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

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| JANET BARNHART,<br><br>Appellant,<br><br>v.<br><br>LIBERTY MUTUAL INSURANCE COMPANY, a foreign corporation; and KATHLEEN BARNHART, as Special Administrator of the Estate of Morris Warren Barnhart,<br><br>Respondent. | ) | No. 30429-9-III<br><br>UNPUBLISHED OPINION |

Korsmo, C.J. — The trial court dismissed on summary judgment this effort to collect against the bond of the special administrator of a California estate, reasoning that recovery was not available under California law. We conclude that there is no conflict between the laws of California and Washington and affirm the trial court.

FACTS

This is the second time matters involving the estate of Reva Barnhart have come before this court. In the first case, this court reversed a ruling in favor of Kathleen Barnhart on the basis that she was an improper party to the action, which involved an effort to set aside her late husband Morris's waiver of inheritance from the estate of his mother, Reva Barnhart. The other Barnhart child, Janet, was the personal representative of Reva's estate.[1]

Reva died in 1995 and Janet was appointed as personal representative of Reva's estate. Prior to her death, Morris had used his power of attorney for Reva to encumber her property to secure his personal debts. He later defaulted and creditors foreclosed on Reva's property. In order to simplify the estate, Janet had Morris sign a waiver of inheritance that reflected that his share of the inheritance was more than consumed by the losses leading to the foreclosure. Morris died in San Diego County, California, in 2001.

Kathleen subsequently filed a Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW, action and obtained a ruling invalidating the waiver on the basis that Morris had revoked it. This court granted discretionary review and reversed on the basis that Kathleen did not represent the estate of her late husband. *In re Estate of Barnhart*, No. 27002-5-III, 2009 WL 997413 (Wash. Ct. App. April 14, 2009). Kathleen

[1] Because all of the parties share the surname of Barnhart, we will refer to them by their first names for the purpose of clarification.

petitioned for probate in San Diego County Superior Court and was made special administrator of the estate for the purpose of taking action against Reva's estate. In accordance with California law, she was required to obtain a bond of $205,000 before acting as special administrator.

Liberty Mutual Insurance Company issued the bond, which required Kathleen to "faithfully execute the duty of Trust according to law" and provided that the obligation "shall be void" if she did so. Clerk's Papers at 13,15. Kathleen then substituted herself as her husband's representative in the Reva estate litigation. The matter went to trial and Janet prevailed in a bench trial. The trial court found that the revocation of the disclaimer of inheritance was not signed by Morris and that the revocation was invalid and fraudulent. A judgment for attorney fees and costs was entered against Morris's estate. Kathleen did not appeal.

Morris's estate had no assets. Janet subsequently filed the current lawsuit to enforce the judgment against Liberty Mutual and against Kathleen in her representative capacity. However, the only relief Janet sought was against Liberty Mutual on the bond. She moved for summary judgment and Liberty Mutual asserted several arguments in opposition.

The trial court determined that California had the most significant contacts and

applied California law. California law permitted recovery on the bond only if the special administrator violated a fiduciary duty with ensuing loss to the estate. On that basis, the court denied Janet's motion for summary judgment and dismissed her suit with prejudice after determining that there were no facts in dispute. Janet then timely appealed to this court.[2]

ANALYSIS

The conflict of laws issue requires us to decide if the laws of California and Washington are in conflict before we reach the question of which state's law applies. Both sides also seek attorney fees for this appeal. We address those matters in the stated order.

*Conflict of Laws*

In typical conflict of law cases, including contract law matters, the choice of law is determined by which jurisdiction has the most significant contacts. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 100, 864 P.2d 937 (1994); *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580, 555 P.2d 997 (1976). This is known as the "most significant relationship" rule. *Johnson*, 87 Wn.2d at 580.

