case including a Motion for Recusal of Honorable Judge Thomas Larkin. CP __. *See* footnote 5, above.

Guy's 351 page Appellant's Incomplete Brief followed.

IV. ARGUMENT

A. Standard of Review.

RCW 11.96A.020 confers plenary power on the probate court. The court has “full power and authority” to proceed “in any manner and way

⁵ It appears from Respondent's review of the Clerk's Papers in Case No. 38243-1-II that documents filed in the Superior Court after August 22, 2008 do not appear in the Clerk's Papers. Thus, Respondent is unable to provide citation to relevant pleadings after that date as such do not appear in the Clerk's Papers.

that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court.” RCW 11.96A.020(2).

In general, because proceedings for probate of wills are equitable, the appellate court reviews the trial court record de novo. *In re Estate of Black*, 116 Wn.App. 476, 483, 66 P.3d 670 (2003), *aff'd on other grounds*, 153 Wn.2d 152, 102 P.3d 796 (2004).⁶ The overriding consideration in Washington probate proceedings is the determination of the decedent's wishes. *In re Estate of Stein*, 78 Wn. App. 251, 259, 896 P.2d 740 (1995).

While the general rule sets forth a de novo standard, there are numerous exceptions to this rule. For example, with regard to the award of attorney's fees in probate and trust matters, the appellate court reviews the trial court's order for abuse of discretion. *In re Estate of Larson*, 103 Wn.2d 517, 521, 694 P.2d 1051 (1985); *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 712, 732 P.2d 974 (1987).

Further, a trial court's decision in a trustee removal case will seldom be reversed absent a manifest abuse of discretion. *Fred Hutchinson Cancer Research Ctr.*, 107 Wn.2d at 716; *See Bartlett v.*

⁶ Further, the court's primary duty in interpreting a will is to give effect to the testator's intent. *In re Estate of Bergau*, 103 Wn.2d 431, 435, 693 P.2d 703 (1985). The interpretation of a will is a question of law which is reviewed de novo. *King v. Snohomish County*, 146 Wn.2d 420, 423-424, 47 P.3d 563 (2002). It does not appear that Guy challenges the interpretation of Mrs. Mettle's Will, instead focusing upon Gregg's actions as personal representative; however if Guy makes such a claim, Gregg sets forth the standard for such.

Betlach, 136 Wn.App. 8, 146 P.3d 1235 (2006)(citations omitted)(trust beneficiaries' removal of trustee for reasonable cause must be necessary to save the trust). Likewise, the trial court has broad discretion in deciding whether to remove a personal representative. *In re Beard's Estate*, 60 Wn.2d 127, 372 P.2d 530 (1962); *See* RCW 11.28.250.

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). “A trial court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *In re Marriage of Lawrence*, 105 Wn. App. 683, 686 fn. 1, 20 P.3d 972 (2001)(citing *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)).

Given the numerous exceptions to the general rule of de novo review, and the fact that the Court's Orders involved the determination of matters so within the discretion of the trial court (including adopting a condition as to distribution and considering allegations of distribution

delays), review should be based upon an abuse of discretion standard. *See In re Brown's Estate*, 129 Wash. 84, 88-89, 224 P. 678 (1924)(applying abuse of discretion standard where issue involved determination as to executor's alleged bad faith regarding distributions).

Further, on appellate review, contentions that are unsupported by argument or citation of legal authority will not be considered. *Camer v. Seattle Post-Intelligencer*, 45 Wn.App. 29, 36, 723 P.2d 1195 (1986)(citing RAP 10.3(a)(5)(6), *rev. denied*, 107 Wn.2d 1020, *cert. denied*, 482 U.S. 916, 107 S.Ct. 3189, 96 L.Ed.2d 677 (1987)). Finally, unchallenged factual findings are verities on appeal. *Sorenson v. Pyeatt*, 158 Wn.2d 523, 528, 146 P.3d 1172 (2006).

Guy's Incomplete Brief fails to comply with applicable Rules of Appellate Procedure ("RAP"), including RAP 10.3(a)(5) and (6), as he fails to provide reference to the record for each factual assertion and fails to provide legal authority and reference to relevant parts of the record. Accordingly, this Court should not consider Guy's appeal. Neither does Guy's brief challenge the trial court's factual findings in its Orders that are the subject of this appeal. Thus, these factual findings are verities on appeal and the conclusions of law flowing therefrom should be affirmed.

