No. 43683-3-II

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

JOHN E. COOK, a married man,
Respondent

v.

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

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BRIEF OF RESPONDENT

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ORIGINAL

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I. INTRODUCTION

The Appellant, A. Diane Brateng, appeals the decision of the Pacific County Superior Court, which awarded real property to the parties, subject to equitable liens. In particular, the Appellant seeks review of the trial court's failure to award her all of her attorney's fees in this proceeding. The Superior Court decision should be affirmed in all respects. This is the second appeal in this matter.

II. RESPONSE TO ASSIGNMENTS OF ERROR.

1. The Trial Court, on Remand, was ordered by the Court of Appeals to award **reasonable** attorney's fees to the Appellant (the Defendant in Superior Court), pursuant to RCW 11.96A.150. (CP 123). The Superior Court concluded that RCW 11.96A.310 did not apply to this case, pursuant to that same ruling of the Court of Appeals (CP 123, 156). Accordingly, the Trial Court acted in conformity with the rulings of the Court of Appeals and the applicable statutes.

III. THE FINDINGS OF FACT ARE VERITIES ON APPEAL.

As in the first appeal in this matter, the Appellant chose not to provide a transcript of the trial. Therefore, there is no evidence before the Court of Appeals to challenge the Trial Court's factual findings. The Appellant concedes as much, indicating that "The application to the foregoing are purely questions of law, as were the issues presented in the first appeal." (Appellant's Brief, page 1.) Without a transcript, Appellant has no basis to argue the Trial Court's findings with regard to attorney's fees. Therefore, the unchallenged Findings of Fact are verities on appeal. Robel v. Roundup Corp., 148 Wash. 2d 35, 59 P. 3d 611 (2002). The issue for this court is whether the Court's Findings support its Conclusions of Law.

IV. FACTS

The facts in this case were previously stated in the first appellate decision. They are as follows. The parties, John Cook and Diane Brateng (hereinafter John and Diane), are brother and sister. They inherited a home in Ilwaco from their uncle Charles Cook. There current interest in that home is as tenants in common, as Diane has refused to sign any deeds divesting

her interest in that home. Their father, Elmer Cook, owned a home next door to Charles.

In 1995, Elmer executed a living trust, naming himself and Diane as Trustees. After Elmer became incompetent in 1997, Diane took over as sole Trustee. Elmer passed away in 2000. Diane's activities as Trustee were the subject of the original lawsuit, and the first appeal between these parties. (CP 2, 7, 123).

The above lawsuit was filed by John after he was advised by Diane that, after the settlement of the Living Trust, he would owe her the sum of over $22,000. (CP 2). John also disagreed with Diane's decisions to charge the trust for certain actions, such as driving their father from Bellevue, Washington (Diane's home, where Elmer was living), to the Trust-owned home in Ilwaco, at the sum of $35.00 per hour, plus travel expenses. Diane had not advised John that she was waiting until their father passed away to charge the trust for the costs of his care. (CP 2 and 123). John further raised an issue of the Trust accounting, which issue was previously resolved by both the Trial Court and the Court of Appeals.

In the first appeal, this court determined that Diane had not breached her fiduciary duty to John regarding the accounting and her failure to advise him that she was delaying her claims for trustee's fees. The court affirmed the Trial Court's approval of funds Diane used during Elmer's life for his personal care. It remanded the matter back to the Trial Court to reexamine and determine whether her remaining claimed expenses were reasonable, to award her further compensation for personal care she provided, to award her all of the funds used to repair and remodel Elmer's Ilwaco home, and to require the Trial Court to set reasonable attorney's fees for Diane for both the trial and the appeal. (our emphasis added). (CP 123). The court vacated an award of attorney's fees to John.

After the Court of Appeals entered its' decision, the Appellant filed a Motion for Partial Reconsideration (See Exhibit 1, attached). The Appellant specifically asked the Court of Appeals to reconsider that portion of the Court's Opinion that remanded the matter to the Trial Court to award attorney's fees to Appellant under RCW 11.96A.150. Much of

Appellant's argument in the Motion for Reconsideration is repeated in her current Brief of Appellant. On December 6, 2010, the Court of Appeals, using the same three-judge panel as the Court's Opinion, denied the Motion for Reconsideration (See Exhibit 1).

At the Trial Court, the court entered its Supplemental Findings of Fact and Conclusions of Law on March 30, 2012 (CP 156). The court found that the reasonable value of the personal care services to Elmer during his lifetime was $38,250, and awarded that sum to Appellant out of the estate assets. (CP 156). That issue was not appealed by the Appellant.

