

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 39463-4

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JOHN E. COOK, a married man,

Respondent,

v.

A. DIANE BRATENG, a widow concerning her interest in
realty subject to partition action, and A. DIANE BRATENG,
as Successor Sole Trustee of the Elmer J. Cook Living Trust,

Appellant.

Respondent' Brief

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I. INTRODUCTION.

The Appellant, A. Diane Brateng, appeals the decision of the Pacific County Superior Court finding she breached her fiduciary duties as Trustee, denying her request for compensation for services to decedent and awarding attorney's fees. The Superior Court's decision should be affirmed in all respects.

II. RESPONSE TO ASSIGNMENTS OF ERROR.

a. The Trial Court correctly denied Appellant's request for payment for services to the decedent.

b. The Trial Court correctly held the Appellant breached her common law fiduciary duty by not disclosing to the beneficiary that she chose to charge the remainder estate rather than sell trust property to pay for the services to decedent Elmer J. Cook.

c. The Trial Court correctly held that the Appellant's post-death claim for services to Elmer J. Cook was in direct conflict with Elmer J. Cook's express intent that the Respondent receive 9/20th of the Trust Estate.

d. The Trial Court correctly disallowed \$10,000.00 for house remodel expenses related to the purchase of kitchen cabinets that were not subject to water damage and

completed when Elmer J. Cook had no reasonable expectation of returning to the house.

e. The Trial Court did not abuse its discretion in awarding Respondent all of his claimed attorney fees, and Appellant one-half of her claimed attorney fees.

f. The Trial Court correctly held that travel expenses and labor costs are not “fiduciary” costs as allowed in the Trust.

g. The Trial Court correctly used its powers in equity to use the 2007 appraisal value of the estate property and the partition property.

III. THE FINDINGS OF FACT ARE VERITIES ON APPEAL.

The Appellant chose not to provide a transcript of the trial. Therefore, there is no evidence before the court of appeal to challenge the Trial Court’s factual findings. The Appellant concedes as much.

“The matter on appeal only concern questions of law which are based on the facts as found by the trial court which are not appealed, except Finding of Fact 21, regarding intent of the deceased Trustor, which finding could only be based on the trial courts (sic) interpretation of the Trust Agreement itself, and not trial testimony, of which there was none, and therefore Finding 21 is appealed as not being supported by substantial evidence and as contrary to the express terms of the Trust Agreement.”¹

¹ Appellant’s Brief, pages 2 and 3. Without a transcript,

Therefore, the unchallenged Findings of Facts are verities on appeal.² The issue for this court is whether the Findings support the Conclusions of Law.

IV. FACTS.

On November 27, 1995, Elmer John Cook (hereinafter "Elmer") executed a living trust, naming himself and Appellant as Trustees.³ Prior to November, 1997, Appellant made regular trips from her home to Ilwaco to look after Elmer. By November, 1997, Elmer was declared incompetent and unable to care for himself, and Appellant decided to take him into her home.

The decision to take Elmer to her home was not discussed with Respondent. During the two years Elmer lived with Appellant, Appellant never notified or informed Respondent she intended to claim the value of her services against the estate after Elmer passed away.⁴ At no time prior to Elmer's death did Appellant seek to sell the Ilwaco house to pay for her services to Elmer.

After Elmer was declared incompetent but while he was living with Appellant, Appellant used Trust money to

Appellant has no basis to claim there was no trial testimony of intent.

² Robel v. Roundup Corp., 148 Wash. 2d 35, 59 P.3d 611 (2002)

³ Exhibit 1.

⁴ Findings of Fact 15.

remodel the Ilwaco house, the only significant asset of the Trust. Although Appellant claimed there was water damage, the remodel included new kitchen cabinets and countertops in an area of the house not affected by water damage. Under the Trust Agreement, Appellant receives the house as a credit to her portion of the estate.⁵ Appellant never informed Respondent of the need and scope of remodel to the house.