If this Court considers Guy's appeal, there is no doubt that the trial court properly approved Gregg's Petition of Personal Representative, closed the Estate and ordered the balance of the property in the Estate to be delivered to the Trust. Likewise, the trial court properly approved Gregg's interim accounting with respect to the Trust and denied Guy's Request for Reconsideration. Given the foregoing, this Court should affirm the Superior Court's Orders that are the subject of this appeal. Gregg also seeks an award of attorney's fees as set forth in Section E, below.

B. Guy Mettle's Requested Relief Is Inappropriate and without Legal Basis or Support.

Guy seeks numerous forms of relief in Appellant's Incomplete Brief including, but not limited to, replacing the trustee, holding attorney Petrich and his firm liable for their "actions", blocking distributions to Gregg and his brother, John, disbaring attorney Petrich, directing certain discovery, granting summary judgment against the personal representative and attorney Petrich for negligence and the revision of prior court orders.

Guy Mettle also advances many allegations against Gregg and his attorneys, including criminal profiteering, kidnapping, violent crimes, the existence of a "Kiesel-Petrich Criminal Plan", ex parte communications between Judge Larkin and attorney Petrich and other allegations. Absolutely none of these assertions is supported by the record and all are

highly prejudicial to Gregg and his attorneys, and inappropriate under the circumstances. Each and every one of these assertions should be disregarded by this Court and Guy should be admonished for his baseless, inflammatory and inappropriate assertions.

C. The Superior Court Did Not Err in Approving Gregg's Final Account and Decree of Distribution of the Last Will and Testament of Dorothy P. Mettle.

1. Under Washington Law, Gregg Properly Administered the Estate under Nonintervention Powers.

The Superior Court did not err in approving Gregg's Final Account and Decree of Distribution under the Will. It is undisputed that the Will grants to Gregg nonintervention powers, and the record reflects that Gregg fulfilled all of his legal duties as personal representative in administering the Will. A nonintervention will grants the personal representative the maximum statutory authority to manage the affairs of an estate in order to simplify and expedite its administration. 26B Mitchell & Mitchell, Washington Practice: *Probate Law and Practice* § 3.11 (2006).

A personal representative's powers under a nonintervention will are extremely broad in scope and allow a personal representative the freedom to administer the Estate to its final disposition without court intervention. *See* Chapter 11.68 RCW. RCW 11.68.090(1) provides, in relevant part:

Any personal representative acting under nonintervention powers may borrow money on the general credit of the estate and may mortgage, encumber, lease, sell, exchange, convey, and otherwise have the same powers . . . that a trustee has under RCW 11.98.070 and chapters 11.100 and 11.102 RCW with regard to the assets of the estate, both real and personal, all without an order of court and without notice, approval, or confirmation, and in all other respects administer and settle the estate of the decedent without intervention of court . . . a personal representative acting under nonintervention powers may exercise the powers granted to a personal representative under chapter 11.76 RCW but is not obligated to comply with the duties imposed on personal representatives by that chapter.

RCW 11.68.090(1)(underline added).

While Guy alleges that Gregg failed to fulfill his duties as personal representative, nothing in the record supports Guy's contention. The personal representative of an estate has a fiduciary relationship with the estate's beneficiaries, and owes a duty to act in the beneficiaries' best interests. *In re Estate of Larson*, 103 Wn.2d 517, 521, 694 P.2d 1051 (1985).

As evidenced by Gregg's October 6, 2004 filing of his Declaration of Completion of Probate and Notice of Declaration of Completion of Probate, Gregg sought to promptly administer and close the Estate. CP 33-34. However, Gregg was immediately faced with a Petition from Guy followed by numerous appearances and withdrawals by attorneys, which led to continual delays in communicating and resolving Estate issues. *See*

CP 531-555. Moreover, nothing in the record supports that Gregg attempted to deceive Guy or the court regarding the Estate, or seek in act in any manner contrary to the beneficiaries' interests. In fact, the Declaration of Completion of Probate sets forth a complete accounting of Mrs. Mettle's Estate reflecting nominal and reasonable expenses incurred in administering the Estate. CP 31-32. Moreover, Gregg's conservative and careful approach to administration of the Estate benefited the beneficiaries. CP 26, 29, 31, 547 (re: Estate tax issues).