The Trial Court found that the reasonable amount of attorney's fees and costs incurred by Appellant at trial was $24,716.34; found that the reasonable amount of attorney's fees incurred by Appellant on appeal was $24,193.95; and that the reasonable amount of attorney's fees incurred by Appellant following remand was $5,000. The court awarded those fees to be paid to Appellant out of estate assets. (CP 156, Findings of Fact 50, 51 and 52).

The Trial Court further found that the Respondent (Plaintiff below) was not personally liable for any of the Appellant's attorney's fees as that would penalize him for exercising his non-frivolous right to challenge the trustee's conduct in managing the estate. (CP 156, Finding 53).

Finally, the Trial Court concluded that attorney's fees should be awarded to Appellant under RCW 11.96A.150, and awarded those fees from the assets of the estate. The court specifically concluded that RCW 11.96A.310 did not apply to Appellant's request for fees. (CP 156, Conclusions of Law 57 and 58).

V. THE TRIAL COURT'S DECISIONS REGARDING FEES SHOULD BE AFFIRMED

A. The Trial Court Correctly Determined That Attorney's Fees Were Awarded Under RCW 11.96A.150.

This court, upon deciding the case in October 2010, reversed the Trial Court and remanded for entry of new findings and conclusions. In its' opinion, the court determined that the Trial Court was to "set reasonable attorney fees to

award to Diane for both the trial and the appeal". Court's Opinion at page 17.

The Appellant, in her Motion for Reconsideration, also asked this Court to determine that fees should be awarded to her pursuant to RCW 11.96A.310. This Court declined that request. On remand, the Trial Court followed suit, and awarded reasonable attorney fees based upon the mandate of this court.

In her Brief, Appellant spends much of her time rearguing issues that were previously decided in the first appeal. They include a re-hash of all her arguments from Appeal number 1, including whether John had the right to ask for an accounting and whether the accounting she provided was accurate, whether she cared for Elmer Cook for the last three years of his life, and whether attorneys fees of a beneficiary should be paid. She refers to two cases regarding this last issue: In re Estate of Ehlers, 80 Wash.App. 751, 911 P.2d 1017 (Div. III, 1996), and In re Estate of Niehenke, 117 Wash.2d 631, 818 P.2d 1324 (1991). She cites these cases for the proposition that she, as the Trustee of her father's estate, should be awarded all

of her fees after the appeal, pursuant to RCW 11.96A.310. Her arguments are misplaced.

In Ehlers, beneficiaries of an estate sought an accounting from the trustee. That accounting did not occur for 16 months after the death of the primary beneficiary. The secondary beneficiaries filed suit to force an accounting and to remove the trustee. (Ehlers at 755). The court, finding that the untimely accounting caused no harm to the beneficiaries, agreed that the trial court was justified in failing to remove the trustee. The court further denied the request for attorney fees filed by the beneficiaries. (id. at 763).

The court further discussed the issue of whether the trial court, in its discretion, may award attorney fees and costs to a beneficiary who was "reasonably required to employ legal counsel to institute legal proceedings to compel an accounting" by a personal representative, or to resist an erroneous accounting. Because the court found that the beneficiaries in that case were not required to employ legal counsel to force an accounting, the trial court did not abuse its discretion in denying them legal fees. (id at 763-4). The court went on to

hold that "Either the personal representative or the trustee may be required to pay fees and costs if the superior court or court of appeals finds, pursuant to RCW 11.96.140, that justice requires it. This award is left to the discretion of the court and will not be overturned absent a clear showing of abuse of discretion". "Where the beneficiaries are unsuccessful in their litigation and primarily pursue their action for their own benefit, the court does not abuse its discretion in denying them attorney fees". (Ehlers at 764).

Significantly, the Ehlers decision involved the issue of whether a beneficiary was entitled to attorney fees for seeking an accounting. It does not hold that a trustee, in defending an accounting, is entitled to fees as Appellant argues.

Similarly, Niehenke involved a will contest involving the construction of language in that will. The court, in reviewing RCW 11.96.140 (which has since been repealed and replaced by RCW 11.96A.150), indicated that "an award of attorneys' fees under this statute is discretionary and will not be overturned on review absent a clear abuse of discretion". Niehenke, at 647. The court further held that "Recent

Washington cases suggest that it is inappropriate to assess fees against an estate when the litigation could result in no substantial benefit to the estate". (id at 648). It further found that such an award would result in other uninvolved beneficiaries funding the attorneys' fees for the litigating parties." That circumstance is not involved in the instant case, as the only two beneficiaries are the litigating parties. Therefore, the reasoning behind Niehenke (not burdening other beneficiaries with attorney fees) is not present in this case.

