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No. 201,256-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN THE MATTER OF THE
DISCIPLINARY PROCEEDINGS AGAINST

RUSSELL K. JONES

An Attorney at Law

Bar Number 10887

REPLY BRIEF OF PETITIONER JONES

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 ORIGINAL

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This is Russell Jones' reply to the Washington State Bar Association's Answering Brief. While the Association spends a great deal of time trying to show what a bad person Russell Jones is, it fails to address and/or convincingly respond to the arguments made by him in his Opening Brief. It is true that Russell Jones pursued his rights in a manner that frustrated opposing counsel and the courts. They all wished he would just go peacefully into the night but he did not do so and was not required to do so. The law of this land is written by persons who do not just accept what others want from them. The law is written by persons who challenge the status quo; by persons who assert positions that others think are beyond the pale; and by persons who stand up for what they believe. You should not disbar Russell Jones simply because as a pro se lawyer he defended his rights. Russell Jones can only be sanctioned if the Bar proved its case and refuted his arguments. They have done neither and the case should be dismissed.

A. GOOD FAITH IN RPC 3.1

The Bar argues that there is no good faith factor in RPC 3.1 when the rule itself provides for a good faith defense. This is a crucial element in the RPCs, since if the rule is interpreted too rigidly aggressive advocacy will surely be stifled. Good faith is the key point in this case – Russell

Jones had a good faith belief that the decisions in the case were not final until the final judgment was entered. As discussed in the Opening Brief and below, there was and is statutory and case law supporting that belief. He does not have to ultimately be legally correct in his argument; we do not punish lawyers for losing cases. He just has to have a reasonable basis for his arguments. The Bar says it did not have to prove that Russell Jones' arguments could not be made in good faith and that the hearing officer made the determination that they were not.

That is not what the record shows. The record is devoid of anyone, at any stage, explaining why Russell Jones' arguments that under the statutes and case law there had not been a final decision was invalid. The Bar has avoided this argument throughout this case and hopes that you too will accept their "We do not have to prove our case" argument. What is missing in this case from anyone including in the underlying case and in the Bar case, is an appellate type opinion reviewing the law and stating that Russell Jones was wrong in his arguments and that he was so wrong that no reasonable attorney could even make the arguments he was making.

That is the burden of proof in this case; the Bar had to show that no reasonable attorney could make the arguments he was making. They do

not show it by having opposing counsel or other judges say that res judicata applied or that issues had been ruled upon. That is hearsay and fails to deal directly with the issues in this case. The Bar failed on this crucial burden and there is no substantial evidence to support the contention that Russell Jones could not possibly be making "... a good faith argument for an extension, modification or reversal of existing law." RPC 3.1.

B. FRIVOLOUS LITIGATION

Russell Jones is accused of frivolous litigation. He has argued in turn that he relied in good faith on Washington authorities that res judicata does not bar modification of the estate asset values until the final order in the probate. The Bar Association does not address this argument, challenging neither Russell Jones' good faith reliance nor the authorities.

There is additional authority that intermediate rulings on estate asset values are not res judicata. Among the elements of res judicata, there must be two actions, and a final judgment in the first action. Concerning two actions, probate is a single action composed of a series of intermediate steps. Probate is not a series of separate actions. Wash. AGO 57-58 No. 133 ("...we are dealing with a single estate ... (removal petition) part of the same proceeding...").

Concerning final judgment, estate asset values are subject to modification until the final order in probate. RCW 11.56.090 (“...if the court is satisfied that the appraisal is too high or too low ... appraisal may be made at any time before sale...”). Since the estate assets were subject to modification; there is no res judicata. And see CR 54(b) (“...subject to revision at any time before entry of judgment...”); 14A Washington Practice, Tegland, section 35.23, page 516, West (2009) (“Decree subject to modification...”); Restatement of Judgments, Second, section 13, ALI (1982) (“Requirement of finality ... comment (b) ... Thus when res judicata is in question a judgment will ordinarily be considered final in respect to a claim ... if it is not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court, short of any steps by way of execution or enforcement...”). A ruling in probate subject to modification is consistent with the Washington legislative pattern in other subjects. RCW 7.40.180 (injunction); RCW 26.09.170(5) (family support).

The ultimate consequence of the Washington probate code is that the Legislature has denied the courts subject matter jurisdiction to impose res judicata in the circumstances of the Jones probate. *Harting v. Barton*, 101 Wn.App. 954, 6 P.3d 91 (2000), review denied 142 Wn.2d 1019, 16

P.3d 1266, (2001) (“...we may only find a lack of jurisdiction under compelling circumstances, such as when it is explicitly limited by the legislature or Congress.”); *Access Project v. Regal Cinemas*, 173 Wn.App. 174, 201, 293 P.3d 413 (2013). Courts do not pass on wisdom of the legislature in violation of separation of powers.