2. Gregg Was Not Required to File Annual Reports of the Estate.

Guy also contends that Gregg violated RCW 11.76.010 by failing to file annual reports with the trial court, thus requiring reversal of the trial court's Order Approving Final Account and Decree of Distribution. However, Guy is mistaken when he argues the application of RCW 11.76.010 to the administration of Estate as this statute applies to the settlement of estates with court intervention, which is not the case here.

Guy also ignores the plain and unambiguous language of RCW 11.68.065, which allows a beneficiary whose interest in the estate has not been fully distributed to petition the court for an order directing the personal representative to deliver a report of the affairs of the estate. RCW 11.68.065. This statutory provision clearly supports Gregg's

position that a personal representative appointed with non-intervention powers is not required to prepare a report or an accounting unless ordered by the Court after a proper request by a beneficiary. RCW 11.68.065. While Guy filed a Petition for Accounting and Approval of Fees on November 1, 2004, there was never a hearing on the matter and never an order requiring Gregg to file an accounting with the court. Guy's argument fails.

3. Gregg's Filing of the Will on September 10, 2003 Does Not Violate Washington Law.

Citing to RCW 11.20.010, Guy next complains that Mrs. Mettle's Will was not filed within thirty days of her death. Guy appears to claim that this action supports reversal of the Court's Order Approving Final Account and Decree of Distribution as well as variety of sanctions against Gregg and attorney Petrich. Guy's claim fails for several reasons. First, Guy's contention flies in the face of the purpose of chapter 11 RCW and RCW 11.20.010. The provision's purpose is to "safeguard the integrity of testamentary dispositions." *In re Hyde's Estate*, 190 Wash. 88, 93, 66 P.2d 856 (1937) (citing an earlier, but substantively similar version of this statute as an illustration for this rule and noting the statute's 30-day requirement). "The public policy and legislative intent behind statutes requiring the production of wills is to encourage the probate of wills and

to prevent one person from benefiting at the expense of others by refusing to probate a will in his or her possession.” 57 Am.Jur., Wills § 730.

Under the circumstances, Greg and John Mettle, in their capacity as co-guardians of Mrs. Mettle, efficiently and dutifully oversaw Mrs. Mettle's accounts prior to her death. Because Mrs. Mettle's affairs had been administered in this manner for years before her death, there was no exigency necessitating the immediate filing of the Will upon her death to give notice to creditors or to identify beneficiaries.

Moreover, Guy fails to show how the delay in the filing of the Will caused him damage. While RCW 11.20.010 provides that a person having custody of any will shall deliver such to the court within thirty days after receiving knowledge of the testator's death, liability for failing to deliver a will within that timeframe is not triggered unless the aggrieved party has sustained damage as a result of the party's actions. RCW 11.20.010. Guy cannot show that any of the policies of chapter 11 RCW have been violated, where each Trust beneficiary, including Guy, received equal distributions of \$200,000.00 to date, and where the Trustee is prepared to evenly distribute the remainder of the Trust upon resolution of all appeals. *Compare with Myers v. Exchange Nat. Bank*, 96 Wash. 244, 164 P. 951

(1917) (objecting party did not receive in excess of \$4,000 disbursement due to failure of custodian of will to timely produce such).

Even if Guy can show that he was damaged by Gregg's failure to file the Will within the required period, Guy's challenge is barred by the applicable statute of limitations. *See, e.g., Myers, supra* (recognizing three year statute of limitations for failure to deliver the will for probate within thirty days). In this case, assuming Guy has a cause of action or claim relating to Gregg's actions, such cause of action accrued when Guy knew or should have known all of the relevant facts giving rise to a cause of action. *See E.R.B. v. Church of God*, 89 Wn. App. 670, 682, 950 P.2d 29 (1998) (citations omitted). Guy knew or should have known that Mrs. Mettle's Will had not been delivered to the court within thirty days of her death by either (1) the thirtieth day after her December 10, 2002 death, or (2) when the Will was filed, on September 10, 2003. In either case, any action Guy may have had against Gregg (as Personal Representative or Trustee), was subject to the expiration of the statute of limitations in either 2005 or 2006. Finally, Guy is not a beneficiary under the Will and, arguably, does not have standing to bring an action or claim regarding this action.

Guy's arguments that Gregg breached his duties as personal representative are not supported by the record and, even if a technical breach or statutory violation occurred, Guy cannot show that he was prejudiced or damaged in any appreciable manner by such violation.