Former RCW 11.96.140 provides that "[e]ither the superior court or the court on appeal, may, in its discretion, order costs, including attorneys fees, to be paid by any party to the proceedings or out of the assets of the estate, as justice may require. Appellate courts will not interfere with an allowance of attorneys' fees in probate matters unless there are facts and circumstances clearly showing an abuse of the trial court's discretion. Estate of Kvande v. Olsen, 74 Wn. App. 65, 71, 871 P.2d 669 (1994), citing In re Estate of Larson, 103 Wash.2d 517, 521, 694 P.2d 1051 (1985). Although it may be inappropriate in some cases to assess fees against an estate

where the estate is not substantially benefited by the dispute, this is not a firm rule; there are situations where attorneys' fees are justly assessed against an estate. Where the award of attorneys' fees affects the interests of uninvolved beneficiaries and would result in their partially funding the attorneys' fees for the litigating parties, attorneys' fees will not be assessed against the estate. However, where both sides to a contest over distribution advance reasonable and good faith arguments, the trial court may properly assess attorneys' fees against the estate rather than against the parties personally. Kvande at 71. In Kvande, as in this matter, the beneficiaries were the only litigants. What Appellant in this matter is seeking is to have John pay all of her fees personally, and not half the fees as would result from charging the fees against the estate. Appellant's request, especially as she is asking for over $155,000 in fees, would end in an unconscionable result.

B. The Issue of Whether to Award Fees, By Statute or Case Law, Is A Matter of Law, and Therefore Reviewed De Novo. The Issue of The Amount of Fees Is Discretionary With The Trial Court, and Therefore Reviewed As An Abuse Of Discretion.

Appellant advances two different arguments as to fees: 1. That this Court, in reviewing the amount of the award of attorneys' fees, is required to only review the matter De Novo; 2. That she was denied her attorneys' fees in this matter.

The test for reviewing an award of attorney fees is two pronged. First, the court must determine whether the relevant statute provides for an award of fees; this is a question of law and is reviewed de novo. Once the court has established that a legal basis exists for the award, the court then reviews the amount of the award under an abuse of discretion standard. Lindsay v. Pacific Topsoils, Inc., 129 Wn.App. 672, 684, 120 P.3d 102 (2005).

Awarding attorney fees under a statute or contract is a matter of discretion with the trial court that the appellate court will not disturb absent a clear showing of an abuse of that discretion. Abuse of discretion occurs when the trial court's decision rests on untenable grounds or untenable reasons. Skinner v. Holgate, 141 Wn.App. 840, 857, 173 P.3d 300 (2007). Under RAP 18.9, the appellate court may award a respondent attorney fees when a petitioner files a frivolous

appeal or files an appeal merely to delay the outcome of underlying proceedings. An appeal is frivolous when no debatable issues are presented upon which reasonable minds may differ. Skinner at 858.

Under Washington law, a trial court may grant attorney fees only if the request is based upon a statute, a contract, or a recognized ground in equity. Washington courts universally agree that the court reviews the reasonableness of an award for attorney fees for an abuse of discretion. Gander v. Yeager, 167 Wn.App. 638, 645, 274 P.3d 393 (2012). The cases applying de novo review agree that the trial court's threshold determination on whether there is a statutory, contractual, or equitable basis for attorney fees is a question of law that the court reviews de novo. Thus, the court applies a two-part review to awards or denials of attorney fees: (1) to review de novo whether there is a legal basis for awarding attorney fees by statute, under contract, or in equity and (2) to review a discretionary decision to award or deny attorney fees and the **reasonableness** (our emphasis) of any attorney fee award for an abuse of discretion.

Gander, at 646-7. See also Unifund CCR Partners v. Sunde, 163 Wn.App. 473, 484, 260 P. 3d 915 (2011).

In this case, the trial court entered specific findings as to reasonable attorneys' fees for the Appellant, at trial, on appeal, and for the hearing on the remand. The award of approximately $55,000 in fees was significant. Appellant, in her brief, indicates that her fees now exceed $155,000, and at oral argument are likely to exceed $175,000. The trial court assessed, based upon the Court of Appeals mandate, what it felt to be reasonable attorneys' fees. Its discretion should not be overturned in this case.

