

FILED: October 08, 2014

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Estate of Archie Q. Adams, Sr., Deceased.

ARCHIE Q. ADAMS, JR.; GLEN A. ADAMS; and JEANNE WOLLMAN, individually,
Appellants,

v.

WEST COAST TRUST, as Personal Representative of the Estate of Archie Q. Adams,
Sr., and as Trustee for the trusts established under the will of Archie Q. Adams, Sr.;
JAMES VAN HORN; and NORTHWEST NATURAL GAS COMPANY,
Respondents.

Linn County Circuit Court
19209A

A145158

Carol R. Bispham, Judge.

Argued and submitted on November 15, 2012.

Theodore E. Sims argued the cause for appellants. With him on the briefs was Sims & Sims.

James R. Cartwright argued the cause for respondent West Coast Trust. With him on the brief was Matthew Whitman.

Randolph C. Foster, Amy Edwards, and Stoel Rives LLP filed the brief for respondent Northwest Natural Gas Company.

Stephen R. Owen waived appearance for respondent James Van Horn.

Before Wollheim, Presiding Judge, and Hadlock, Judge, and Schuman, Senior Judge.

WOLLHEIM, P. J.

Respondent Northwest Natural Gas Company's motion to dismiss dismissed as moot; affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondents

- No costs payable to James Van Horn.
 - Costs allowed, payable by Appellants to Respondents West Coast Trust and Northwest Natural Gas Company.
 - Costs allowed, to abide the outcome on remand, payable by
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1 WOLLHEIM, P. J.

2 Petitioners are the children and heirs of Archie Q. Adams, Sr., the decedent,
3 who died in 2000. They appeal from a probate court judgment approving a final and an
4 amended accounting submitted by respondent West Coast Trust, the personal
5 representative of the decedent's estate. Respondent Northwest Natural Gas Company
6 (NW Natural) purchased mineral rights from the estate. Respondent James Van Horn,
7 the son of and conservator and then personal representative for Louise Adams, the
8 decedent's surviving spouse, appeared in the probate proceeding to protect his mother's
9 interest in the estate. Petitioners assign error to the probate court's denial of their
10 objection to the final and amended accounting and denial of their petition to surcharge the
11 personal representative \$215,573,115.60 for the personal representative's alleged
12 negligent sale of the mineral rights to NW Natural. *See* ORS 116.123.¹ They also
13 challenge the probate court's rejection of their request to set aside the personal
14 representative's sale of the mineral rights or to require NW Natural to disgorge
15 \$215,573,115.60 on a theory of unjust enrichment. Finally, they contend that the probate

¹ ORS 116.123 provides:

 "To the extent that the final account is approved, the personal representative and the surety of the personal representative, subject to the right of appeal, to the power of the court to vacate its final orders and to the provisions of ORS 116.213, are relieved from liability for the administration of the trust. The court may disapprove the account in whole or in part, surcharge the personal representative for any loss caused by any breach of duty and deny in whole or in part the right of the personal representative to receive compensation."

1 court erred in determining that NW Natural is not a party to the probate proceeding, and
2 erred in awarding the personal representative an extraordinary fee of \$11,500.00. We
3 conclude that the probate court did not err and affirm.

4 We have traditionally reviewed probate court proceedings *de novo*. See,
5 *e.g.*, *McIntire v. Lang*, 241 Or App 518, 520 n 1, 254 P3d 745 (2011); *Brown v. Hackney*,
6 228 Or App 441, 443, 208 P3d 988 (2009); *Stanfield v. Stanfield*, 192 Or App 447, 449,
7 86 P3d 77, *rev den*, 337 Or 160 (2004). However, since June 4, 2009, *de novo* review is
8 now discretionary in most equitable cases, like this one. ORS 19.415(3)(b). Petitioners
9 have requested *de novo* review of the record. As will become apparent, the extraordinary
10 circumstances of this lengthy litigation justify the exercise of our discretion to review *de*
11 *novo*. ORAP 5.40(8). Many of the procedural facts are undisputed, and the probate court
12 made extensive findings of fact that are supported by legally sufficient evidence in the
13 record. ORS 19.415(3). However, there are some factual disputes that have not been the
14 subject of explicit findings by the probate court and that we conclude must be resolved on
15 appeal. We set out those disputes as well as our findings explicitly where applicable.

