

FILED

MAR 16 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

No. 30272-5-III

IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

IN THE MATTER OF THE ESTATE OF SHIRLEY E. WILSON,
Deceased, JAMES WILSON,

Appellant.

Spokane County No. 09-4-01585-8

REPLY BRIEF OF APPELLANT

Robert E. Kovacevich, #2723
Attorney for Appellant James Wilson
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I-II.

**INTRODUCTION AND COUNTER-STATEMENT TO
RESPONDENT'S STATEMENT OF ISSUES**

Appellant disagrees with the Personal Representative's introduction and statement of issues. The record is complete, not scant and the issues are before the Court for the reason that the Appellant, a beneficiary of the estate, has standing to question the non-inclusion of an inventory item. At the least, he is an interested person who may question the Personal Representative's refusal to provide information, failure to account and failure to complete the estate by not completing the Idaho property administration until the beneficiary objected.

III.

**COUNTER-STATEMENT TO RESPONDENT'S
STATEMENT OF THE CASE**

At page 2 of the Personal Representative's brief, the Personal Representative admits that Appellant filed a request for special notice of proceedings on January 14, 2010. CP 10. The statement also mentions the petition to transfer real

property in Idaho dated August 12, 2011. Attached to Respondent's brief as Appendix A-1. The petition to close the estate states that there is no proceeding pending in Idaho. James Wilson argued (Verbatim Report of Proceedings hereafter "RP" 6) that no Idaho ancillary petition was filed. After the petition to close the estate was filed, and without amending the petition to close the estate, and without notice to Appellant, Larry D. Wilson, pro se, filed an ancillary probate on August 12, 2011.

The violation is more than an inadvertent error. The failure to give advance notice violated Sup.Ct.R 5 requiring every paper relating to discovery to be filed with all parties. It indicates further mismanagement, secrecy and failure to notify. It is another reason for the case to be sent back as the Appellant has again been denied information of suspicious activity.

Appellant also disputes the conclusion of the Personal Representative at page 14 stating that the estate "has been fully and completely administered." It was not completed until

August 12, 2011. The Personal Representative never completely administered the estate. When he completed it, he did so by violating the request for notice and in secret. This conduct is an obvious withholding of information by a fiduciary. Regardless of any other outcome, the Appellant should receive attorney's fee's resulting from the intentional violation of the rules of the court and appearance. The proper completion was only after Appellant filed the petition, and was probably in response to James Wilson's Petition. RCW 11.96A.150 allows the fees.

IV. ARGUMENT

A. The Burden of Proof was on the Holder of the Power to Prove the Gift who is Also the Personal Representative.

The Personal Representative, at page 6 of his brief, quotes the trial court statement placing the burden of proving a negative on information that the Personal Representative refused to give to the beneficiary. The trial court ignored RCW 11.94.050 holding that a holder of the power of attorney who receives a gift must prove that the power included a specific

provision allowing a gift to the holder of the power. At page 3 of his brief, the Personal Representative admits that the deed was signed by “Larry Wilson as attorney-in-fact.” Further, Appellant filed an affidavit in this case contesting the gift. (CP 14, 15, 32). There was never a trial, only a dismissal. All of James Wilson’s allegations of fact were admitted as true for purposes of the motion. CP 13, CP 28. His Declaration dated November 9, 2011, verifies the facts. CP 14. Since the transfer was by power of attorney and the Personal Representative has a duty and burden to prove the facts of transfer and the consideration of the transfer to Larry Wilson, the holder of the power who deeded to himself personally.

The Appellant properly raised the issue of failure to include the sale proceeds in the estate. The Personal Representative did not deny the facts. CP 32. The Personal Representative had the burden of coming forward with information and proof that the power of attorney allowed a gift to him personally. The power of attorney did not have a

specific provision allowing the holder of the power to gift to himself.

B. The Proceeding was Well Within the Procedure to Question the Inventory and Inclusion of Assets.

The Petition of Appellant (CP 1) easily fits within the probate statutes. It alleges refusal to account, breach of fiduciary duty, failure to file annual accounts and a request for a denial of personal representative and attorney fees. RCW 11.96A.040(3) states:

The superior courts may: Probate or refuse to probate wills, appoint personal representatives, administer and settle the affairs and the estates of incapacitated, missing, or deceased individuals including but not limited to decedents' non-probate assets; administer and settle matters that relate to non-probate assets and arise under chapter 11.18 or 11.42 RCW; administer and settle all matters relating to trusts; administer and settle matters that relate to powers of attorney; award processes and cause to come before them all persons whom the courts deem it necessary to examine; order and cause to be issued all such writs and any other orders as are proper or necessary; and do all other things proper or incident to the exercise of jurisdiction under this section. (Underlining Added).

RCW 11.96A.020 grants the probate court authority to proceed in any manner and way that to the court seems right and proper.” RCW 11.96.030(1)(b) states “[m]atter’ includes any issue, question, or dispute involving. . .[t]he direction of a personal representative. . .to do or abstain from doing. . .any act in a fiduciary capacity.” RCW 11.96A.060 also allows the court to issue any order “that might be considered proper” in probate matters.