Russell Jones had appealed res judicata as allowed by court rule, did not prevail, and did not raise the issue again. Then the issues changed on remand in the trial court. Jeff and Peter Jones and the new personal representative requested modification of the estate house value to include the very same depreciation previously supposedly precluded by res judicata. Jeff and Peter Jones had prevailed on res judicata, but now waived their affirmative defense by proceeding on their own motion. The trial court had originally held that there was no depreciation to be subtracted, EX A-28, but now held that depreciation was proper. EX A-140. Restated, the trial court now accepted Russell Jones’ argument that it was to subtract depreciation, and by implication it had been proper for him to receive the estate house in his distributive share at fair market value based on subtraction of the depreciation. The two decisions that, first, depreciation will not be subtracted and, second, that the very same depreciation will be subtracted, are inconsistent.

Russell Jones argued that the decision last in time should control, thereby resolving the issue in his favor. Restatement of Judgments, Second, section 15, ALI (1982); Restatement of Conflicts, Second section 114, comment (a), ALI (1971). (There is no Washington case resolving inconsistent decisions.) Jeff and Peter Jones responded that the first decision was res judicata by the earlier Court of Appeals decision, but did not address the subsequent, second, inconsistent decision. The trial court ruled that the first decision had been affirmed on appeal, but did not address the second, inconsistent decision. EX A-149. A commissioner of the Court of Appeals wrote about “unreliable ... appraisals,” but did not address the inconsistent decisions. EX A-159. While he did not prevail, Russell Jones relied on the Restatement and reasoned thought. Both inconsistent decisions continued to be enforced, without remedy.

Russell Jones’ arguments to the various courts were premised on his good faith belief that the statutes and court decisions could not be final until after the entry of the final judgment at the probate court level since the law allowed modification until that time. He is now being punished for making this argument. Such punishment should be avoided as its inevitable result is to stifle argument by lawyers for extension of the law or differing

interpretations of the law since the risk of doing so is loss of the lawyer's license to practice.

C. MOTIVE

On the issue of the valuation of the house – see discussion above about the valuation issues and the fact that the court itself used depreciation for setting value at a later time when it had rejected the concept at trial.

On the issues of valuation of the piano, the Bar Association argues against good faith reliance saying that Russell Jones acted from a retaliatory motive. This argument derives from a demonstrably false finding in the trial record. The finding is false because it reverses the actual chronology of events in the same record. The finding, authored by Mr. Greer, states, “Russell K. Jones ... retaliat(ed) against Jeffrey P. Jones in claiming that the value of the piano was \$14,950 after Jeffrey P. Jones retained counsel and filed a complaint against Russell K. Jones...” Findings, Conclusion 16, October 23, 2001. EX A-28.

Referring to the actual fact record at trial, Jeff Jones took possession of the piano as a partial distribution at \$5,000. The piano appraiser then withdrew her appraisal. Affidavit of Carol Worthington filed February 14, 2005. EX R-306. In February 1998, a second appraiser opined that the piano had a likely value of \$15,000, a \$10,000 windfall to

Jeff Jones. Affidavit of Stepan Bagmanyany filed February 16, 2005. EX R-307. On February 18, 1998 Russell Jones, acting as personal representative for all the beneficiaries including Peter Jones, wrote to Jeff Jones' lawyer, "I again ask for your response ... a second appraisal is necessary on the estate piano. Will Jeffrey Jones cooperate?" Exhibit B to Declaration of Frank Gebhardt filed June 26, 1998. EX R-303. Certainly notice to his lawyer was notice to Jeff Jones. The request for access to the piano to appraise value was ignored. On November 25, 1998 Jeff and Peter Jones filed their petition to remove Russell Jones as personal representative. EX. A-6.

Thus Russell Jones requested access to the piano at least ten months before Jeff and Peter Jones filed their petition for removal. Russell Jones could not retaliate against an unknown future event. Nor did Russell Jones increase the value to \$15,000 but only requested access to determine value. Only on a much later date, at the July 2001 mediation, did Russell Jones take the bargaining position that Jeff's noncooperation would force a \$15,000 value by default. His being charged with a bad motive for taking a position at a mediation about an appraisal that he had claimed was wrong some 10 months earlier. The piano has never been reappraised.

