

FILED

JUL 24 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 30799-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In the Matter of the Estate of: RICHARD OBERDORFER.

APPELLANT ROBIN MERRILL'S OPENING BRIEF

Geoffrey D. Swindler, WSBA #20176
Law Office of Geoffrey D. Swindler
103 E. Indiana Ave., Suite A
Spokane, WA 99207
(509) 326-7700

APPELLANT'S OPENING BRIEF

FILED

JUL 24 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 30799-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In the Matter of the Estate of: RICHARD OBERDORFER.

APPELLANT ROBIN MERRILL'S OPENING BRIEF

Geoffrey D. Swindler, WSBA #20176
Law Office of Geoffrey D. Swindler
103 E. Indiana Ave., Suite A
Spokane, WA 99207
(509) 326-7700

APPELLANT'S OPENING BRIEF

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....1

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1

IV. STATEMENT OF THE CASE.....2

V. ARGUMENT.....4

 A. SINCE MR. MERRILL DID NOT ACT IN BAD FAITH,
 THE TRIAL COURT ERRED IN AWARDING
 ATTORNEY FEES.....4

 B. MR. MERRILL IS ENTITLED TO ATTORNEY FEES
 ON APEAL.....7
 10

VI. CONCLUSION.....9

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>Gillespie v. Seattle-First Nat'l Bank</i> , 70 Wn.App. 150, 855 P.2d 680 (1993).....	6
<i>In re Estate of Black</i> , 153 Wn.2d 152, 173, 102 P.3d 796 (2004).....	4 and 7
<i>In re Estate of Jones</i> , 152 Wash.2d 1, 20-21, 93 P.3d 147 (2004).....	6
<i>In re Guardianship of Matthews</i> , 156 Wn.App. 201, 232 P.3d 1140 (2010)	4
<i>In re Guardianship of McKean</i> , 136 Wn.App. 906, 151 P.3d 223 (2007).....	5 and 6
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 435, 957 P.2d 632 (1998).....	8

WASHINGTON STATUTES

RCW 11.96A.150.....	1, 3, 4, 5, 6, 7, and 8
---------------------	----------------------------

COURT RULES

RAP 18.1.....	7 and 8
---------------	---------

I. INTRODUCTION

Appellant Robin Merrill requests the court of appeals correct the miscarriage of justice inflicted upon him and reverse the trial court's improper award of attorney fees against him. Mr. Merrill also requests attorney fees and costs under RCW 11.96A.150.

II. ASSIGNMENTS OF ERROR

Mr. Merrill makes the following assignments of error:

1. The trial court erred in awarding attorney fees to the petitioner.
2. The trial court erred in failing to enter findings of fact and conclusions of law.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in awarding attorney fees to Mr. Oberdorfer when he filed the action to determine the beneficiaries' rights under the Trust?
(Assignment of Error 1)
2. Did the trial court err in ordering Mr. Merrill to pay attorney fees under RCW 11.96A.150 when Mr. Merrill did not force the lawsuit to be filed?
3. Did the trial court err in ordering Mr. Merrill to pay attorney fees under RCW 121.96A.150 when Mr. Merrill did not act in bad faith?
4. Did the trial court err in failing to enter findings of fact and conclusions of law to justify the attorney fees and costs award?

IV. STATEMENT OF THE CASE

Mr. Merrill's mother, Elizabeth Merrill, died in early 2009. Mr. Merrill retained attorney Richard Perednia to probate her estate. In the course of probating her estate, Mr. Perednia noticed in her Last Will and Testament referenced an "inheritance from Richard Oberdorfer," who was still alive. (CP 108).

Mr. Oberdorfer passed away in August 2009. After that time Mr. Merrill received notice about a Trust from the Moulton Law Office, which had prepared the Oberdorfer Family Trust and represented Mr. Oberdorfer. Mr. Merrill provided copies of the Trust to Mr. Perednia so he could determine how it might impact the estate of Elizabeth Merrill. (CP 109).

Mr. Perednia determined that Mrs. Merrill had exercised a power of appointment in her Will to the benefit of Mr. Merrill. Mr. Perednia immediately informed the Moulton Law Office of Mr. Merrill's possible claim. (CP 109).