16 The decedent owned mineral rights to 27 parcels in Columbia County. The
17 decedent had had an underground gas storage lease and gas and oil leases with NW
18 Natural since the 1970s and received rent and royalties for those leases.² In 1996, the
19 decedent and his wife, Louise Adams, entered into a new agreement with NW Natural.
20 In March 1997, petitioner Jeanne Wollman, the decedent's daughter, sought to be

² At the time of the original leases, the decedent was married to his first wife, who died in 1983. In 1985, the decedent married Louise Adams, who died in July 2007.

1 appointed as conservator for the decedent, for the reason that the decedent could not
2 properly manage his affairs. Also in March 1997, Wollman obtained a power of attorney
3 from the decedent. In June 1997, the court appointed Wollman as conservator.

4 In October 1997, without notifying the court and under her power of
5 attorney for the decedent, Wollman signed a lease agreement with Enerfin Resources
6 Northwest LP, a natural gas company (Enerfin), for other mineral rights of the decedent
7 in exchange for rents and royalties. The lease agreement designated the decedent as a
8 widower, although at the time he was married to Louise Adams. On May 26, 1998, in
9 her capacity as conservator, and again without notifying the court or anyone else,
10 Wollman transferred all of the decedent's mineral rights to herself and her two brothers,
11 petitioners Glen and Archie Adams, for consideration of \$10 in total.³

12 On October 1, 1998, Wollman applied for Medicaid for the decedent, and
13 the decedent began receiving Medicaid benefits in November 1998.⁴ In February 1999,
14 after the decedent had been approved for Medicaid, Wollman requested that the court

³ Throughout the remainder of this opinion, we describe Wollman and her brothers collectively as "petitioners."

⁴ Wollman testified that at the time she transferred the decedent's mineral rights to herself and her brothers, she believed that they had little value, and that she reported this to the State of Oregon when making application for Medicaid for the decedent. Wollman testified that she conveyed the mineral rights to petitioners not to short change the State of Oregon but because she understood it to be her father's wish, as a part of his testamentary plan, that the mineral rights be transferred to his children outside of a will or probate. In December 2004, petitioners satisfied the estate's \$40,000 obligation to the State of Oregon.

1 close the conservatorship. Wollman's final accounting did not make mention of the
2 transfer of the mineral rights. The court closed the conservatorship in March 1999. At
3 the time of the decedent's death in January 2000, the decedent had accumulated \$40,000
4 in Medicaid debt.

5 In 1999, petitioners had been negotiating with NW Natural concerning the
6 lease but could not come to an agreement as long as Louise Adams remained on the
7 lease. When it learned of the decedent's death, NW Natural inquired whether the
8 decedent had a will. Wollman informed NW Natural that the decedent had died intestate
9 and that she and her brothers owned the decedent's mineral rights. NW Natural
10 subsequently learned from Van Horn that the decedent had not died intestate, that Louise
11 Adams was his surviving spouse, and that a will had been executed in 1988. Under that
12 will, after certain specific bequests, the beneficiaries were Louise Adams, the decedent's
13 grandchildren, and Louise Adams's children. The will created a trust for Louise Adams,
14 and the trust set out the powers and duties of the trustee, West Coast Trust. Petitioners
15 were not beneficiaries under the 1988 will.

16 After the decedent's death, petitioners entered into an additional lease with
17 Enerfin and signed two mineral leases with Cascade Resources Corp. (Cascade) for the
18 same land that the decedent and Louise Adams had leased to NW Natural. Wollman
19 testified that she believed that she could re-lease the mineral rights to Cascade because, at
20 the time the decedent and Louise Adams had leased those rights to NW Natural in 1996,
21 the decedent was incompetent, and the NW Natural lease was therefore invalid.
22 Wollman testified that petitioners chose for that reason not to recognize the NW Natural

1 lease.

2 In November 2003, NW Natural filed a petition to probate the 1988 will.

3 *See* ORS 113.035.⁵ NW Natural alleged in its petition that it was an interested party

4 because

5 "it believes it owes royalty and rental payments to the Decedent's Estate
6 under certain leases with the Decedent. NW Natural has deposited
7 approximately \$3,604.51 of such rental payment under Oil and Gas storage
8 leases in an interest bearing account * * * some or all of which sum NW
9 Natural believes belongs to the Decedent's Estate. In addition, NW Natural
10 has written royalty checks payable to Archie and Louise F. Adams, as well
11 as the three children of Archie Adams, since January 2001 which total the
12 sum of \$14,938.15, all of which remains uncashed to date. NW Natural is
13 informed and believes that Jeanne Wollman holds all of these uncashed
14 checks and accordingly NW Natural requested on October 13, 2003 a stop
15 payment by its bank and is in the process of depositing these funds for the
16 potential benefit of the Decedent's Estate. The amount of \$697.55, a sum
17 accumulated from several uncashed royalty checks from 1997 and 1998,
18 was sent to the State of Oregon and are also funds that NW Natural believes
19 belong to Decedent's Estate."