Elmer died on January 1, 2000.⁶ Although both Appellant and Respondent discussed settlement of the Trust, the discussions broke down because Appellant sought reimbursement for travel time and labor to the Ilwaco house prior to November 1997, and \$1,500.00 per month for her personal services to Elmer after November 1997.⁷ At no time has Appellant filed a claim with the Trust Estate for the cost of these services.

After a two-day trial, the court disallowed the travel and labor expenses, but allowed \$125.00 per month for fiduciary duties. The court disallowed the claim for services, and disallowed \$10,000.00 for the \$20,000.00 remodel expense.⁸ The court awarded Elmer's property to Appellant although she had executed a Trustee's Deed to herself in

⁵ Exhibit 1.

⁶ Findings of Fact 9.

⁷ At various times in the litigation, Appellant demanded more per month, but her claim at trial was for \$1,500.00

⁸ See Findings of Fact 13, 14, 15, 16 and 22.

2005, and partitioned Uncle Chuck's property, awarding it to Respondent. The court, in equity, used the 2007 value for both properties.⁹ Finally, finding that Appellant breached her fiduciary duty as Trustee, the court awarded Respondent all of his attorney fees, and Appellant one-half of her attorney fees.¹⁰

V. THE TRIAL COURT'S DECISION SHOULD BE AFFIRMED

A. The Trial Court Correctly Denied Appellant's Request For Compensation For Her Personal Services to Decedent During His Lifetime

1. The Appellant Failed To Provide Notice To The Beneficiaries

At trial, Appellant requested she be paid \$1,500.00 per month from November 1997 to December 31, 1999, for personal services she provided Elmer. Respondent objected that he was given no notice of the deferred claim, and therefore, no opportunity to avoid the costs to preserve the trust estate, if he chose to do so. The Trial Court agreed, finding:

"The Defendant had a duty to disclose to Plaintiff that she was deferring making any charges against the estate for her services to her father."¹¹

⁹ Findings of Fact 19.

¹⁰ Findings of Fact 30 and 31.

¹¹ Conclusion of Law 35.

“Defendant breached her duty as Trustee of the Elmer J. Cook Revocable Trust by failing to disclose to John Cook that she was deferring charges to the estate for her services to the trust.”¹²

Washington is clear that a Trustee owes a fiduciary duty to the beneficiaries, even the remainder beneficiaries.

“All parties agree that a trustee is a fiduciary who owes the highest degree of good faith, diligence and undivided loyalty to the beneficiary. (Citations omitted). A trustee’s duties and powers are determined by the terms of the trust, by common law and by statute.”¹³

The Trust, Article Fourteen, Section 2, states:

“Notwithstanding anything to the contrary in this agreement, my Trustee shall not exercise any power in a manner inconsistent with the beneficiaries’ right to the beneficial enjoyment of the trust property in accordance with the general principals of the laws of trusts.”

The Trust Agreement requires the trustee protect the beneficiaries of the Trust, which includes the Respondent, as well as the Salvation Army and the Finnish Assemble of God Church, Naselly, WA.

In *Esmieu v. Schrag*,¹⁴ the Trustee failed to inform the beneficiaries of a court hearing that affected the disposition of the trust. The Court of Appeal found the Trustee had a common laws duty to inform the beneficiaries of the hearing.

¹² Conclusion of Law 37.

¹³ *Ehlers v. Hurdung*, 80 Wash. App. 751, 757, 911 P.2d 1017 (1996).

¹⁴ 88 Wash. 2d 490, 563, P2d 203 (1997)

“The trustees, as fiduciaries, owe to the beneficiaries the highest degree of good faith, care, loyalty and integrity. This duty includes the responsibility to inform the beneficiaries fully of all facts which would aid them in protecting their interests.”¹⁵

Washington statutes require the Trustee act in good faith. RCW 11.97.010, provides that the Trust Agreement controls but “In no event may a trustee be relieved of the duty to act in good faith and with honest judgment.”