4. The Trial Court's Order Denying Guy's Motion for Recusal Is Appropriate and Legally Sustainable

Guy also references the trial court's Order Denying Guy Mettle's Motion for Recusal of October 24, 2008. Guy fails to provide any reasoned argument, relevant case law or citation to the record in support of his contention that the trial court erred in denying his Motion for Recusal, and this court should not consider his argument. RAP 10.3(a)(5),(6). In addition to issues relating to timeliness in bringing his Motion for Recusal, Guy fails to show any facts supporting recusal including that there was an ex parte communication between attorney Petrich and Judge Larkin. This is because there was no ex parte communication. Guy's allegation of an ex parte communication is absurd. Guy was present in court and participated in the June 27, 2008 hearing where Judge Larkin signed and entered the Orders. Verbatim Transcript of Proceedings (6/27/08). Further, the mere fact that a court renders adverse rulings does not support recusal. The trial court did not abuse its discretion in denying Guy's

Motion for Recusal. *In re Marriage of Farr*, 87 Wn.App. 177, 188, 940 P.2d 679 (1997)(abuse of discretion standard for motions for recusal).

5. The Trial Court Properly Awarded Attorney's Fees, hich Were Reasonable and Supported in the Record.

Finally, Guy challenges the trial court's award of attorney's fees for Mr. Petrich's work. However, Guy does not provide any reasoned argument or citation to the record supporting his assertion. Attorney Petrich's fees are well supported by his declarations and a review of these records shows fair and reasonable billing entries for work necessary to accomplish tasks relating to the administration of the Estate, including repeated interactions with Guy and his attorneys. CP 55-56, 486-87. While Guy accuses Mr. Petrich of inflating his attorney's fees, it is notable that Mr. Petrich repeatedly reached out to Guy in hopes of cooperating to close the Estate and distribute the assets of the Trust as promptly as possible and without incurring additional attorney's fees. CP 540, 547, 550, 553-54. Unfortunately, Guy did not avail him of this opportunity.

Given the nature of this case including the amount of work necessary to respond to Guy's motions, voluminous filings and other actions as well as work with multiple attorneys and navigation of estate tax issues, Mr. Petrich's attorney's fees are reasonable. The trial court did not abuse its discretion in awarding attorney's fees.

D. The Superior Court Did Not Err in Approving the Trustee's Interim Accounting.

1. Under Washington Law, Gregg Properly Administered the Trust and Fulfilled His Fiduciary Duties.

The Superior Court was also correct in approving the Trustee's interim accounting. While Guy complains that Gregg failed in his duties as trustee and that the Court's Order Approving Interim Accounting is erroneous, the record reveals otherwise.

"A trustee is a fiduciary who owes the highest degree of good faith, diligence and undivided loyalty to the beneficiaries." *In re Estate of Ehlers*, 80 Wn.App. 751, 757, 911 P.2d 1017 (1996)(citing *Estate of Jordan v. Hartford Accident & Indem. Co.*, 120 Wn.2d 490, 502, 844 P.2d 403 (1993)). The trustee has a duty to maintain clear, complete and accurate books and records relating to trust property and the trust's administration. Restatement (Third) of Trusts § 83 (2007). Further, a trustee must provide trust beneficiaries with notice of nonroutine transactions. RCW 11.100.140.

The record supports that Gregg fulfilled his duties and obligations as Trustee. Specifically, Gregg did not engage in any nonroutine transactions and there is absolutely no evidence in the record that Gregg's actions compromised or diminished the Trust assets, or harmed Guy. In

fact, the record reveals otherwise. The beginning balance of the Trust was \$954,614. CP 331. Notably, under Gregg's administration, the assets of the Trust appreciated in value and there were no expenses paid by the Trust at any time. CP 303. The only significant transaction relating to the Trust was the 2004 distribution of \$600,000.00, which was split equally among Gregg, Guy and John and which, of course, was fully disclosed to Guy. CP 303, 540. Gregg's actions with regard to Trust administration were appropriate, transparent and in the beneficiaries' best interests.

2. Gregg's Fulfilled His Duties with Respect to the Accounting of the Trust and His Actions Do Not Violate Washington Law.

While Guy also complains that Gregg failed to provide an annual accounting to him pursuant to RCW 11.106.020, the record reflects that Gregg was not required to provide such an accounting as there was nothing for which to account in terms of receipts and disbursements as required by RCW 11.106.020.⁷ In any event, Gregg kept Guy well informed about Trust matters, including the distribution of \$600,000. CP 539-40, 543-51, 555.