On behalf of Mr. Merrill, Mr. Perednia attempted to negotiate a settlement of Mr. Merrill's claim with the Moulton Law Office in February of 2010. Moulton Law Office refused to mediate until the court ordered mediation. (CP 109).

After Moulton Law Office refused to negotiate a settlement, Mr. Merrill decided not to pursue the case any further. Mr. Merrill took no further action after February 19, 2010. Mr. Merrill also did not plan to file a suit to contest the Trust. (CP 110).

Nearly five months later, Mr. Oberdorfer filed the petition to determine. The petition was to determine who the beneficiaries were under the Oberdorfer Trust. (CP 1). The court ordered mediation, which was unsuccessful. (CP 111).

After prevailing on summary judgment, Mr. Oberdorfer sought attorney fees and costs under RCW 11.96A.150. (CP 53). The trial court awarded \$35,109.50 in attorney fees and costs. (CP 141).

Mr. Oberdorfer was not entitled to attorney fees under RCW 11.96A.150 for several reasons. First, Mr. Oberdorfer voluntarily filed suit to determine the rights under the Trust. Mr. Merrill did not force Mr. Oberdorfer to file suit. In fact, Mr. Oberdorfer did not inquire of Mr. Oberdorfer between February and July of 2010 to determine if Mr. Merrill planned to file suit. Had Mr. Oberdorfer contacted Mr. Merrill, he would have learned that Mr. Merrill had decided not to file suit. (CP 109). Thus, Mr. Merrill did not force or cause the lawsuit.

Second, once Mr. Oberdorfer filed suit, Mr. Merrill joined the suit. Mr. Merrill was merely a participant in the suit to determine his rights under the Trust. (CP 109).

Third, immediately after suit was filed Mr. Merrill requested mediation to learn the strengths and weaknesses of his case. However, Mr. Oberdorfer refused to engage in a good faith discussion of the case. Had Mr. Oberdorfer disclosed his theories of the case, the matter probably would have settled. (CP 106, 110).

Fourth, the trial court abused its discretion in awarding attorney fees and costs because “the Petitioners were the prevailing parties” under RCW 11.96A.150. (CP

141). However, RCW 11.96A.150 attorney fees are not awarded because a party prevails. Instead, RCW 11.96A.150 attorney fees are awarded only if a party has acted in bad faith that caused the litigation.

Further, the trial court also failed to issue findings of fact and conclusions of law to justify and explain its decision . (CP 141-42).

In sum, the trial court abused its discretion in awarding prevailing party attorney fees and because Mr. Merrill did not act in bad faith in merely joining the lawsuit to determine his rights under the Trust. Thus, Mr. Merrill requests this Court reverse the trial court's award of attorney fees and costs against him. Mr. Merrill also requests attorney fees and costs associated with this appeal under RCW 11.96A.150.

V. ARGUMENT

A. SINCE MR. MERRILL DID NOT ACT IN BAD FAITH, THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES.

This Court reviews an award of attorney fees for an abuse of discretion. *In re Estate of Black*, 153 Wn.2d 152, 173, 102 P.3d 796 (2004). "A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or when untenable reasons support the decision." *In re Guardianship of Matthews*, 156 Wn.App. 201, 214, 232 P.3d 1140 (2010) (*citation omitted*).

The trial court abused its discretion when it awarded attorney fees under RCW 11.96A.150, which provides as follows:

(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.

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10).

RCW 11.96A.150 allows attorney fees only “as the court determines to be equitable.” Before a court may award attorney fees in equity, the court must specifically find the party against whom attorney fees are awarded was at fault in causing the litigation. *In re Guardianship of McKean*, 136 Wn.App. 906, 920, 151 P.3d 223 (2007).

Michael McKean appealed the trial court’s attorney fees award against him under RCW 11.96A.150. McKean’s two minor daughters had trusts that were not properly managed. The court appointed successor trustee to manage the trust, investigate any impropriety and seek recovery for any wrongdoings. *Id.* at 909-10.

Based on the investigation, the trial court concluded that McKean and his former wife had not deceptively and in bad faith regarding the trusts. *Id.* at 909-10. The court of appeals affirmed the attorney fees because McKean’s bad behavior caused the lawsuit. *Id.* at 920.

