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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

In the Matter of the Estate of
MARGARET L. PERTHOU-TAYLOR,
Deceased,

ALISON PERTHOU,
Petitioner/Appellant,

v.

CORNELIA PERTHOU MacCONNEL, Individually and as Executrix and
Notice Agent for the Estate of Margaret L. Perthou-Taylor,
Respondent.

SURREPLY BRIEF OF RESPONDENT/CROSS-APPELLANT
CORNELIA PERTHOU MacCONNEL

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I. INTRODUCTION

The sole issue to be addressed on Respondent's cross-appeal is whether the King County Superior Court abused its discretion in denying Respondent Nina MacConnel's ("Ms. MacConnel") request for an award of attorney's fees incurred to defend Alison Perthou's ("Ms. Perthou") meritless claims.

Ms. Perthou presented no admissible evidence to support a claim for tortious interference with testamentary expectancy or gift, nor did her assertion of this claim present a novel issue justifying the denial of attorney's fees. Ms. Perthou's pursuit of this unfounded claim imposed substantial needless expense upon Ms. MacConnel, who in good faith administered her mother's Trust and distributed her assets pursuant to her mother's clear intent.

The trial court's denial of Ms. MacConnel's request for an award of attorney's fees was inequitable and contravenes the clear direction of decedent Margaret Perthou-Taylor that Ms. MacConnel, as trustee, not be personally liable for attorney's fees or expenses in administering the Trust.

II. ARGUMENT

A. **Ms. MacConnel Timely Filed a Cross-Appeal Regarding the Trial Court's Denial of Her Motion for Attorney's Fees.**

Ms. MacConnel's notice of appeal was timely filed and is properly before this Court for consideration.

Ms. Perthou filed her notice of appeal seeking direct review by the Supreme Court of Washington on January 26, 2013. The following day,

Ms. MacConnel filed a notice of appeal to Washington Court of Appeals, Division One, seeking review of the Order denying her motion for reconsideration regarding attorney's fees, which was entered in King County Superior Court on January 28, 2013.

Ms. MacConnel's notice of appeal was filed on February 27, 2013; one day after Ms. Perthou filed her notice of appeal. Pursuant to RAP 5.2(f) Ms. MacConnel not only filed her notice of appeal within 14 days after service of Appellant's notice of appeal, but also within 30 days after the entry of the trial court decision for which she seeks review.

On April 2, 2013, Ms. MacConnel's appeal was forwarded by the Court of Appeals to the Washington Supreme Court and consolidated with Ms. Perthou's appeal. The Supreme Court subsequently denied Ms. Perthou's motion for direct review pursuant to RAP 13.4(b) and unanimously agreed to transfer the case to Division One of the Court of Appeals.

B. Equity Requires an Award of Attorney's Fees at Trial.

Pursuant to RCW 11.96A.150, this Court has the authority to order Ms. Perthou to pay Ms. MacConnel's attorney's fees and costs incurred to defend Ms. Perthou's claims. RCW 11.96A.150(1) provides in relevant part:

Either the superior court or the court on appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) from any party to the proceedings.... The court may order the costs to be paid in such amount and in such manner as the court determines to be equitable.

(Emphasis added.)

Ms. Perthou's claims are based upon a promise allegedly made by her former mother-in-law ("Mrs. Perthou-Taylor"). However, any claim Ms. Perthou may have had against Mrs. Perthou-Taylor to enforce an alleged promise to fund a retirement account should have been brought against Mrs. Perthou-Taylor or her estate. Mrs. Perthou-Taylor died more than eight years ago, the assets in her estate were distributed long ago, and any claim Ms. Perthou may have pursued against the estate is barred under the nonclaim statute. Nevertheless, Ms. Perthou filed her claims against Ms. MacConnel as executor and trustee of her mother's estate and individually, alleging that she tortiously interfered with Mrs. Perthou-Taylor's supposed gift of a retirement account.