⁷ RCW 11.106.020 provides that "the trustee or trustees appointed by any will . . . shall mail or deliver at least annually to each adult income trust beneficiary a written itemized statement of all current receipts and disbursements made by the trustee of the funds of the trust both principal and income, and upon the request of any such beneficiary shall furnish the beneficiary an itemized statement of all property then held by that trustee, and may also file any such statement in the superior court of the county in which the trustee or one of the trustees resides."

Even if Gregg was required to provide annual reports and did not, Guy does not demonstrate he was prejudiced or damaged by any of Gregg's actions relative to reporting. *See In re Park's Trust*, 39 Wn.2d 763, 238 P.2d 1205 (1951)(trustee not liable to beneficiary even if technical failure to provide accounting where error is harmless). Accordingly, Guy's claim fails and the trial court did not abuse its discretion.

3. There Was No Basis under Washington Law to Remove Gregg as Trustee.

Guy also argues that Gregg should have been removed as Trustee. However, there is absolutely no evidence in the record to support Guy's June 18, 2008 request to the trial court. Based upon the record before the trial court, including a lack of evidence of bad faith or any breach of Gregg's duties as well as evidence of numerous delays caused by Guy in the administration of the Estate and Trust as well as communications with Guy regarding the Trust, the trial court did not abuse its discretion in denying Guy's request to replace Gregg.

4. The Trial Court Properly Awarded Attorney's Fees, which Were Reasonable and Supported in the Record.

The interim accounting also approves attorney Petrich's attorney's fees, which fees are supported by the Declaration of David B. Petrich.

Given the nature of this case including the amount of work necessary to interact with Guy, counter his numerous pleadings and interact with numerous attorneys, there is substantial evidence to support the trial court's finding that Mr. Petrich's attorney's fees were reasonable, thereby supporting an award of such fees. The trial court did not abuse its discretion in ordering an award of attorney's fees to attorney Petrich.

5. There Is No Evidence that Gregg Intentionally Delayed Distribution of Trust Assets – The Record Supports that Guy Caused Numerous Delays

Guy also contends that the Gregg, as Trustee, inappropriately delayed distribution of the beneficiaries' inheritance, but, once again, the record does not support his contention. As set forth in detail above, Guy's actions in filing numerous motions and pleadings, hiring several attorneys to represent him and failing to timely respond to attorney Petrich's request over the years delayed settlement of the Estate and Trust as well as Guy's distributions.

6. The Trial Court's Order Approving Interim Accounting, which Includes a Provision Delaying Distribution until Appeals Are Exhausted, Effectuates Mrs. Mettle's Intent as Evidenced in Her Trust.

Finally, the trial court did not err in entering an Order containing language that "the interim distribution proposed by the Trustee is authorized and that such distribution may be delayed until the statutory

period for appealing this Order has expired or until any appeal of this Order has been resolved." CP 626-28. First, Guy Mettle fails to cite to any legal authority supporting that the trial court does not have the authority to condition the proposed interim distribution upon the expiration of the applicable appeal period. RCW 11.96A.020 grants the trial court broad authority to fashion orders relating to estates and trusts.

RCW 11.96A.020(2) states:

(2) If this title should in any case or under any circumstance be inapplicable, insufficient, or doubtful with reference to the administration and settlement of the matters listed in Section (1) of this section, the court nevertheless has full power and authority to proceed with such administration and settlement in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court.

RCW 11.96A.020 (underline added).

Further, RCW 11.96A.060 states:

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.

In this case, given Guy's history of frivolous filings, which required significant legal work to address, the trial court reasonably conditioned the Trustee's proposed distribution upon full resolution of the

case to ensure that there would be ample assets in the Trust to satisfy fees expended on its behalf. Further, the trial court's Order advances the intent of Mrs. Mettle's Trust, which is to distribute maximum assets evenly among her children. Mrs. Mettle's intent was neither complicated nor controversial. Mrs. Mettle's Will directed the transfer of her assets into a Trust for equal distribution among her three living children. The trial court's Order placed an appropriate condition upon future distributions to the beneficiaries by seeking to limit continued, frivolous litigation to preserve Mrs. Mettle's assets for future distribution. Given such, the trial court's Order Approving Interim Accounting was appropriate, and the trial court did not abuse its discretion in entering the order.