Appellant claims that the Trustee was not required to disclose her deferred compensation plan to Respondent because RCW 11.106.020 only requires an annual accounting to adult income trust beneficiaries.¹⁶ But, RCW 11.106.020 does not supplant common law, and the deferred compensation plan would not show up in an income and expense report in any instance. Rather, the Trustee had a common law duty of good faith to inform the Respondent of her plan because it constitutes facts that would aid him in protecting his interest.¹⁷ Throughout this litigation, Appellant has attempted to use her deferred compensation plan to deny Respondent any interest in the estate, thereby illustrating the very reason her plan needed to be disclosed to Respondent prior to Elmer’s death. The failure to disclose

¹⁵ 88 Wash. 2d at 498; Accord *Petrie v. Petrie*, 105 Wash. App. 268, 19 P3d 443 (2001).

¹⁶ Appellant’s Brief, page 27.

¹⁷ See *Esmieu* and *Petrie*, *supra*.

the plan compromised Respondent's ability to protect his interest in the trust estate, and is a breach of Appellant's duty as a fiduciary to the Respondent.

The breach is aggravated by the fact that on August 1, 2005, while this case was pending, Appellant deeded Elmer's Ilwaco house to herself individually, thereby removing from the estate the only asset available to pay Respondent's share of the estate.

2. The Appellant Failed To File A Claim

The second reason that Appellant was correctly denied deferred compensation for her personal services to Elmer is that she failed to file a claim with the Trust Estate. Article Six, Section 1 of the Trust Agreement authorizes the Trustee to pay "Legally enforceable claims against me and against my estate." The Trust Agreement contemplates the need to file formal claims against the Trust Estate.

Under RCW 11.40.140, a personal representative must file a formal claim against the estate.

"If the personal representative has a claim against the decedent, the personal representative must present the claim in the manner provided for in RCW 11.40.070 and petition the court for allowance or rejection. The petition must be filed under RCW 11.96A.080. This section applies whether or not the personal representative is acting under nonintervention powers."

There is no evidence, and no Finding of Fact, indicating the Appellant filed a claim against the Trust for her services to Elmer.

3. The Appellant Has Not Established An Express Or Implied Agreement With Elmer To Be Paid For Her Services.

In order to make a valid claim for the personal services provided to Elmer during his lifetime, the Appellant must establish either an express or implied contract with Elmer to be compensated for those services.

“A party seeking to establish a claim against an estate for services rendered to the decedent during his or her lifetime has the burden of providing a contract, express or implied, to pay for the services; and the evidence to support such claim must be clear, cogent, and convincing.”¹⁸

In this case, there is no finding of either an express or implied contract with Elmer for Appellant to be reimbursed for her services to him during his lifetime. Nor could there be, since at the time the services were rendered Elmer was legally incompetent and unable to enter into a binding contract with anyone.

¹⁸ Estate of Suddreth, 59 Wash. 2d 517, 368 P.2d 907 (1962).

B. The Trial Court Correctly Disallowed \$10,000.00 of The House Remodel Expense.

The parties presented conflicting evidence at trial regarding the remodel of Elmer's Ilwaco house. Appellant claimed the cost were necessary to preserve the estate asset. Respondent argued it was an unnecessary expense since Elmer was not able to reside at the house from November 1997, a date before the remodel was started. Respondent further argued that the new kitchen cabinets and countertops had nothing to do with preserving the estate asset. The court resolved the claim by disallowing \$10,000.00 of the \$20,000.00 expense. This was appropriate and the Trial Court must be affirmed.

In Petrie v. Petrie,¹⁹ the father was the Trustee of the Trust benefitting his young son. In 1998, the Trustee purchased a 1997 Lincoln Continental with Trust funds. The Court of Appeal disallowed the purchase. The court first recited the Trustee's duty:

"A trustee owes the beneficiaries of the trust 'the highest degree of good faith, care, loyalty and integrity. This duty includes the responsibility to inform the beneficiaries fully of all the facts that would aid them in protecting their interest.' Failure to report can be a breach of fiduciary duty."²⁰

¹⁹ 105 Wash. App. 268, 19 P.3d 443 (2001).