20 NW Natural also alleged in the petition that it was interested in acquiring or leasing
21 additional mineral rights from the decedent's estate. NW Natural requested the
22 appointment of West Coast Trust as personal representative. *See* ORS 113.035.

23 The court entered a limited judgment appointing West Coast Trust as
24 personal representative. After the opening of the estate, NW Natural released to the
25 personal representative the rent and royalty payments that it had been accumulating for

⁵ ORS 113.035 provides in part:

"Any interested person or executor named in the will may petition for the appointment of a personal representative and for the probate of a will."

1 the benefit of the legal owner of the mineral rights. Thereafter, NW Natural's
2 participation in the probate proceeding was sporadic, relating to its interests as a creditor
3 of the estate,⁶ to its participation in an auction for the public sale of the estate's mineral
4 interests, and to responding to petitioners' discovery requests.

5 We pause in our description of the procedural facts to provide some further
6 context. The issues presented on appeal have as their source petitioners' contention that,
7 in breach of the personal representative's fiduciary duty, the personal representative
8 allowed the probate proceeding to be orchestrated and funded by and colluded with NW
9 Natural so that NW Natural could acquire the mineral assets and defeat petitioners'
10 rightful inheritance through a commercially unreasonable sale of those assets. As
11 evidence that NW Natural colluded with the personal representative and orchestrated the
12 probate, petitioners point to the evidence that NW Natural filed the probate petition,
13 nominated the personal representative, agreed to pay the personal representative, and also
14 "funded" Louise Adams's challenge to petitioners' acquisition of the mineral rights,
15 creating the need for the sale of those rights. Petitioners point out that NW Natural also
16 fought off discovery that petitioners contended would show NW Natural's collusion with
17 the personal representative to unjustly enrich NW Natural to the detriment of the heirs,
18 and that the personal representative resisted petitioners' unjust enrichment claim against
19 NW Natural. For their part, NW Natural and the personal representative deny that the
20 evidence cited by petitioners shows either that there has been collusion between them,

⁶ NW Natural became a creditor of the estate by virtue of it having advanced funds to Van Horn to obtain legal representation for Louise Adams.

1 that they have manipulated matters to the disadvantage of the heirs of the estate, or that
2 the probate and sale of the mineral rights were conducted other than reasonably.

3 In light of the parties' conflicting interpretations of the record, we make
4 these additional findings: At the time of the filing of the petition by NW Natural, the
5 estate had no assets. West Coast Trust, an independent fiduciary, agreed to act as
6 personal representative and to attempt to recover assets of the estate upon agreement by
7 NW Natural to cover West Coast Trust's costs up to \$20,000 if West Coast Trust was
8 unable to recover fees and costs from the estate.⁷ Ultimately, however, as will be

⁷ In a letter to NW Natural's legal counsel, West Coast Trust's Vice President and Manager of Private Client Services wrote:

"West Coast Trust Company, Inc., is willing to serve as the court-appointed Personal Representative for the Estate of Archie Q. Adams, deceased. The purpose of this appointment is to identify assets held by the decedent and distribute them according to the terms of the Will. The probate proceeding could be a simple procedure or a complex one, depending on the validity of previously signed documents.

"If the Trust Company serves as Personal Representative, our fees would include, but not be limited to, an hourly amount of \$150 and the payment of all costs associated with engaging legal counsel to assist us with probate proceedings. Since the extent of time involved in the Estate is unknown, the Trust Company would expect your client to cover the Personal Representative's costs up to \$20,000. The Trust Company would submit billing statements for reimbursement based on a procedure developed with your client."

NW Natural's counsel agreed to the arrangement proposed by West Coast Trust. Its counsel also advised West Coast Trust that,

"[a]lthough NW Natural is willing to ensure that at least some of your costs and fees are covered regardless of the ability of the Estate to pay, it is understood that neither you nor your legal counsel will be representing NW Natural in these proceedings or acting in any way other than in the best

1 explained, West Coast Trust recovered assets of the estate to cover West Coast Trust's
2 costs, as well as to pay the estate's creditors, and NW Natural did not pay any money to
3 West Coast Trust.