The Bar Association also argues in order to gain prejudicial effect that Russell Jones resided in the estate home “rent free.” In reply, Russell Jones had received the estate house as a partial distribution of his beneficiary share of the estate. He relied in good faith on a Washington statute that he could possess and enjoy his partial distribution as his own property just like any other beneficiary. RCW 11.72.006 (“...Distribution of part of estate ... shall be as conclusive as a decree of final distribution with respect to the estate distributed...”) See *Estate of Kruse*, 52 Wn.2d 342, 349, 324 P.2d 1088 (1958). The only issue was whether Russell Jones received his partial distribution at fair market value. Resolution of value was frustrated by the court’s opinion on res judicata, but failing to prevail is not frivolous.

The Bar Association also argues for prejudicial effect that Russell Jones did not answer all of the hearing officer’s questions about proceeds of unrelated litigation in a Canadian bank account. In reply, the Bar omits mention of a superior court order that Russell Jones not disclose the information. TR 1284. A hearing officer does not have the power to lift a superior court gag order so Russell Jones would not be answering under compulsion, but volunteering in violation of the superior court order. The decision not to volunteer cannot be wholly understood without knowledge

of the character of unrelated client family from unrelated litigation. TR 1284. These persons are unrelenting trouble and Russell Jones was not willing to volunteer information which would lead to that trouble.

The Bar Association also omits mention in this issue that no move was made by the Bar to relieve Russell Jones of the superior court order entered in the same courthouse where the Bar hearing was being held. There was quick, easy access. The issue had more value to the Bar as prejudice than for any real evidentiary value in the Bar proceeding. Nor does the Bar mention that Jeff and Peter Jones had executed on the remaining balance of the Canadian account in an amount not credited in the present action. Russell Jones has paid \$175,000 to Jeff and Peter Jones in rent, costs, and attorney fees. He has also paid his own lawyers.

The Bar Association also reprises for its prejudicial value that Russell Jones failed to provide Peter Jones with a copy of the will. In reply, the trial court, Court of Appeals, and Supreme Court have all held that Russell Jones had no duty to provide information on demand. The record also includes that Peter Jones was represented by lawyer Sharon Best. EX A-181, dated March 16, 1996. Sharon Best already had the will for her client. EX A-181. (“...I have obtained copies of the existing court documents...”) The will had been filed September 25, 1995. EX A-172 –

Court Docket, Sub # 2. Did Peter Jones really want information, or just to make demands? Despite the added difficulties, there is no allegation that Russell Jones failed to observe Ms. Best's request for special notice in any detail.

D. MOTION FOR DISQUALIFICATION

The Bar Association also accuses Russell Jones of frivolous litigation in moving to disqualify the trial judge. Russell Jones' motions for disqualification were based on personal bias or prejudice against him as a party to the action. Personal bias or prejudice against a party is not waived by the party. When such bias is asserted an independent determination has to be made and it makes no difference when the assertion occurs. The problem with the Bar's waiver argument is that it ignores that Russell Jones made his motions after the case was remanded. He made a timely motion. He was not required to do so during the trial. He could give the judge the benefit of the doubt which he did. He made his motion after she got reversed for making prejudicial determinations against him. He had a good faith basis to make the argument he made – he lost but lawyers should not be intimidated into avoiding motions on something as crucial as possible personal bias by a judge for fear that if they lose, the lawyer may also lose his/her license.

Washington CJC 3(E), now CJC 2.11(C), permits remittal (waiver) for other reasons, but pointedly omits personal bias or prejudice. Judicial Conduct and Ethics, 3rd Ed., section 4.26, n. 435, Matthew-Bender (2000) (“...the 1990 Code expands the scope of permissible remittal to all forms of disqualification except bias or prejudice.”); Annotated Model Code of Judicial Conduct, 2nd Ed., page 273, 274, 278, ABA (2011) (“Rule 2.11(c) ... permits parties to waive disqualification unless it is grounded in a judge’s personal bias or prejudice under Rule 2.11(A).”) Russell Jones cited the trial court to then CJC 3. EX A-68. Russell Jones relied in good faith on law that he could seek the disqualification of a judge for personal bias.

E. DISCOVERY

The Bar Association argues that Russell Jones “lied” in discovery that Russell Jones paid, when the estate paid, expenses of the house. The actual record is “Russell K. Jones ... (had) the estate pay taxes, utilities, and insurance ... although his trial exhibit (D.Ex. 116) reflected this sum as part of his distributive share.” Findings, Conclusion 13, October 23, 2001. EX A-28. Could Russell Jones say that he paid because the money was deducted from his own distributive share, his own asset? The Bar’s argument is a cavil of words. The estate records are clear and complete.