RCW 11.44.035 states “In an action against the personal representative. . .any party in interest in the estate may challenge the inventory and appraisal at any stage of the probate proceedings.”

Tucker v. Brown, 20 Wash.2d 740, 807, 150 P.2d 604 (1944) holds that separate action does not have to be commenced stating: “The superior court sitting in probate has no jurisdiction to try the title to property, but the court does have power to determine the fact whether or not property in dispute belongs to an estate as an asset thereof or for the purpose of inclusion in the inventory.”

In re Estate of Jones, 152 Wash. 1, 9, 93 P.3d 147 (2004) reviewed the statutes applicable to non-intervention probates and states: “However, under RCW 11.68.070, Peter and Jeffery, as heirs of the estate, had the statutory authority to invoke jurisdiction and properly did so. Therefore, the superior court had the jurisdiction to decide if Russell faithfully discharged his duties pursuant to RCW 11.68.070 and 11.28.250.”

RCW 11.48.070 allows discovery in any action where persons are suspected of having concealed property. *In re Guardianship of McKean*, 136 Wash.App 906, 151 P.3d 223 (Div. II 2007) holds that RCW Title 11 allows the court to cite anyone before it who is accused of concealing any property of the estate.

In re Estate of Ardell, 96 Wash.App 708, 717, 980 P.2d 771 (1999) allows an estate beneficiary of a non-intervention probate to petition for removal of the personal representative. It states that RCW 11.68.070 allows any heir, devisee or legatee to file a petition, supported by an affidavit making a prima facie

case for removal of the personal representative or for restriction of his or her powers.”

The arguments of the Personal Representative in his brief at pages 4 through 8 on jurisdiction are without merit. The issue before the court is whether the proceeds from the sale of the property admittedly signed by the Personal Representative by a power of attorney from the deceased, should be disclosed in the probate to a beneficiary and be inventoried if the transfer was without consideration. The proof in the case is a transfer to Larry Wilson personally by his mother, Shirley Wilson, the deceased. Larry Wilson signed as grantor and grantee. (CP 23). Larry Wilson refuses to account. If it was a gift, he has to prove the specific power to gift to himself. The argument that the gift issue cannot be raised in the appeal is without merit. This is a de novo review and the fraudulent conveyance of the property was alleged in the petition. CP 1.

If the transfer is not a gift, as a fiduciary, he has to provide the information to James Wilson, a beneficiary of the estate. *Liebergesell v. Evans*, 93 Wash.2d 881, 889, 613 P.2d

1170 (1980) states: "The Restatement of Contracts describes such a fiduciary relationship as one in which one party 'occupies such a relation to the other party as to justify the latter in expecting that his interest will be cared for.'" Restatement Contracts s 472(1)(c). Larry Wilson as the holder of the now deceased's power of attorney and as personal representative has a fiduciary duty to James Wilson, a beneficiary of the estate.

Since he did not produce any information, the fiduciary cannot cast the burden on the beneficiary to prove the omission. *Weimerskirch v. C.I.R.*, 596 F.2d 358, 362 (9th Cir. 1979). See "*Proving a Negative*," Christina Potter Moraski, 70 Cornell Law Review 141, 157 (Nov. 1984).

The beneficiary is entitled to the faithful conduct of the personal representative. This includes the duty to disclose information. *Jones*, 152 Wash.2d at 12. Continued distrust, which has been shown here, is grounds to remove the personal representative. *In re Matter of Estate of Cooper*, 81 Wash.App 79, 95, 913 P.2d 393 (Div III., 1996).

C. *In re Estate of Jones*, 152 Wash.2d 1 (2004) And Other Case Law, Clearly Requires that this Case Be Reversed.

The Personal Representative, at pages 8-10 of his brief, tries to distinguish the *Jones* case on the basis that the property was part of the estate. The Appellant at pages 10-12 and throughout, argues to the contrary. *Jones*, 152 Wash.2d at 10 cites RCW 11.28.250 allowing the court to remove anyone who “has neglected to perform and act as personal representative or any other cause or reason to which the court deems necessary.” *Jones* is cited by this Court to support any matter concerning a probate. *In re Estate of Dubois*, 146 Wash.App 1052 (Div. III 2008). This case has procedural value that is sufficient to indicate reliance on *Jones*. RCW 2.06.040.

Jones removed the personal representative for many reasons, including refusing to disclose information to the beneficiaries. *Id.* at 12. Here, the refused information may lead to inclusion of substantial amounts to the estate. It clearly applies as it is not limited in any way to inventory property.

V. CONCLUSION

The Personal Representative has a fiduciary duty to Appellant and continuously refused to discharge his duty to furnish information as shown by his conduct throughout. He treated the proceeding as though the beneficiary and the Personal Representative were strangers in adversarial positions. The proceeds of the sale are part of the estate. If they are not, the fiduciary could easily explain why not. All the information was in his possession, yet he attempts to cast the burden on the beneficiary to whom he owes a fiduciary duty. The case should be reversed.

DATED this 16th day of March 2012.



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Reply Brief of Appellant was served on counsel for Respondent by mailing the same by United States mail on March 16, 2012, in a postage paid envelope addressed as follows:

Mr. John Montgomery
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2206 N. Pines Rd
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DATED this 16th day of March 2012.



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