4 In March 2004, West Coast Trust filed a petition in the probate court to set
5 aside the 1998 conveyance of the decedent's mineral rights to petitioners. *See*
6 ORS 114.305.⁸ West Coast Trust also sought an accounting and restitution. Wollman
7 objected and testified at a hearing regarding ownership of the mineral rights that the
8 decedent had always intended that the mineral rights would pass to petitioners outside of
9 the will and the estate, and that, in conveying the mineral rights to herself and her
10 brothers, Wollman had followed the decedent's wishes.

11 In the meantime, Wollman, who had initially told NW Natural that the
12 decedent had died intestate, produced a second will, allegedly executed by the decedent
13 in 1992 and leaving all of his assets to petitioners. That 1992 will was also filed with the
14 probate court.

15 After a hearing regarding the ownership of the mineral rights, the probate
16 court found on March 22, 2005, that Wollman was not credible, that she had acted
17 without authority in transferring mineral rights to petitioners for nominal consideration of

interests of the Estate."

⁸ Under ORS 114.305(9), the personal representative is authorized to "[p]rosecute or defend actions, claims or proceedings in any jurisdiction for the protection of the estate[.]" *See also* ORS 114.425 (describing probate court's authority to order the appearance of a person who has "concealed, secreted or disposed of any property of the estate of a decedent[.]"); ORS 114.435 (describing power of the personal representative to avoid transfers made with intent to defraud the creditors of the decedent).

1 \$10, and that in doing so she had breached her fiduciary duty to the decedent and the
2 court.⁹ The court further found that Wollman's transfer of mineral interests to petitioners
3 "ended a stream of income to her father and served to impoverish" him, causing him to
4 incur over \$40,000 in Medicaid debt. In an order of June 2005, the court determined that
5 the 1998 deed transferring mineral rights to petitioners would be set aside as void and
6 that petitioners must fully account for and repay to the probate estate all funds received as
7 a result of the 1998 conveyance and the mineral lease agreements.

8 Petitioners did not appeal that ruling. They transferred the mineral rights to
9 the probate estate and filed an accounting showing that, between November 30, 1999 and
10 January 8, 2004, petitioners had received mineral lease payments of approximately
11 \$200,000. Thereafter, as trustee and personal representative of the decedent's estate,
12 West Coast Trust held the mineral rights and petitioners' obligation to the estate to repay
13 the lease payments as the only assets of the probate estate.

14 In January 2006, the probate court considered the validity of the 1992 will
15 and found that it had superseded the 1988 will. The court held a hearing to determine
16 Louise Adams's elective share of the estate, *former* ORS 114.135 (1999),¹⁰ to provide
17 instructions to the personal representative regarding the sale of mineral rights, and to

⁹ In a letter opinion dated March 22, 2005, the court expressly found "not credible" Wollman's testimony that "she did not know the mineral lease rights had a significantly greater value than the amount paid [\$10][.]"

¹⁰ When the decedent died in 2000, *former* ORS 114.135(1999) granted the court discretion to determine the reasonable and proper value of the elective share. In making that determination, the court shall consider the length of the marriage and whether the marriage was a first or subsequent marriage for the parties.

1 close the estate. The court ordered that Louise Adams receive an elective share of 20
2 percent of the estate and that petitioners receive the remaining 80 percent. However, the
3 court declined to authorize a sale of the mineral rights at that time, concluding that the
4 record did not contain sufficient information to determine the value of the mineral rights.
5 The court denied petitioners' request to reopen the conservatorship and to approve a
6 distribution of the mineral rights to petitioners outside of the probate estate.

7 In June 2007, the probate court held a status conference on the record, at
8 which time the parties, including petitioners, agreed that a liquidation of the mineral
9 rights was necessary in order to satisfy the estate's creditors and to pay Louise Adams her
10 elective share. In August 2007, the personal representative wrote to the represented
11 parties, including petitioners, proposing a plan to auction the mineral rights through a
12 professional auctioneer, Realty Marketing/Northwest (Realty Marketing).

13 On October 24, 2007, Wollman protested the procedure for auctioning the
14 mineral rights, objecting to the personal representative's decision that the estate's
15 beneficiaries would not be able to bid their anticipated distributions from the estate, but
16 would instead be required, like all third-party bidders, to bid cash. Wollman
17 subsequently withdrew her objection to the sale. The auction took place as scheduled on
18 November 3, 2007, and the probate court approved the auction on November 28, 2007.