[McKean's] **deceptive manipulation** of his children's assets would require him to pay some or all of the fees and costs . . . See RCW 11.96A.150 (1) (the trial court may order fees and costs "in such manner as the court determines to be equitable). . . . **Rather, equity requires some finding of fault that in fairness requires a party to pay.** Here, the trial court should have considered allocating fees amongst those who created the need for the guardianship. See, e.g., *In re Estate of Jones*, 152 Wash.2d 1, 20-21, 93 P.3d 147 (2004) (personal representative/beneficiary of a will ordered to pay other beneficiaries' attorney fees personally "because the litigation was necessitated by his multiple breaches of fiduciary duty" to those beneficiaries); see also *Gillespie v. Seattle-First Nat'l Bank*, 70 Wash.App. 150, 177-78, 855 P.2d 680 (1993) (even absent bad faith or self-dealing, attorney fees equitably assessed against the trustee where, but for its breach of fiduciary duty, the beneficiaries would not have needed to incur the fees). And the record amply demonstrates that Michael . . . created the need for the guardianships.

Id. at 920 (emphasis added).

Unlike *McKean*, the trial court should not have awarded attorney fees in equity against Mr. Merrill because he was not at fault. Mr. Merrill was not a fiduciary and, thus, did not breach his fiduciary duty that necessitated the lawsuit. Nor did Mr. Merrill act deceptively, in bad faith or self-dealing that necessitated the lawsuit. Thus, the trial court erred in awarding attorney fees against Mr. Merrill personally.

The trial court failed to justify its award because Mr. Merrill had acted improperly. To the contrary, the lower court awarded attorney fees "because the Petitioners were the prevailing parties." (CP 141). RCW 11.96A.150 does not award attorney fees to a prevailing party. Thus, the trial court erred in awarding attorney fees and costs under RCW 11.96A.150.

Further, fault does not exist when parties file suit to determine the beneficiaries' rights under a trust. In fact, litigation to determine beneficiaries' rights

actually benefits the trust.

The litigation benefits the estate by establishing the final wishes of Margaret and establishing which alleged beneficiaries have a right to Margaret's estate.

Black, at 174 (*citation omitted*)(ordering the estate to pay attorney fees to the beneficiaries because the lawsuit determined the beneficiaries' rights).

Here, Mr. Oberdorfer filed suit to determine the rights of the beneficiaries under the Trust. The litigation benefitted the Trust by determining who received what under the Trust. Since the Trust benefitted, Mr. Merrill did not act in bad faith. Thus, the court should have not assessed attorney fees against Mr. Merrill.

If this Court is inclined to affirm the attorney award against Mr. Merrill, it first must remand the matter to the trial court. The lower court did not issue findings and conclusions in issuing its award. “[F]indings of fact and conclusions of law are required” in ruling on attorney fees. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). When a trial court fails to include findings and conclusions, the court of appeals must remand the matter to the trial court. *Mahler*, at 435.

B. MR. MERRILL IS ENTITLED TO ATTORNEY FEES ON APEAL.

Mr. Merrill is entitled to attorney fees and costs under RAP 18.1. RAP 18.1 provides for attorney fees when “applicable law grants to a party the right to recover reasonable attorney fees or expenses.”

As established above, RCW 11.96A.150 permits the court to award attorney fees and costs to any party whose litigation benefits the Trust. Mr. Oberdorfer filed suit against to determine the beneficiaries' rights, including those of Mr. Merrill, under Trust. As one of the beneficiaries, Mr. Merrill requests attorney fees under RCW 11.96A.150.

V. CONCLUSION

The trial court abused its discretion in awarding attorney fees and costs under RCW 11.06A.150. Mr. Merrill requests attorney fees and costs under RCW 11.96A.150 and RAP 18.1.

DATED this 24th day of July, 2012.

LAW OFFICE OF GEOFFREY D. SWINDLER



Geoffrey D. Swindler WSBA #20176
Attorney for Appellant

CERTIFICATE OF SERVICE

I do hereby certify that on the 27th of July, 2012, I caused to be served a true and correct copy of the foregoing amended brief per the court of appeals' request by the method indicated below and addressed to the following:

James McPhee
Workland & Witherspoon
601 W. Riverside, Suite 714
Spokane, WA 99201

Delivery Service
 U.S. Mail
 FAX
 Hand Delivery



Geoffrey D. Swindler