Additionally, the Court of Appeals, in its mandate back to the trial court, ruled that fees be assessed pursuant to RCW 11.96A.150, and not 11.96A.310, as suggested and urged by Appellant. The Appellant urged the Court of Appeals to reconsider itself; this court denied that request. The Appellant did not appeal that decision to the Supreme Court, and therefore cannot re-argue that issue on appeal.

C. The Issue Of Attorneys' Fees Under RCW 11.96A.310 Is Res Judicata

After the first appeal in this case, Appellant moved the court to reconsider its decision regarding the statute under which attorney's fees were being awarded to the Appellant. This court denied that motion, effectively ruling that **reasonable** attorneys' fees should be awarded pursuant to RCW 11.96A.150. The trial court herein, in entering its findings and conclusions, and based upon this court's mandate, concluded that RCW 11.96A.310 was not applicable.

The doctrine of res judicata prevents relitigation of the same claim where a subsequent claim involves the same subject matter, cause of action, persons and parties, and quality of persons for or against the claim made. Estate of Black, 153 Wash.2d 152, 170, 102 P.3d 796 (2004).

In this case, the parties have not changed from the first appeal to the present matter. While the first appeal resolved other issues, the issue of attorneys' fees, and the statute under which those fees should be ordered, was resolved by this court. It was further and again later resolved by this court when the court ruled regarding Appellant's Motion for Reconsideration. The issue of the statute under which fees are awarded is res

judicata and therefore not subject to relitigation. The only issue before this court should be the reasonableness of the Appellant's fees.

818 **CONCLUSION.**

This Court of Appeals in the first appeal allowed an award of reasonable attorney's fees pursuant to RCW 11.96A.150. Nothing has changed between that decision and this time, other than the trial court awarding fees based upon that mandate. The Appellant believes that she is entitled to fees under RCW 11.96A.310, which this Court of Appeals denied after a Motion to Reconsider. She and her counsel have incurred unreasonable fees, litigating this matter to death, with the only purpose in filing this appeal being to either get all of her fees paid (which this court has already denied), or to ensure that the Respondent essentially receives nothing from the estate. The Trial Court, in awarding fees, properly exercised its discretion in the amount of fees awarded. The Respondent does not deny that the Court of Appeals or the Trial Court could award fees. It is clear under the law that those fees could be awarded. It is also clear that the statute from which fees should

be awarded is RCW 11.96A.150, and not 11.96A.310. The Appeal should be denied.

Further, as the issue of the statute from which fees could be awarded is res judicata, Respondent asserts that this appeal is in bad faith, and should be awarded his reasonable attorneys' fees in the amount of $3500.00.

RELIEF REQUESTED

Mr. Cook requests the denial of the appeal with a mandate to the trial court to enter orders allowing for the award of the respective properties to the parties, as reflected in the judgment entered by the trial court. He further requests an award of reasonable attorney's fees in the amount of $3500.00

Respectfully submitted this 12th day of April 2013.

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CERTIFICATE OF SERVICE

I, Nicholas R. Franz certify under penalty of perjury and the laws of the State of Washington that on April 12, 2013, I caused to be served a copy of the above document entitled "BRIEF OF RESPONDENT" on the interested parties in this action, by United State, First Class Mail, Postage Pre-Paid and email, addressed to the following:

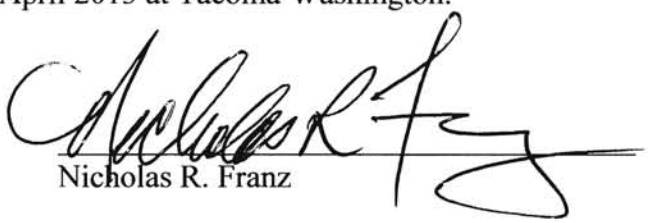
James D. McBride

McBride and Julin

16088 NE 85th Street

Redmond WA 98052

DATED this 12th day of April 2013 at Tacoma Washington.



Nicholas R. Franz

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EXHIBIT 1

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BY _____
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IN THE 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.	No. 39463-4-II ORDER DENYING MOTION FOR RECONSIDERATION

APPELLANT moves for reconsideration of the Court's **October 20, 2010** opinion.

Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Bridgewater, Hunt, Van Deren

DATED this 6TH day of DECEMBER, 2010.

