IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Estate of: CORRINE WEGNER, Deceased; and KENNETH WEGNER, Personal Representative, Respondents/Cross Appellants, v. MAXINE ELAINE TESCHE, Appellant/Cross Respondent.	No. 39067-1-II PART PUBLISHED OPINION

Armstrong, J. — When Corrine D. Wegner died, her principal asset was real estate she owned with Maxine Tesche in joint tenancy. Her personal representative believed that Wegner and Tesche intended the joint tenancy title to be a financing device that gave Tesche an equitable mortgage, not survivorship rights, and he sued Tesche in an attempt to acquire title to the property. The personal representative incurred fees and expenses investigating the issue, but, after concluding that the estate was unlikely to recover the property, dismissed the claims against Tesche. The personal representative then sought to recover the estate's fees and expenses from Tesche. Tesche appeals the superior court's award of attorney fees and other estate expenses and its denial of her motions to remove the personal representative, for damages, and for CR 11 sanctions. The estate and the personal representative cross appeal the amount of expenses awarded and the denial of administrative fees to the personal representative. Finding no reversible error, we affirm.

FACTS

Corrine Wegner died intestate on February 20, 2006. Her heirs were two sisters and Kenneth Wegner, her brother.

At the time of her death, Corrine's main asset was real property in Enumclaw that contained her residence and a rental home.[1] She bought the property in 1994 with Tesche, and the two took title as joint tenants with right of survivorship. Tesche lived in Nevada and played no role in managing the property.

Kenneth was appointed personal representative of Corrine's estate with nonintervention powers.[2] The value of Corrine's personal property was less than $10,000, and the real property was worth approximately $400,000, subject to a first and second deed of trust with a balance owing of $134,000.

Before her death, Corrine's family understood that she was the sole owner of the real property and that she had borrowed money from a friend for its purchase. Three months before her death, Corrine allegedly told her aunt that the person who lent her the money "had played a dirty trick on her" regarding her deed but that she hoped to pay off the loan from some anticipated real estate commissions. Clerk's Papers (CP) at 121, 326. After her death, the family discovered that the real property was in Corrine's and Tesche's names as joint tenants with right of survivorship.

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[1] We refer to the Wegners by their first names for the sake of clarity. We intend no disrespect.

[2] When a court provides nonintervention authority, the personal representative receives the maximum statutory authority to manage the estate. 26B C. Mitchell and F. Mitchell, Washington Practice: Probate Law and Practice, at 62 (2006).

In April 2006, Kenneth sued Tesche under the Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW, alleging (1) that Corrine and Tesche had created an equitable mortgage, (2) that they held the real property as tenants in common, (3) that an accounting of the real property expenses paid solely by Corrine was required, and (4) that Corrine's nonprobate real property asset should bear the reasonable pro-rata costs of the probate administration. That action was consolidated with the probate proceeding in 2007.

After filing the TEDRA action, Kenneth went through several boxes of Corrine's real estate records looking for documentation of the alleged comments to her aunt and the "true" nature of title to the real property. CP at 302. Failing to uncover any supporting evidence, the estate moved in August 2008 to voluntarily dismiss the three claims involving equitable mortgage, tenancy in common, and an accounting. The estate did not dismiss its claim that Corrine's interest in the real property, a nonprobate asset under Washington law, should be assessed its fair share of administrative expenses and creditor claims under RCW 11.42.085.

Kenneth then filed his final report as the estate's personal representative. He requested that the estate be closed and that Corrine's interest in the real property be used to pay the remaining creditor claims, plus administrative fees and expenses. More specifically, Kenneth requested that Corrine's interest be responsible for $23,335.15 in legal fees to the estate's attorney and $7,500 in administrator fees to him as personal representative, as well as approximately $10,000 in other claims and costs. His final report cited RCW 11.18.200 as authority for that request. Tesche opposed the estate's request for administrative expenses and fees, arguing that the property was left in a "horrible state" when she finally received possession,

that RCW 11.18.200 did not support the request, and that there was no accounting for the two fee requests. CP at 61. She also moved for a citation against Kenneth so that the court could reassess his nonintervention authority, and for an award of damages based on her property damage and litigation costs. In a supporting memorandum, she stated that "this Court should inquire into C.R. 11 violations by P.R. Wegner and by his attorney." CP at 80. Tesche did not move separately for CR 11 sanctions, and she never noted any motion for hearing.