19 Underlying petitioners' June 25, 2009 objection to the final accounting is a
20 contention regarding what the record shows concerning the mineral assets offered for sale
21 and the assets that petitioners contend NW Natural actually purchased at the auction,
22 verses the description in the deed executed by the personal representative. In their

1 opening brief, petitioners contend in their first assignment of error that there is evidence
2 in the record that shows that the auction materials referenced a sale of the mineral rights
3 in Parcels 1 to 23, but not the assignment of leases on Parcels 24 to 27. However, they
4 contend, the deed executed by the personal representative mistakenly included a
5 conveyance of title to the mineral rights to Parcels 24 to 27, and the estate received no
6 additional consideration from NW Natural for that fundamental change in what the
7 probate court had ordered sold, depriving the heirs of significant value.

8 The personal representative and NW Natural respond that the legal
9 descriptions of the mineral rights in Parcels 24 to 27 have been a part of the sale from the
10 beginning. They note that the property description in Wollman's 1998 deed from the
11 decedent to petitioners included "[a]ll other mineral reservations held or reserved in the
12 name of Archie Q. Adams * * * in Columbia County, Oregon." Additionally, they point
13 out that the auction marketing information noted that six leases were to be assigned to the
14 new owner and included descriptions included in the deed as Parcels 24 to 27. Further,
15 the personal representative responds that the personal representative conveyed a bargain
16 and sale deed of all mineral rights held by the estate, and the probate court found that the
17 personal representative intended and all of the parties knew that the personal
18 representative intended to and did auction off all of the mineral interests held by the
19 estate including Parcels 24 to 27.

20 The probate court found "that all of the mineral rights owned in Columbia
21 County by the Estate of Archie Adams have been appropriately auctioned[.]" We make
22 these additional findings: All of the estate's mineral rights in Columbia County,

1 including the mineral rights to Parcels 24 to 27, were offered for sale. Seven bidders
2 registered for the auction and paid the required deposit of \$30,000, including petitioner
3 Archie Adams, Jr. All qualified bidders received an auction packet, which was
4 distributed in advance of the auction, and which listed the mineral rights to be auctioned
5 on Parcels 1 to 27, including the mineral leases to which those rights were subject, and
6 including the mineral rights. The auction took place on November 3, 2007. NW Natural
7 was the successful bidder, with a bid of \$375,000. Realty Marketing issued an opinion
8 stating that the "mineral interests obtained 'fair market value' within the structure of a
9 public competitive auction."

10 The personal representative filed a motion for court approval of the sale and
11 sought an order that the auction was "a commercially reasonable sale of the assets of the
12 estate." No objections were filed and, on November 28, 2007, the court approved the sale
13 and entered an order authorizing a transfer of all auctioned mineral rights to NW
14 Natural.¹¹ The personal representative executed a bargain and sale deed that specifically
15 described all of the parcels at issue, including mineral rights in Parcels 24 to 27, using the
16 same property descriptions that had been included in the leases to Enerfin and Cascade
17 Resources executed by petitioners and that had been included in the third annual
18 accounting filed by the personal representative and approved by the court on March 25,

¹¹ The court's order stated:

"Upon being fully informed, the court hereby finds that all of the mineral rights owned in Columbia County by the Estate of Archie Adams have been appropriately auctioned and the sale price of \$375,000 is hereby approved."

1 2008, without objection by petitioners.

2 The personal representative filed a final accounting on June 5, 2008.

3 Wollman filed an objection on June 27, 2008. There ensued lengthy wrangling on
4 discovery requests by petitioners for appraisals of the property sold and communications
5 between NW Natural and the personal representative concerning the estate. On
6 January 21, 2009, the personal representative filed an amended final accounting. The
7 attorneys representing petitioners withdrew from the case.

8 On March 18, 2009, Wollman filed a *pro se* motion with the court
9 requesting an extension of time to file her objections to the amended final accounting.
10 No party objected, and the court allowed an extension to Wollman to file her objections
11 to the amended final accounting. The court gave Wollman until May 26, 2009, to file her
12 objections to the amended final accounting. On May 20, 2009, Wollman filed an
13 objection *pro se*, in which she asserted that the personal representative's letters
14 testamentary had lapsed and that the auction process was defective. She requested that
15 the court delay approval of the final accounting until after further discovery. The other
16 petitioners did not join in her *pro se* objection or file separate objections.