E. The Estate Is Entitled to An Award of Attorney's Fees and Costs on Appeal.

Pursuant to RCW 11.96A.150(1), RAP 18.9 and RAP 18.1, the Estate requests an award of attorney's fees and costs for responding to Guy's appeal matter(s) in the appellate courts.

With respect to the Estate/Trust's request for attorney's fees, TEDRA, relates to trust and estate matters and specifically provides for an award of attorneys' fees and expenses on appeal, as follows:

Either the superior court or *any 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 non probate 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. 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(1) (emphasis added). As noted above, this section specifically applies to appellate proceedings involving estate and trust matters and gives the court broad discretion in awarding fees. *See* RCW 11.96A.150(2). *See In re Irrevocable Trust of McKean*, 144 Wn.App. 333, 183 P.3d 317 (2008)(awarding attorney's fees on appeal pursuant to RCW 11.96A.150(1) to avoid settlor of trust's actions to deplete trust and frustrate Trust's purpose).

Respondent also requests an award of attorney's fees and costs pursuant to RAP 18.9(a), which provides, in relevant part:

The appellate court . . . on motion of a party may order a party or counsel . . . who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay . . . The appellate court may condition a party's right to participate further in the review on compliance with terms of an order or ruling including payment of an award which is ordered paid by the party.

RAP 18.9(a).

In *Rhinehart v. Seattle Times Co.*, 51 Wn.App. 561, 581, 754 P.2d 1243 (1988), the court of appeals awarded fees pursuant to RAP 18.9(a) where the appeal presented no debatable issues upon which reasonable minds might differ and was so devoid of merit that there was no reasonable possibility of reversal. *Id.* at 581.

In this case, where the Estate/Trust has incurred attorney's fees and costs in responding to Guy's appeal matters before this Court, an award of attorney's fees and costs is proper. This request is particularly compelling where Guy's motions are neither supported by any factual basis in the trial court record nor any citation to relevant legal authority and/or legal analysis. Under these unique circumstances, an award of attorney's fees is appropriate.

Further, the expenditure of attorney's fees and costs incurred in responding to these motions does not benefit the Estate/Trust in any way, but instead reduces assets that would otherwise be equally divided among the three beneficiaries. Thus, Gregg and his brother, John, are damaged financially by Guy's appeal, in the form of a reduced distribution. Accordingly, in the interests of fairness and equity, Guy should be ordered to pay for the attorney's fees and costs expended by the Estate/Trust in responding to these motions.

If Guy contends that he is unable to pay such fees and costs at this time, the appellate court can order that Guy's distribution be reduced by the reasonable attorney's fees and costs incurred by the Estate/Trust in responding to the motions. For the foregoing reasons, an award of attorney's fees and costs in favor of the Estate/Trust to be paid by Guy, personally, is warranted.

V. CONCLUSION

For the reasons set forth above, Gregg respectfully requests that this Court affirm the trial court's Orders that the are subject of Guy's appeal and order Guy to pay the Estate and Trust's attorney's fees and costs associated with his appeals in this case pursuant to RCW 11.96A.150(1), RAP 18.9 and RAP 18.1.

RESPECTFULLY SUBMITTED this 13th day of September, 2010.

EISENHOWER & CARLSON, PLLC

By: 

David B. Petrich, WSBA # 18711
Jennifer A. Wing, WSBA # 27655
Of Attorneys for Respondent

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COURT OF APPEALS
DIVISION II

CERTIFICATE OF SERVICE

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I hereby certify that on the 13th day of September, 2010, I served
Appellant with a copy of the foregoing document by depositing with the
United States Postal Service, first class mail with postage affixed and pre-
paid, a true and correct copy of the foregoing Respondent's Brief for
delivery at the following address:

STATE OF WASHINGTON
BY Ca DEPUTY

Guy Mettle
Post Office Box 2491
Westerville OH 40086-2491

I arranged for the original of the foregoing document to be filed
with the Court of Appeals, Division II, by depositing the same with ABC
Legal Messengers for delivery to the following address:

Clerk of the Court
Washington State Court of Appeals, Division II
950 Broadway, #300
Tacoma, WA 98402

DATED this 13th day of September, 2010.



Gayle Herrmann

IN RE THE ESTATE OF DOROTHY P. METTLE - 32