Following the hearing on the final report, a pro tempore commissioner entered findings of fact stating that Corrine's alleged comments to her aunt required the estate's investigation, that there were reasonable grounds for the estate to sue Tesche, that the associated legal actions were reasonably incurred expenses in the estate's administration, and that the decedent's net one-half interest in the real property after deducting the secured interest was valued at approximately $133,000. The unpaid estate expenses, including attorney fees of $24,335.15 and fees to Kenneth of $7,500, totaled $39,925.17. The commissioner struck Kenneth's fee request because no written documentation supported it, and he determined that Corrine's interest in the real property, a nonprobate asset, would be responsible for only $16,212.58. Because Tesche is the beneficiary of the nonprobate asset, the order provided that she was personally liable to the estate for that amount and that the estate was entitled to a judgment lien against the real property in that sum, with interest. The commissioner's order concluded:

> Kenneth Wegner's application for P.R. fees is denied; and that from the monies received on the judgement [sic] lien, the creditors will first be paid, and the attorney fees paid from the remaining funds. The court determines in equity that the non-probate property should be responsible for ½ of the expenses requested by petitioner, except as denied.

CP at 125-26.[3]

Tesche moved for revision without specifying which aspect of the commissioner's decision she was challenging, and the estate moved to revise that part of his decision denying Kenneth's fee request and reducing by half the amount of expenses awarded. The estate contemporaneously filed a declaration explaining Kenneth's request for $7,500 in fees. At the revision hearing, Tesche argued that her motions for damages and a citation were properly before the court, and she argued that her motion for CR 11 sanctions had not been heard and should be scheduled "unless the Court is prepared to enter a ruling today in respect to my motions. . . for removal and citation and . . . attorney's fees." Report of Proceedings at 36-37. The superior court denied both parties relief, ordering that "all motions for revision including oral motions are hereby denied, and the Commissioner's order remains in full force and effect." CP at 130.

Tesche appeals the trial court's award of attorney fees and its denial of her oral motions, and the estate and Kenneth cross appeal the court's decision to reduce the award of expenses and deny Kenneth fees.

ANALYSIS

Litigation Expenses Under RCW 11.18.200

On revision, the superior court reviews the commissioner's findings of fact and conclusions of law de novo. *In re Estate of Wright*, 147 Wn. App. 674, 680, 196 P.3d 1075 (2008), *review denied*, 166 Wn.2d 1005, 208 P.3d 1124 (2009). We review the superior court's decision, not the commissioner's decision. *Wright*, 147 Wn. App. at 680. Generally, we consider

[3] There is no transcript of the hearing before the commissioner in the record, apparently because there was no court reporter and the parties did not transcribe the audio recording.

whether the superior court abused its discretion, which we will find only if the decision rests on unreasonable or untenable grounds. *In re Marriage of Griffin*, 114 Wn.2d 772, 779, 791 P.2d 519 (1990). The first issue presented here, however, is one of statutory construction, which we review de novo. *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 515, 910 P.2d 462 (1996).

Both parties argued before the superior court that RCW 11.18.200 was the controlling statute; it provides in part:[4]

> (1) Unless expressly exempted by statute, a beneficiary of a nonprobate asset that was subject to satisfaction of the decedent's general liabilities immediately before the decedent's death takes the asset subject to liabilities, claims, estate taxes, and the fair share of expenses of administration reasonably incurred by the personal representative in the transfer of or administration upon the asset. The beneficiary of such an asset is liable to account to the personal representative to the extent necessary to satisfy liabilities, claims, the asset's fair share of expenses of administration, and the asset's share of estate taxes[.]
> (2) The following rules govern in applying subsection (1) of this section:
> . . .
> (b) A beneficiary of property held in joint tenancy form with right of survivorship . . . takes the property subject to the decedent's liabilities, claims, estate taxes, and administrative expenses as described in subsection (1) of this section to the extent of the decedent's beneficial ownership interest in the property immediately before death.

RCW 11.18.200(1), (2)(b).

RCW 11.02.005 also defines "nonprobate assets" in part as:

> [T]hose rights and interests of a person having beneficial ownership of an asset that pass on the person's death under a written instrument or arrangement other than the person's will. "Nonprobate asset" includes, but is not limited to, a right

[4] Despite this fact, Tesche opens her brief with the claim that the commissioner erred if he relied on RCW 11.42.085. This is the statute that the estate first cited in requesting an award of fees and expenses from the nonprobate asset. It applies only to the settlement of creditor claims for estates passing without probate, where a personal representative has not been appointed. RCW 11.42.085, .010(1). The commissioner did not cite legal authority in his decision, and both parties relied on RCW 11.18.200 in arguing to the superior court that his decision was erroneous. Tesche did not refer to RCW 11.42.085 below and has waived any claim of error concerning it. *Peoples Nat'l Bank of Wash. v. Peterson*, 82 Wn.2d 822, 829-30, 514 P.2d 159 (1973).