FOR THE COURT:

Bridgewater, P. J.
PRESIDING JUDGE

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No. 39463-4

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

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

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APPELLANT'S MOTION FOR PARTIAL RECONSIDERATION

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I. IDENTITY OF MOVING PARTY

Appellant, A. Diane Brateng, by and through her attorney of record James D. McBride, of JULIN & McBRIDE, P.S., moves the Court pursuant to RAP 12.4 for partial reconsideration of that decision as issued by the Court dated October 20, 2010.

B. DECISION UPON WHICH RECONSIDERATION IS SOUGHT

Appellant seeks reconsideration of that portion of the Court's Opinion dated October 20, 2010, attached hereto as Appendix A, remanding to the trial court for an award of attorney's fees to Appellant under RCW 11.96A.150. Specifically, since Respondent sought appeal from an arbitration decision under RCW 11.96A.310 and has failed to improve his position in light of the reversal by this Court, the award of attorney's fees is governed by RCW 11.96A.310(10), requiring that the fees to be awarded to Appellant be charged against Respondent, John E. Cook, as the non-prevailing party.

C. ISSUE PRESENTED FOR RECONSIDERATION

Does RCW 11.96A.310(10) control over the discretionary fee provisions set forth in RCW 11.96A.150 where an appeal is sought from an arbitration decision under RCW 11.96A.310?

D. STATEMENT OF THE CASE

As set forth in the unpublished opinion issued by the Court in the above matter, the dispute between the parties came on before the trial court as an appeal by Respondent, John E. Cook, from an arbitration decision rendered under TEDRA as follows:

> John [Cook] filed suit against Diane [Brateng] in October 2001, which led to mediation and arbitration under the "Trust and Estate Dispute Resolution Act." [Chap. RCW 11.96A]. ***John appealed the arbitrator's decision and requested a trial de novo***. [emphasis added]

(See Unpublished Opinion, pg. 4).

Since Respondent filed an appeal for a trial de novo, the arbitrator's decision did not become conclusive and binding on the parties and, thus, was not filed with the trial court (although proof of service of the arbitrator's decision upon the parties was filed with the Court as required under RCW 11.96A.310(7)). Having now received the Court of Appeals decision reversing the trial court's decision, Appellant has concurrent herewith filed the arbitrator's decision with the Clerk of the Pacific County Superior Court in accordance with RCW 11.96A.310(8) as follows:

> (8) Arbitration decision may be filed with the court. The arbitrator or any party to the arbitration may file the arbitrator's decision with the clerk of the superior court at any time after its issuance. Notice of such filing shall be promptly given to each party to the arbitration proceedings.

Attached hereto as Appendix B and incorporated by reference herein is a true and correct copy of Appellant's "Notice of Filing Arbitrator's Decision" dated November 1, 2010, with arbitration decision attached thereto.

As more fully set forth below, Respondent John E. Cook failed to improve his position relative to the arbitration decision from which Respondent sought a trial de novo. Accordingly, all costs and fees to be awarded in this matter are to be charged against Respondent individually as the non-prevailing party in accordance with RCW 11.96A.310(10) which provides as follows:

> (10) Costs on appeal of arbitration decision. The prevailing party in any such de novo superior court decision after an arbitration result must be awarded costs, including expert witness fees and attorneys' fees, in connection with the judicial resolution of the matter. ***Such costs shall be charged against the nonprevailing parties in such amount and in such manner as the court determines to be equitable***. The provisions of this subsection take precedence over the provisions of RCW 11.96A.150 or any other similar provision. [emphasis added]

For purposes of remand in this matter, this Court reversed the trial court's award of attorney's fees in favor of Respondent under RCW 11.96A.150 based upon the failure of Respondent's action to result in any substantial benefit to the trust, and remanded for an award of fees to Appellant stating as follows:

> [W]e vacate the award of attorney fees to John below and remand to the trial court to award Diane [Brateng] attorney fees, for her expenses incurred below and remand to the trial court to award Diane attorney fees, for her expenses incurred below and on this appeal, after the estate is revalued and distributed.

(Slip Onion, pg. 17).

While the opinion of this Court does not specifically address the statutory basis for the award of fees to Appellant/Trustee upon remand, the Court's analysis focused on the discretion of the trial court and the appellate court to order an award of attorney fees under RCW 11.96A.150(1). (Slip Opinion, pg. 16). Accordingly, there is the potential that the trial court will construe the Court's decision in this matter as remanding for an award of attorney fees to Appellant under the provisions of RCW 11.96A.150 which grants to the trial court the discretion to charge such fees against the trust estate and/or a party as follows:

> **RCW 11.96A.150**
> **Costs -- Attorneys' fees.**
>
> (1) Either the superior court or any court on an 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, including reasonable attorneys' fees, 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.