17 On June 25, 2009, the court held a hearing on Wollman's *pro se* objection
18 to the final accounting. At that time, the court became aware that Mr. Sims, petitioners'
19 newly retained attorney, had filed a new objection to the final accounting. In their
20 "Objection to Personal Representative's Petition and Petition for Surcharge of Personal
21 Representative and Claim for Unjust Enrichment," petitioners asserted that the mineral
22 rights (which petitioners had previously purchased from the decedent for \$10.00) were

1 reasonably worth \$215,948,115.60, and that, in selling them to NW Natural for only
2 \$375,000.00, the personal representative had negligently or willfully breached its
3 fiduciary duty to the estate.¹²

4 The personal representative moved to strike the June 25 objection on the
5 grounds that it was untimely and that it was precluded by the court's November 28, 2007,
6 order approving the sale of the mineral rights. The personal representative's counsel
7 reminded the court that in 2007, Wollman had withdrawn her objection to an order
8 approving the sale of the mineral rights, and further contended that the court's order
9 approving the sale precluded petitioners' renewed challenge.

10 Petitioners countered that NW Natural had not yet provided full discovery
11 as ordered by the court and that further discovery would show that, unbeknownst to
12 Wollman at the time she withdrew her objection to the sale, "the gas company has been
13 playing puppet master with the personal representative in this estate to the detriment of
14 the beneficiaries[.]"

15 The court allowed a hearing on petitioners' objection to address petitioners'
16 allegations of wrongdoing by the personal representative and NW Natural. NW Natural's
17 legal counsel advised the parties that it did not intend to appear at subsequent hearings,

¹² Petitioners alleged that (1) the sale was not necessary to administration of the estate; (2) the sale was not conducted in a manner reasonably calculated to obtain fair value; (3) the personal representative had failed to disclose to petitioners that "higher offers than the auction price had already been offered, or that [NW Natural], which, as predicted by petitioners, was the only bidder at the auction, had privately agreed to compensate the Personal Representative up to \$20,000 beyond the fees and costs allowed by the court under ORS 116.173."

1 because "discovery is complete from our point of view. We've provided full access,
2 provided documents to prior counsel[.]" For that reason, NW Natural's counsel
3 explained, "I don't need to be here at any of these proceedings * * * I don't expect to be a
4 participant in any of these proceedings." Petitioners' counsel responded that petitioners
5 had "filed * * * an alternative claim against the gas company, so you might want to be
6 here." Counsel for NW Natural replied that, "if you'd like to file a lawsuit against the gas
7 company, I think there's a way to do that, but I don't believe that you'd file a lawsuit
8 against a non-party, non-participant in the guise of a probate proceeding." Discussion
9 continued about whether NW Natural had appeared or intervened as a party to the probate
10 proceeding and whether petitioners' unjust enrichment claim would be heard within the
11 probate proceeding.

12 The court held further hearings on July 16 and 22, 2009. As promised, NW
13 Natural did not appear or respond to petitioners' allegations. The personal representative
14 moved to strike petitioners' most recent objections as untimely, and also asserted that, if
15 the order approving the sale of mineral rights is valid, "there can be no claim * * *
16 against [NW Natural]." Petitioners responded that, irrespective of the timeliness of
17 petitioners' objections to the final accounting, the claims against NW Natural survive,
18 because NW Natural is a party to the probate proceeding, and the probate court therefore
19 has jurisdiction to consider petitioners' separate claim against NW Natural.

20 In a letter opinion of September 15, 2009, the court rejected petitioners'
21 June 25, 2009, objections to the final accounting as untimely, reasoning that those
22 objections had not been filed by the May 26, 2009, deadline fixed by the court, as

1 required by ORS 116.103. The probate court also rejected petitioners' petition to
2 surcharge the personal representative as not supported by the record. The court was not
3 persuaded by petitioners' argument that the personal representative had exceeded its
4 authority by transferring a fee title in the mineral rights to Parcels 24 to 27, finding that
5 "[t]he documents, when read as a whole, are clear that the fee simple title would be sold
6 at auction. Further, the exhibits show that all parties knew that all mineral rights would
7 be sold."

8 The court found:

9 "The exhibits support that all parties knew exactly what was to be sold at
10 the auction, and the mineral rights to all parcels were sold. The opportunity
11 to contest the auction was at the November 1, 2007, hearing or after the
12 filing of the motion for the approved sale by West Coast Trust. The first
13 objection was filed June 27, 2008, seven months after the sale was finalized
14 by the court on November 28, 2007. The sale only becomes void if there
15 can be a claim established for negligence or breach of fiduciary duty. I
16 have heard many such allegations and have waited for evidence to actually
17 support the allegations and suspicions, but no evidence of 'negligence or of
18 a willful act or nonfeasance in the administration of the estate' by the
19 Personal Representative has been shown. ORS 116.063(g). I find that the
20 doctrine of [the law of] the case applies, and I find that the sale of the
21 mineral rights was decided when the Order approving the sale was entered
22 on November 28, 2007."