> or interest passing under a joint tenancy with right of survivorship[.]

RCW 11.02.005(15); *see also* RCW 64.28.010 (joint tenancy with right of survivorship permits property to pass to survivor without cost or delay of probate proceedings, but "such transfer shall not derogate from the rights of creditors").

Tesche admits that Corrine's interest in the real property is a nonprobate asset that is responsible for creditor claims under RCW 11.18.200, but she contends that the attorney fees that arose out of the unsuccessful litigation against her do not qualify as authorized administrative expenses under RCW 11.18.200. More specifically, Tesche argues that the attorney fees related to the TEDRA action do not constitute expenses of administration reasonably incurred by the personal representative in the transfer or administration of the nonprobate asset.

But Tesche did not challenge the commissioner's findings of fact in her appeal to the superior court. *See* PCLR 7(g)(3) (motion for revision shall state with specificity the portion of the commissioner's order sought to be revised, and any portion not so specified shall be binding as if no revision motion had been made). The commissioner found that the litigation expenses incurred were reasonable because the allegations concerning Corrine's statements to her aunt needed investigation: "There were reasonable grounds for the estate to bring its initial lawsuit against Maxine Elaine Tesche, and the legal actions, including discovery, briefings, court appearances and orders entered, were all reasonable incurred expenses in the administration of the estate." CP at 121. In addition to the local rule cited above, Tesche is bound by the rule that unchallenged findings of fact are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002). Thus, Tesche did not preserve the issue for review.

Moreover, even if we assume that Tesche did preserve the issue, the commissioner did not err in ruling that Kenneth reasonably incurred the litigation expenses in the transfer or administration of the nonprobate asset. The TEDRA action was not frivolous; its allegation that the deed created an equitable mortgage is not without legal support. *See Gossett v. Farmers Ins. Co.*, 133 Wn.2d 954, 966, 948 P.2d 1264 (1997) (if deed is conveyed with the intent to create a debtor-creditor relationship, it may create an equitable mortgage); *Thomas v. Osborn*, 13 Wn. App. 371, 375, 536 P.2d 8, 88 ALR 3d 898 (1975) (equitable mortgage arises when money is loaned and the parties intend to create a lien on the debtor's property as security for the debt's payment). Kenneth argued that the joint tenancy was created for security purposes only and that title in the entire property should be vested in the estate. He also contended that the court should find in equity that Tesche and Corrine took the property as tenants in common, thus extinguishing the right of survivorship. *Lyon v. Lyon*, 100 Wn.2d 409, 411, 670 P.2d 272 (1983). Joint tenancies are disfavored under the law, and the trial court denied Tesche's motions to dismiss the TEDRA action before consolidating it with the probate proceeding, thus supporting the conclusion that the litigation expenses were reasonably incurred. *See v. Henningar*, 151 Wn. App. 669, 674, 213 P.3d 941 (2009), *review denied*, 168 Wn.2d 1012, 227 P.3d 295 (2010).

In addition to being reasonable, RCW 11.18.200(1) specifies that the expenses must be incurred "in the transfer of or administration upon" the nonprobate asset. The statute does not define "transfer of" or "administration upon," so their ordinary meanings apply. *See Nationwide Ins. v. Williams*, 71 Wn. App. 336, 342, 858 P.2d 516 (1993) (undefined statutory terms must be given their usual meaning and courts may not read into a statute meanings that are not there).

"Administration" is "[t]he management and settlement of the estate of an intestate decedent . . . by a person legally appointed and supervised by the court." Black's Law Dictionary, at 49 (9th ed. 2009). "Transfer" includes "every method . . . of disposing of or parting with property or with an interest in property." Black's Law Dictionary, at 1636. Kenneth pursued the TEDRA action as part of his attempt to acquire title to Corrine's property and settle the estate. Until the issue of the true nature of the joint tenancy was settled, it was not clear whether the asset belonged in the estate or was properly going to Tesche as a true surviving tenant. Thus, Kenneth reasonably incurred the litigation expenses in administering the nonprobate asset and the superior court did not err in awarding the estate attorney fees under RCW 11.18.200.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

The Award of Fees

a. Attorney Fees

We review a trial court's award of attorney fees in a probate for an abuse of discretion. *In re Estate of Larson*, 103 Wn.2d 517, 521, 694 P.2d 1051 (1985). The record before us is the same as the record before the superior court in its review of the commissioner's decision, thereby putting us in the same position as the superior court in determining the reasonableness of fees. *Larson*, 103 Wn.2d at 521-22.