While Appellant/Trustee clearly concurs in this Court's decision to award attorney fees to Appellant in this matter, RCW 11.96A.150 leaves it open to the trial court upon remand to determine whether the award of those fees is to be paid from the assets of the trust estate or from Respondent personally as the party instigating the appeal in this matter from the arbitrator's original decision. Accordingly, Appellant/Trustee seeks partial reconsideration/clarification of the decision of this Court regarding the basis upon which fees are to be awarded to Appellant on remand to the trial court, and directing that all fees and costs to be awarded to Appellant be charged against Respondent as the non-prevailing party in accordance with RCW 11.96A.310(10).[1]

[1] While it is unclear whether Respondent improved his position before the trial court on appeal of the arbitration decision, Respondent did not seek post-trial confirmation of the arbitration decision for purposes of the award of fees under RCW 11.96A.310. In light of the Court of Appeals decision it is now clear the Respondent did not improve his position relative to the original arbitration decision and, thus, Respondent is the non-prevailing party and Appellant is entitled to be awarded her costs and fees under RCW 11.96A.310.

E. LAW AND ARGUMENT

The rules governing arbitration of disputes under TEDRA are set forth in RCW 11.96A.310, which specifically provides as follows regarding the award of costs on appeal of an arbitration decision:

> (10) Costs on appeal of arbitration decision. The prevailing party in any such de novo superior court decision after an arbitration result must be awarded costs, including expert witness fees and attorneys' fees, in connection with the judicial resolution of the matter. Such costs shall be charged against the nonprevailing parties in such amount and in such manner as the court determines to be equitable. The provisions of this subsection take precedence over the provisions of RCW 11.96A.150 or any other similar provision.

See RCW 11.96A.310(10).

The determination of which party is to be deemed the "nonprevailing" party for purposes of the award of fees on appeal of an arbitration decision under TEDRA is governed by the rules set forth in Chapter 7.06 RCW governing superior court mandatory arbitration (which rules are incorporated by reference in RCW 11.96A.310(5)(a)). Towards this end, RCW 7.06.060 directs the award of fees on appeal as follows:

> (1) The superior court shall assess costs and reasonable attorneys' fees against a party who appeals the award and fails to improve his or her position on the trial de novo.

See RCW 7.06.060(1).

Based on the decision of this Court reversing the trial court and approving payment of the Appellant/Trustee's fees and expenses, Respondent has not improved his position on appeal relative to the arbitrator's decision. Accordingly, as the party who elected to appeal the arbitrator's decision and failed to improve his position, the costs and fees to be awarded in this matter must be charged against Respondent John E. Cook in accordance with RCW 11.96A.310(10).

As further reflected in the language of RCW 11.96A.310(10), the award of fees against the nonprevailing party is mandatory and takes precedence over the discretionary award of fees under RCW 11.96A.150 as follows:

> The provisions of this subsection take precedence over the provisions of RCW 11.96A.150 or any other similar provision.

See RCW 11.96A.310(10).

As with the award of fees in appeals of mandatory arbitration proceedings under RCW Ch. 7.06, the public policy served by the fee provisions of RCW 11.96A.310(10) are the same, to wit: to ease court congestion and discourage meritless claims. See Hutson v. Rehrig Intern, Inc., 119 Wn.App. 332, 335, 80 P.3d 615

(2003). Accordingly, Respondent should be charged with payment of all fees and costs to be awarded hereunder.

F. CONCLUSION

Respondent, John E. Cook, elected to appeal an arbitration decision which, while it denied a substantial portion of Diane Brateng's claim for the value of her services rendered to her father, Ms. Brateng was nevertheless willing to abide the decision. Having sought a trial de novo and failed to improve his position, Respondent caused Diane Brateng to incur additional fees and expenses throughout the trial and appeal of this matter which will substantially consume the benefit of Ms. Brateng's distribution under her father's trust if charged against the trust estate. Accordingly, having failed to improve his position or otherwise obtain any resulting benefit to the trust estate, Respondent should be charged with payment of all fees and costs to be awarded to Diane Brateng, as trustee in this matter in accordance with RCW 11.96A.310(10).

Respectfully submitted this 2 day of November, 2010.

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