Even if Washington recognized a cause of action for tortious interference with an expectancy of a gift, Ms. Perthou has no admissible evidence to support such a claim. Ms. Perthou's only evidence is a letter allegedly written by Mrs. Perthou-Taylor in 1982, from which Ms. Perthou inferred the promise of a gift she now seeks to enforce against Ms. MacConnel. Nor is there evidence that any such gift existed or that Ms. MacConnel knew about or did anything whatsoever to interfere with respect to the alleged gift before Ms. Perthou's inquiry — which was made only after Ms. Perthou had slept on her expectations for more than 30 years.

Washington favors the award of attorney's fees where the result is to make the trust or estate whole. Here, there are no longer any assets in

Mrs. Perthou-Taylor's trust or estate. Instead, Ms. MacConnel has had to personally pay attorney's fees she would not otherwise have incurred to defend Ms. Perthou's frivolous claims. An award of attorney's fees in favor of Ms. MacConnel appropriately places the financial responsibility for Ms. Perthou's pursuit of her baseless and stale claims, brought without regard for the financial consequences, on the appropriate party: Appellant Alison Perthou.

C. **The Trial Court Erred in Denying an Award of Attorney's Fees Because of a Novel Issue.**

The trial court denied Ms. MacConnel's request for an award of attorney's fees because "petitioner presented a novel issue of the law in the State of Washington, which has been adopted in other jurisdictions." CP 323. RCW 11.96A.150 "allows a court considering a fee award to consider any relevant factor, including whether a case presents novel or unique issues." *In re Guardianship of Lamb*, 173 Wn.2d 173, 198, 265 P.3d 876 (2011).

In *Lamb*, the Washington Supreme Court granted direct review on a matter of first impression regarding guardians' fees and upheld the denial of attorney's fees because of the unique issue presented. Likewise, in *In re Estate of Burks v. Kidd*, 124 Wn. App. 327, 333, 100 P.3d 328 (2004), the court declined to award attorney's fees under RCW 11.96A.150 because of difficult questions involving the operation and constitutionality of a statute. In *In re Estate of D'Agasto*, 134 Wn. App. 390, 402, 139 P.3d 1125 (2006), the court declined to award attorney's

fees under RCW 11.96A.150 because of novel issues of statutory construction.

The present case, however, does not present a novel or unique issue. The Washington Supreme Court denied Ms. Perthou's motion for direct review of this matter. And this Court explicitly declined to recognize the tort of interference with an inheritance expectancy, while acknowledging that other states have done so, in *In re Estate of Hendrix*, 2006 WL 2048240, 1, 16 (Wn. App. Div. I, 2006). Consequently, no novel issue was presented.

Contrary to Ms. Perthou's assertion, this case is not about "the growth of the law." It is nothing more than a grab for money made years after the individual who allegedly promised a gift died. Even if Washington recognized a cause of action for tortious interference with a gift, Ms. Perthou has no admissible evidence to support the claim.

As Ms. MacConnel has repeatedly shown, Ms. Perthou alleged no conduct on the part of Ms. MacConnel that she induced or caused her mother to take any action that deprived Ms. Perthou of any supposed gift. Ms. Perthou's unsubstantiated allegations in support of her claim for tortious interference with a gift are based solely on her speculation and belief. Ms. Perthou failed to plead a single act by Ms. MacConnel that would support a claim against her. Because Ms. Perthou failed to allege facts sufficient to support any of the claims she asserted under Washington law, the trial court abused its discretion in denying Ms. MacConnel's request for an award of attorney's fees.

III. CONCLUSION

Ms. Perthou's claims against Ms. MacConnel were not supported by the facts or applicable law. This Court should reverse the trial court's denial of attorney's fees below, allow the same, and exercise its discretion under RCW 11.96A.150 and award Ms. MacConnel her attorney's fees on appeal.

RESPECTFULLY SUBMITTED this 17th day of October, 2013.

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