Tesche argues that the estate was not entitled to any attorney fees because they were not reasonably incurred. We have already addressed this issue. Kenneth cross appeals the award,

claiming that the court abused its discretion in halving the total award of expenses requested, which in effect granted the estate only $8,000 in attorney fees. Kenneth cites hypothetical examples to support his argument that the nonprobate asset is responsible for all fees and claims incurred, but in doing so, he largely ignores the statute's requirement that the nonprobate asset bear its "fair share" of expenses. RCW 11.18.200(1).

Neither party addresses the statutory language providing that the beneficiary of property held in joint tenancy with right of survivorship takes the property subject to the claims and expenses described in subsection (1) "to the extent of the decedent's beneficial ownership interest in the property immediately before death." RCW 11.18.200(2)(b). Upon the creation of a joint tenancy, each tenant takes a complete, undivided interest in the whole. *deNoskoff v. Scott*, 36 Wn. App. 424, 427, 674 P.2d 687 (1984). Accordingly, Corrine had a complete ownership interest in the property before she died, less any encumbrances, which conceivably could be responsible for all the expenses set forth in RCW 11.18.200(1). As stated, however, the statute twice directs that the beneficiary of a nonprobate asset is responsible only for the asset's "fair share" of administrative expenses. RCW 11.18.200(1). Here, the expenses sought were incurred during an unsuccessful lawsuit against Tesche, the beneficiary of the nonprobate asset. Thus, we can easily conclude that it would be unfair to require her to pay all of the expenses incurred in that litigation.

The court's reduction of the award by half also may be due to the state in which the estate left the property. The record contains photographs showing possessions and garbage strewn about the interior and exterior of Corrine's personal residence. Although Kenneth denied doing

anything to the exterior of the property, he acknowledged that he left the mess inside her home. Kenneth also admitted that the photographs of the wreckage might have influenced the commissioner. The superior court affirmed the commissioner's use of equitable authority to award the estate half of the expenses it sought, and we find no abuse of discretion in this award.

b. Administrative Fees

Kenneth cross appeals the denial of his request for $7,500 in administrative fees. Kenneth has the burden to prove that his fee request was reasonable, which includes documenting the work performed. *Beckman v. Wilcox*, 96 Wn. App. 355, 367-68, 979 P.2d 890 (1999). Kenneth provided only a general description of his activities in his initial fee request and apparently sought to offer additional detail in testimony before the commissioner. He stated that the commissioner did not allow his testimony because of a crowded docket, but Tesche maintained that the commissioner struck it because Kenneth's attorney sought to offer the testimony without noting it. The commissioner ultimately denied Kenneth's fee request because he provided no documentation of the work he performed as personal representative. Kenneth filed a declaration documenting his efforts when he filed his motion for revision, but he noted during the revision hearing that the declaration was not technically before the court without its permission. *See* RCW 2.24.050 (revision shall be upon records of case). The court listed Kenneth's declaration as one of the documents it considered in ruling on the motions for revision.

Despite that declaration, the court denied Kenneth administrative fees, and that denial again may have been linked to the state in which Kenneth left the property before granting Tesche possession. *See* RCW 11.48.210 (if the court finds that the personal representative has failed to

discharge his duties, it may deny or reduce the compensation otherwise allowed). Kenneth's original request for fees was based in part on his efforts to clean out his sister's furniture and personal effects, and the photographs show that his efforts fell short. Even if the superior court erred in considering Kenneth's declaration, it did not abuse its discretion in denying Kenneth's requested fees.

Tesche's Oral Motions

At issue here are Tesche's motions to remove Kenneth as personal representative under RCW 11.68.070 and RCW 11.68.080, her request for damages, and her request for CR 11 sanctions. These motions were never noted for hearing before the commissioner, and the CR 11 motion was never even filed. Tesche argues that they were properly before the superior court as oral motions, and the court denied them as such. *See* CR 7(b)(1) (motions shall be in writing unless made during hearing or trial).