[2] In order to fulfill its duty of candor to the tribunal, Liberty Mutual offered as an exhibit at oral argument an order of the San Diego Superior Court exonerating bond. That fact undercut one of the arguments it had made in its briefing. Janet objected to consideration of the exhibit. We sustain the objection and will not consider the exhibit.

However, "there must be an actual conflict between the laws or interests of Washington and the laws or interests of another state before Washington courts will engage in a conflict of laws analysis." *Seizer v. Sessions*, 132 Wn.2d 642, 648, 940 P.2d 261 (1997); *accord Erwin v. Cotter Health Ctrs., Inc.*, 161 Wn.2d 676, 692, 167 P.3d 1112 (2007); *Burnside*, 123 Wn.2d at 100-01. Thus, the existence of a genuine conflict is a threshold determination. When the outcome of a case would differ depending on choice of law, a "real conflict" exists. *Seizer*, 132 Wn.2d at 648. When the interests of the jurisdictions are not "fundamentally incompatible," a "false" conflict exists. *Burnside*, 123 Wn.2d at 100. In cases of "false" conflict, the law of the forum state presumptively applies. *Id*. at 100-01.

A reviewing court must therefore first analyze the laws of the different jurisdictions to determine whether they conflict before engaging in a determination of the significant contacts of each jurisdiction. Janet acknowledges that if California law applies, her claim fails, but she contends that the outcome would be different under Washington law. Kathleen argues that California law governs under the significant relationship test, but also believes the laws of the two states are fundamentally the same. We agree with her latter observation.

Both states provide for the appointment of special administrators who generally

have more limited powers than a personal representative. The duties of a California special administrator primarily encompass activities of an urgent or immediate nature such as the preservation of property, collection of rents, or the sale of perishable assets. Cal. Prob. Code § 8544(a).[3] The authority to "maintain or defend suits and other legal

[3] Section 8544 states:

(a) Except to the extent the order appointing a special administrator prescribes terms, the special administrator has the power to do all of the following without further order of the court:

(1) Take possession of all of the real and personal property of the estate of the decedent and preserve it from damage, waste, and injury.

(2) Collect all claims, rents, and other income belonging to the estate.

(3) Commence and maintain or defend suits and other legal proceedings.

(4) Sell perishable property.

(b) Except to the extent the order prescribes terms, the special administrator has the power to do all of the following on order of the court:

(1) Borrow money, or lease, mortgage, or execute a deed of trust on real property, in the same manner as an administrator.

(2) Pay the interest due or all or any part of an obligation secured by a mortgage, lien, or deed of trust on property in the estate, where there is danger that the holder of the security may enforce or foreclose on the obligation and the property exceeds in value the amount of the obligation. This power may be ordered only on petition of the special administrator or any interested person, with any notice that the court deems proper, and shall remain in effect until appointment of a successor personal representative. The order may also direct that interest not yet accrued be paid as it becomes due, and the order shall remain in effect and cover the future interest unless and until for good cause set aside or modified by the court in the same manner as for the original order.

(3) Exercise other powers that are conferred by order of the court.

(c) Except where the powers, duties, and obligations of a general personal representative are granted under Section 8545, the special

proceedings" is expressly granted. Cal. Prob. Code § 8544(a)(3). When necessary, the special administrator can be granted the full powers of a personal representative. Cal. Prob. Code § 8545.

Washington treats a special administrator as an interim position. A special administrator may be appointed by a judge, whenever there is a delay in granting letters testamentary or of administration, to collect and preserve the effects of the deceased for the personal representative "who shall thereafter be appointed." RCW 11.32.010, .030. RCW 11.32.030 authorizes special administrators to commence and maintain suits as an administrator for the purpose of collecting all the goods, effects, and debts of the estate and preserving them. The policy of the Washington laws is to "'keep the administration of estates within the hands of regularly appointed administrators, and to rely upon special administrators only in cases of emergency and for a limited time.'" *Peterson v. Johnson*, 49 Wn.2d 869, 872-73, 307 P.2d 564 (1957) (quoting *Ward v. Magaha*, 71 Wash. 679, 680, 129 P. 395 (1913)).