23 The court reasoned, further, that "Petitioners' contention concerning the finality of the
24 sale has been resolved when this Court signed the order of the sale of mineral rights of
25 November 28, 2007," and concluded further that "the law of the case" prevented
26 relitigation of that matter. Finally, the court ordered that the personal representative was
27 entitled to a fee of \$24,661.85 for its services, including an extraordinary fee of
28 \$11,250.00.

1 In an order of November 17, 2009, which incorporated its letter opinion,
2 the court granted the personal representative's motion to strike petitioners' objections to
3 the final accounting, as well as its "Petition for Surcharge of Personal Representative and
4 Claim for Unjust Enrichment."

5 On February 2, 2010, petitioners submitted a letter "offer of proof" to the
6 probate court itemizing their assertions in support of a claim that the personal
7 representative had breached its duty to the estate, resulting in monetary loss.¹³ On
8 March 1, 2010, the probate court entered a general judgment approving the amended final
9 accounting.

10 Petitioners filed a notice of appeal naming as respondents West Coast
11 Trust, NW Natural, and Van Horn, now as personal representative of the estate of Louise
12 Adams. In their first of four assignments of error, petitioners contend for several reasons
13 that the probate court erred in rejecting their objections to the final accounting.
14 Petitioners first assert that the probate court erred in concluding that the objections were
15 untimely. As noted, on March 18, 2009, Wollman requested an extension of time from
16 the court to file her objections to the personal representative's January 21, 2009, amended
17 final accounting, so that she could find new counsel. The court gave her until May 26,
18 2009, to file her objections. On May 20, 2009, Wollman filed objections *pro se*. The
19 court rejected each of the objections made *pro se*, and those rulings are not challenged on
20 appeal. Also as noted, however, on June 25, 2009, the date set for hearing on Wollman's

¹³ The parties stipulated that petitioners' offer of proof could be made by letter, as opposed to orally before the court.

1 *pro se* objections, petitioners' new counsel appeared and filed new objections, which the
2 court rejected as untimely. Petitioners continue to assert that those objections were
3 timely under ORS 111.235.

4 The probate court was correct in rejecting the June 25 objections as
5 untimely. It is true, as petitioners contend, that ORS 111.205 to 111.275 describe probate
6 procedures generally, and that ORS 111.235 provides that "[a]ny interested person, on or
7 before the date set for a hearing, may file written objections to a petition previously
8 filed." But other provisions, ORS 116.063 to 116.263, relate specifically to final
9 accountings. Under ORS 116.093, the personal representative "shall fix a time for filing
10 objections [to the final accounting] in a notice thereof." Under ORS 116.103, any person
11 entitled to notice under ORS 116.093 of the time for filing objections to the final
12 accounting "may, within the time fixed for the filing, file in the estate proceedings
13 objections to the final account and petition for distribution."

14 Thus, in the context of a final accounting, the personal representative fixes
15 the time for filing objections to the final accounting and notifies interested persons of that
16 time. Under ORS 116.113, objections may be filed within that time. If, as contended by
17 petitioners, a party could also file objections on the date of the hearing set to consider
18 objections, then both the duty to fix the time for filing objections under ORS 116.093 and
19 the right under ORS 116.103 to file objections "within the time fixed for the filing,"
20 would be superfluous. We conclude, therefore, that in the context of a final accounting,
21 the time limit set pursuant to ORS 116.093 and provided in ORS 116.103 controls.
22 Petitioners had until May 26, 2009, the date set by the court, to file their objections to the

1 amended final accounting. The court did consider the objection to the final accounting
2 that was filed within the time provided in the court's prior order. The court did not abuse
3 its discretion in disallowing petitioners' untimely June 25, 2009, objections to the final
4 accounting.

5 Petitioners further contend in their first assignment of error that the probate
6 court erred in striking their petition to either surcharge the personal representative for
7 breach of fiduciary duty or to require that NW Natural pay the estate \$215,573,115.60,
8 representing the value of the mining interest by which NW Natural was allegedly unjustly
9 enriched.