Tesche moved under RCW 11.68.070 and RCW 11.68.080 for a citation directing Kenneth to appear so that the court could consider whether to rescind or restrict his nonintervention powers, and in the same motion sought to have Kenneth pay for all property damage and litigation costs she suffered or paid as a result of his breach of fiduciary duties owed to the estate and to her as the surviving joint tenant.

RCW 11.68.070 provides that if a personal representative who has been granted nonintervention powers fails to execute his trust faithfully, "upon petition of any unpaid creditor of the estate who has filed a claim or any heir, devisee, legatee, or of any person on behalf of any incompetent heir, devisee, or legatee," where such petition is supported by cause, the court shall

cite the personal representative to appear before it. If the personal representative has not faithfully discharged his duties, the court may intervene and remove or restrict his nonintervention powers. *In re Estate of Jones*, 152 Wn.2d 1, 9, 93 P.3d 147 (2004).

Tesche was not among the parties with authority to invoke the court's jurisdiction under RCW 11.68.070. *See Jones*, 152 Wn.2d at 9 (superior court loses jurisdiction over nonintervention probate once order of solvency is entered and may regain jurisdiction only if the executor or another with statutorily conferred authority invokes jurisdiction). Under RCW 11.68.070, only heirs, devisees, legatees, or creditors of an estate have the right to petition to remove or restrict a personal representative's nonintervention powers. *In re Estate of Hitchcock*, 140 Wn. App. 526, 532, 167 P.3d 1180 (2007). As the beneficiary of a nonprobate asset, Tesche did not fit within any of these categories, and her motion for a citation was properly denied. *See Hitchcock*, 140 Wn. App. at 532 (beneficiary of trust may not file a petition under RCW 11.68.070).

Nor does she qualify to challenge Kenneth's nonintervention powers because the estate may have been insolvent. RCW 11.68.080(3) provides that if, upon a petition "of any personal representative, beneficiary under the decedent's will, heir if any of the decedent's property passes according to the laws of intestate succession, or any unpaid creditor with a claim that has been accepted," the court determines that the estate is insolvent, the court may restrict its prior grant of nonintervention powers. Here, even if the estate was insolvent, as Tesche argues, she had no authority to seek review of Wegner's nonintervention powers under RCW 11.68.080.[5]

[5] It does not appear that the estate was insolvent; a court's determination of solvency takes into account both probate and nonprobate assets. RCW 11.68.011(2).

Finally, Kenneth did not owe any fiduciary duty to Tesche, and she did not have standing to seek damages for the breach of any fiduciary duty he owed to the estate. *See Larson*, 103 Wn.2d at 521 (personal representative is obligated to exercise the utmost good faith and diligence in administering the estate in the best interests of the heirs). The trial court properly denied her request for damages based on Kenneth's alleged breach of his fiduciary duties.

It is questionable whether Tesche's CR 11 motion for sanctions is properly before us. Although she orally asked the superior court to schedule the motion for hearing, she invited the court to enter a ruling.[6] Assuming the court included that motion in its denial of her oral motions, that denial was appropriate. A trial court should impose sanctions under CR 11 only when it is patently clear that a claim has no chance of success. *Skimming v. Boxer*, 119 Wn. App. 748, 755, 82 P.3d 707 (2004). The commissioner found that Kenneth had good reason to investigate the true nature of the joint tenancy, and we have already concluded that the TEDRA action was not frivolous. Tesche now claims that she was also entitled to fees under RCW 4.84.185 and RCW 11.96A.150. Because she did not make these requests below, we will not further consider them.

Attorney Fees on Appeal

Under RAP 18.1(a), a party on appeal is entitled to attorney fees if a statute authorizes the award. *Steele v. Lundgren*, 96 Wn. App. 773, 787, 982 P.2d 619 (1999). Both parties request attorney fees on appeal under RCW 11.96A.150, which provides that such fees are available on appeal solely at the discretion of the court: "any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party. . . [f]rom any party to the

[6] In her reply brief, Tesche seeks a remand so that the trial court may consider whether CR 11 sanctions are warranted.

proceedings." Division One of our court denied fees under RCW 11.96A.150 to a prevailing personal representative because the issues were not frivolous. *Wright*, 147 Wn. App. at 688. Here, the issues raised were not frivolous, and neither party prevailed. We decline to award fees on appeal to either party under RCW 11.96A.150. For the same reason, Tesche is not entitled to fees under RAP 18.9, even if we consider her the responding party. *See Kearney v. Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872 (1999) (compensatory damages available against party who files frivolous appeal).

Affirmed.

Armstrong, J.

We concur:

Penoyar, C.J.

Worswick, J.