No one disputes that Russell Jones was a coequal beneficiary entitled to an equal distributive share. No one disputes that the amount at issue was duly recorded, and deducted from his distributive share. No one disputes that distributive shares were exactly equal in estate records. No one, particularly Russell Jones, disputes that he was responsible for the amount at issue. No one disputes that the amount was exactly correct. No one disputes that a fiduciary has authority to distribute to a third party for the benefit of the beneficiary. An action as severe as the present one should be grounded in more than a semantic objection.

The Bar Association further argues that Russell Jones failed to provide discovery of a "check register." Jeff and Peter Jones had, in prior discovery specifically moved to compel production of a "check register," which was granted by a court commissioner. EX A-4. That order was reversed on review by the superior court. EX A-19. In later discovery, Jeff and Peter Jones did not request a "check register." A reasonable reading of the discovery requests was that Jeff and Peter Jones had dropped their interest in the check register because they had received complete bank records in the meantime. A check register would be a mere duplication of the same information. A lawyer should not be faulted in discovery for failing to detect an unexpressed intention.

In further reply, Russell Jones referred Jeff and Peter Jones to the bank records then in their possession. This discovery response was permissible under the business records option, CR 33.

The Bar Association also argues that Russell Jones failed to produce a copy of an appraisal. In reply, there was no discovery request, only an informal request on the Friday afternoon before trial. There was no discovery duty in this circumstance. Also, such interruptions are a common strategy to interfere with an opponent's last minute trial preparation.

F. CONCLUSION

Russell Jones has no disciplinary history in Washington, Oregon, Idaho, Montana, multiple federal districts and levels, tribal, or any other jurisdiction, court, or agency where he has represented clients, from 1975 to present. He made arguments in good faith at all stages of his case and although rebuked for them, he was not acting unethically in doing so.

He had a reasonable and good faith belief that decisions in the case were not final until the final judgment was entered. As such he could and did reasonably believe they could be modified. In fact, it turned out the value of the house was not set in stone and when the personal representative, supported by Jeff and Peter Jones, needed a different value

to sell the house, they got the value modified. It was okay for them to seek modifications and get it yet the court is being asked to disbar Russell Jones for the very same thing.

He is accused of acting improperly in asking that a judge remove herself for bias. He tried to be gently about it but the judge kept putting him off on technical grounds. He put his issue directly on the table and when he did so, the judge did not deal with the allegations but rather said it was too late for him to raise the issue. If what Russell Jones says she said had occurred "Russell Jones, I can't listen to him," EX A-68, there is little question she would have had to be removed from the case. Therefore, it appears it is not the motions that are wrong but rather the timing which is supposed to make them frivolous. He had good faith arguments and beliefs that a judge's personal bias against a party is not waived by a party by participation in the case and he should not be sanctioned for bringing up the issue.

He did not inflate the a value of the house or piano – he made his arguments about what they were worth including that the house was worth less than the appraised value unless the appraisal took into account depreciation. This was the very position later taken by the new personal representative and adopted by the same court. How can it have been wrong

or somehow dishonest for him to make the very argument which was later adopted and used by the other side? The answer is, of course, that he did not inflate the price of the house in some dishonest or unreasonable way. The court may not have accepted the argument but there was a reasonable basis for it and he should not be punished for taking a position based on that reasonable basis.

He raised the value of the piano early and was intentionally ignored. When he put forward his position during a mediation being conducted between parties, he is accused of somehow retaliating against his brother but the action he is alleged to be retaliating against happened well after he had already raised the piano valuation as an issue.

Russell Jones is accused of not providing discovery – this is an issue which is best left for a trial court to sort out but if this court is to inject itself into the issue it should only be when the evidence is compelling. Here Russell Jones did not provide a check register which was not called for in the discovery and he did provide the information and/or direct the opposing party to the all the information. There has never been any showing that there was any difference between what the check register showed and what the bank records showed. They never moved to compel any additional discovery. It is also argued that he did not provide an

appraisal but the appraisal was not asked for with a proper discovery request. He cannot be sanctioned for not doing something he was not required to do.

It maybe that Russell Jones was a difficult opposing party but at no time did he fail to have a good faith basis for his actions. He should not be sanctioned for standing up for his rights in litigation by making his arguments.

Dated this 23rd day of April, 2014.

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Attached is Petitioner's Reply Brief in *In re Jones*, Supreme Court No. 201,256-6

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