²⁰ 105 Wash. App. at 275.

In addressing the purchase directly, the court held:

“Second, the trial court found that Petrie’s purchase of a luxury car from the custodial account of a child who could not drive the car was a breach of fiduciary duty. The court found that Petrie was the primary driver and the car was registered in his own name. The misappropriation of custodial funds to purchase a personal asset is a breach of fiduciary duty.”²¹

In this case, Appellant used Trust funds to improve a house that Elmer could no longer live in. Further, the improvements would ultimately be owned by the Appellant who was given the house in the Trust. Appellant breach her fiduciary duty to the beneficiaries, not only by using trust funds to remodel a Trust asset she would ultimately inherit, but also by failing to inform the beneficiaries of the need and scope of the remodel before it was started.

“The trustee is not permitted to make a profit out of the trust.”²²

The only person who stood to benefit from the house remodel was the Appellant. The Trial Court correctly disallowed \$10,000.00 of the remodel expense.

²¹ 105 Wash. App. at 276.

²² Estate of Drinkwater, 22 Wash. App 26, 587 P.2d 606 (1978).

C. The Trial Court Properly Exercised Its Discretion In Its Award Of Attorney Fees.

Both Respondent and Appellant requested attorney fees. The Trial Court awarded Respondent one hundred percent of his fees, but, due to Appellant's breach of her duties as Trustee, awarded her only fifty percent of her claimed fees.

In *Petrie*, the Court held fee awards are discretionary.

"RCW 11.96A.150 provides that '[e]ither the superior court or the court of appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party... (b) from the assets of the estate or trust involved in the proceedings.' Fee awards are left to the discretion of the court."²³

Appellant argues that it is "inappropriate to assess fees against an estate when the litigation could result in no substantial benefit to the estate."²⁴ But, this litigation has benefitted the estate in the following ways:

1. Disallowing Appellant's claim for services rendered to Elmer, thereby preserving estate assets for the beneficiaries.
2. Disallowing \$10,000.00 of remodel expenses, thus making those funds available to the beneficiaries.

²³ 105 Wash. App. at 278.

²⁴ Appellant's Brief, page 31.

3. Disallowing the claimed travel and labor expense (see below), thus making those funds available to the beneficiaries.

4. Finding the Trustee breached her fiduciary duty to the beneficiaries by:

a. Failing to inform them of her deferred payment plan;

b. Failing to inform them of the need and scope of the house remodel.

Absent this litigation at least one beneficiary, Respondent John Cook, would have received no Trust distribution since the Trust assets would entirely be consumed by Appellant's claims. As a result of this litigation, the Respondent has received his share of the estate. The attorney fee awards are appropriate and the Trial Court should be affirmed.

D. The Trial Court Correctly Disallowed The Travel And Labor Expenses

As part of her claim, Appellant requests an hourly rate for traveling to Ilwaco to see Elmer, as well as the same hourly rate for shopping, mowing the yard and performing other tasks for Elmer. The court allowed \$125.00 per month for several years for her work in taking care of Elmer's finances.

First, to the extent this claim is for personal services to Elmer, the argument at Section V. A. 3 of this Brief is on point. The Trial Court made no finding of either an express or implied contract with Elmer to reimburse the Appellant for these expenses.

Second, the Appellant relies on Article Thirteen, Section 7 of the Trust Agreement to justify the claim:

My Trustee shall be entitled to fair and reasonable compensation for the services it renders as a fiduciary.”

Appellant seeks to eliminate the clause “as a fiduciary” in making her claim. A “fiduciary” is defined as:

1. A person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to other the duties of good faith, trust, confidence and candor.
2. One who must exercise a high standard of care in managing another’s money or property.”²⁵

The Trust Agreement creates a clear limitation on what duties the Trustee is entitled to fair and reasonable compensation. The Trust limits the duties to those the Trustee renders “as a fiduciary.” The fiduciary role is to watch over Elmer’s bank accounts, and other financial matters. It does not include shopping, mowing the yard, or travel time. If that were the intent, then the Trust would say

²⁵ Black’s Law Dictionary, Eighth Edition (2004).

that the Trustee was entitled to compensation for all activities, not just those done as a fiduciary. The Trial Court's decision correctly limited the compensation to Appellant's work on Elmer's financial matters and disallowed the remainder of the claims.