10 As the probate court explained in its September 15, 2009 letter opinion,
11 underlying both of petitioners' assertions is a claim that the personal representative
12 breached its duty to the estate by allowing the sale of the mineral rights to go forward at
13 all or to go forward in a commercially unreasonable fashion. That sale had been
14 approved by the probate court in an order of November 28, 2007, as "a commercially
15 reasonable sale of the assets of the estate." The court based its rejection of petitioners'
16 petition, in part, on the law of the case doctrine, reasoning that "the sale of the mineral
17 rights was decided when the Order approving the sale was entered on November 28,
18 2007."

19 We need not consider whether, as petitioners contend, the probate court's
20 reliance on the law of the case doctrine was incorrect. The probate court also expressly
21 found that there was "no evidence of 'negligence or of a willful act or nonfeasance in the
22 administration of the estate' by the Personal Representative[.]" We have reviewed *de*

1 *novo* the record designated on appeal, and we agree with the trial court's findings. We
2 further find on this record that there is no evidence that the sale of the mineral rights was
3 commercially unreasonable, and that there is no evidence of negligent or willful
4 misconduct on the part of the personal representative in conducting the sale. We
5 conclude for those reasons that the probate court did not abuse its discretion in declining
6 to reconsider its November 28, 2007, order approving the sale of the mineral rights. That
7 conclusion also disposes of petitioners' second assignment of error, in which they contend
8 that the probate court erred in not setting aside the sale.¹⁴

9 We continue with the third assignment, which challenges the probate
10 court's ruling that NW Natural is not a party to the probate proceeding. As background,
11 we note that, after the filing of the notice of appeal, NW Natural moved to dismiss the
12 appeal as to itself, contending that it was not a party to the probate proceeding below, had
13 not been properly served with petitioners' petition alleging unjust enrichment, and,
14 therefore, is not a respondent on appeal. NW Natural also pointed out that on February 6,
15 2006, in response to a motion by petitioners to compel discovery, the probate court had
16 expressly ordered that "Northwest Natural Gas is not a party to this action," and that
17 "Northwest Natural Gas will not be permitted to act as a party."

18 The Appellate Commissioner denied NW Natural's motion to dismiss with
19 leave to renew, explaining that a complete review of the record was necessary. NW

¹⁴ We also reject petitioners' assertion that the order approving the sale should be set aside because the personal representative did not provide sufficient notice of the order to petitioners. The record reflects that the notice was sufficient.

1 Natural has renewed its motion, contending that, although it initiated the probate
2 proceeding by filing a petition as an interested party and designated itself as "petitioner,"
3 it is not a party to the probate proceedings.

4 Dovetailing NW Natural's motion to dismiss is petitioners' third assignment
5 of error, in which petitioners contend that the probate court erred in determining on
6 February 6, 2006, that NW Natural was not a party to the probate. NW Natural asserts
7 that this assignment is not preserved, and responds in the alternative that, consistent with
8 its motion to dismiss the appeal, it was not a party to the probate proceeding and is not a
9 proper respondent.

10 As we have noted, petitioners' first and second assignments depend on the
11 assertion that the personal representative breached its duty to the estate by allowing the
12 sale of the mineral rights to go forward. In our *de novo* review of the record designated
13 on appeal, we have rejected that assertion. Underlying this third assignment of error is
14 the contention that NW Natural should be required in this probate proceeding to answer
15 petitioners' contention that NW Natural was unjustly enriched by a commercially
16 unreasonable sale of the mineral rights. In view of our finding, above, that the evidence
17 does not support a finding that the sale of the mineral rights was commercially
18 unreasonable, and our conclusion on the first assignment of error that the probate court
19 did not err in striking petitioners' petition seeking damages from NW Natural based on
20 unjust enrichment, whether NW Natural was a party to the probate proceeding is of no
21 consequence. We conclude, therefore, that this third assignment is moot. Accordingly,
22 we also dismiss NW Natural's motion to dismiss as moot.

1 In their fourth assignment, petitioners contend that the probate court erred
2 in awarding an extraordinary fee of \$11,250 to the personal representative for services in
3 connection with the sale of the estate's assets. The fee was in excess of that calculated
4 under ORS 116.173(1). However, ORS 116.173(2) provides that,

5 "[i]n all cases, further compensation as is just and reasonable may be
6 allowed by the court for any extraordinary and unusual services not
7 ordinarily required of a personal representative in the performance of duties
8 as personal representative."

9 The personal representative provided an explanation of why it was entitled to an
10 extraordinary fee. In view of the complexity and duration of this probate proceeding, the
11 probate court did not abuse its discretion in allowing an extraordinary fee to the personal
12 representative.

13 Respondent Northwest Natural Gas Company's motion to dismiss dismissed
14 as moot; affirmed.