E. The Trial Court, Using Its Equitable Powers, Correctly Relied Upon 2007 Values For Both The Estate And Partition Properties.

In resolving this case, the Court found both parties delayed in bringing this matter to a conclusion and, using its equitable authority, accepted the 2007 appraised value of both the Estate and partition properties. The commonly applied rules are that Estate property is valued as of the date of death and the partition property is valued on the date of the partition. At the time of Elmer's death, Uncle Chuck's property was worth less than the value of Elmer's property. But, by 2007, Uncle Chuck's property was worth more than Elmer's property's date of death value, potentially resulting in a vastly different distribution. If the trial court applied the usual rules to the changing values, the Appellant would benefit by the delay in resolution of this case, and would arguably benefit more the longer resolution is delayed because Uncle Chuck's property would continue to

appreciate. But, a court can use its equitable power to correct this result.

“A probate court is a court of equity and general jurisdiction. It is said that equity is the vehicle by which the conscience of the community finds expression.²⁶

Applying the 2007 value to both properties was within the Court’s equitable powers and was the correct decision. The application of the 2007 values leaves both parties in the same relative position as they were in 2000, as both properties would have appreciated at the same rate between 2000 and 2007. The application of the 2007 values does not favor one party over the other and does not create an incentive for either party to delay the resolution of this case. The Trial Court’s decision to use 2007 property values was correct and should be affirmed.

VI. RESPONDENT IS ENTITLED TO ATTORNEY FEES ON APPEAL

RCW 11.96A.150 provides that either the superior court or the court of appeal may, in its discretion, order costs, including reasonable attorney fees paid from the assets of the estate or trust involved in the proceedings. The trial court found that Respondent was entitled to 100% of his attorney fees in this matter. An award of Respondent’s fees on appeal is appropriate.

²⁶ *Estate of Drinkwater*, 22 Wash. App. at 29.

In bringing this action, the Respondent benefitted the trust beneficiaries by preventing reimbursement for claims for personal services, payment for non-fiduciary duties, and established a breach of the trustee's duties. If this action were not brought, Respondent would have received no distribution of his father's estate, while Appellant received the Ilwaco house, newly remodeled with trust monies. This action needed to be brought to protect his interest, and it ultimately benefitted the estate. The Respondent is entitled to his attorney fees on appeal.

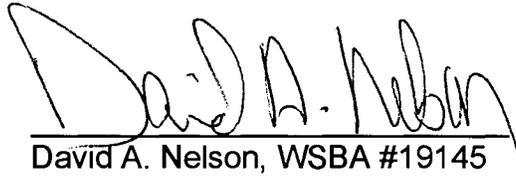
VI. CONCLUSION

The trial court's decision in this lengthy and involved litigation should be affirmed. The court correctly found that Appellant was not entitled to compensation for her personal services to Elmer, was not entitled to travel and labor expense, and was not entitled to use \$10,000.00 of trust money for a remodel of the Ilwaco house. The court correctly awarded attorney fees to the Respondent and correctly relied upon the 2007 appraised value of both the Trust and partition property. The unchallenged finding of fact support the Conclusions of Law, so that the trial court 's

decision must be affirmed.

DATED this 23rd day of October, 2009.

NELSON LAW FIRM, PLLC

A handwritten signature in black ink, appearing to read "David A. Nelson", written over a horizontal line.

David A. Nelson, WSBA #19145
Attorney for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd
day of October 2009, she deposited in the United
States Post Office in Longview, Washington, in a first-class
sealed envelope postage prepaid a copy of Respondent's
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