Special administrators in both states serve similar functions. There is no fundamental incompatibility between the laws of the two states.

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administrator is not a proper party to an action on a claim against the decedent.

(d) A special administrator appointed to perform a particular act has no duty to take any other action to protect the estate.

California treats special administrators and personal representatives alike for bonding purposes. California law requires personal representatives and special administrators to give bond prior to assuming the duties of their appointment. Cal. Prob. Code §§ 8480, 8542(a)(1). In California, the bond is conditioned on "the personal representative's faithful execution of the duties of the office according to the law." Cal. Prob. Code § 8480(b). California Probate Code § 8542(a)(1) extends that same condition to any bond given by a special administrator. Under California Probate Code § 8488(a), "an action may be brought against the sureties on the bond" only when there is a breach of a condition of the bond. The general rule in California is that an action against a surety on a probate bond cannot be commenced until there has been a prior order of the court fixing the liability of the administrator. *Alexandrou v. Alexander*, 37 Cal. App. 3d 306, 311, 112 Cal. Rptr. 307 (1974).

Like California, Washington requires both personal representatives and special administrators to give bond, payable to the state of Washington, before entering the duties of their trust. RCW 11.28.185; RCW 11.32.010. The bond of the personal representative is "conditioned that the personal representative shall faithfully execute the duty of the trust according to the law." RCW 11.28.185. The bond of the special administrator is subject to "conditions as required of an executor or in other cases of administration."

RCW 11.32.020.[4]

Thus, both states have similar bonding requirements for special administrators and likewise limit recoveries on bonds to breaches of the fiduciary duties of the special administrators. Once again, the two states are very similar. There is no fundamental incompatibility between the two schemes. The results under either state's law would be the same here. Janet has never alleged, let alone established, that Kathleen breached a duty to Morris's estate by engaging in the Washington litigation that resulted in the judgment against the estate. There would be no recovery under either state's law for Kathleen's actions as special administrator.

In light of this statutory scheme, Janet puts all of her argument into RCW 11.76.160, arguing that it applies here and allows recovery under the bond. That statute provides:

> Whenever a decree shall have been made by the court for the payment of creditors, the personal representative shall be personally liable to each creditor for his or her claim or the dividend thereon, except when his or her inability to make the payment thereof from the property of the estate shall result without fault upon his or her part. The personal representative shall likewise be liable on his bond or her bond to each creditor.

Janet contends that under this provision if a creditor is awarded a judgment against the

[4] Additionally, a special administrator "shall not be liable to an action by any creditor of the deceased." RCW 11.32.050.

estate, then the personal representative is liable on her bond. We do not agree for two different reasons.

First, Kathleen acted as a special administrator, not as a personal representative. By its terms, this statute applies only to personal representatives.

Second, the final clause of the first sentence prevents the statute from having the effect Janet claims that it has. The initial clause of the first sentence makes the personal representative personally liable to each creditor, but the second clause provides that there is no liability when there is an inability to make payment from the property of the estate. The one exception is when the paucity of property results from the fault of the representative.

Janet argues that Kathleen was at fault for the judgment and that this matter therefore falls within the exception. The problem with that argument is that it misplaces the modifier in the second clause of the quoted sentence. The exception applies only when the inability to make payment from the property of the estate results from the fault of the representative. Even if the judgment is Kathleen's fault, a question we do not decide, there is no recovery here because Morris's estate had no assets. There is nothing in the record here to suggest the lack of assets resulted from some fault of Kathleen's. The estate was insolvent before Janet prevailed in Kathleen's lawsuit and it was insolvent

afterwards.

Even if RCW 11.76.160 applied to Kathleen as special administrator of her late husband's estate, Janet has not established that Kathleen caused the estate to become insolvent. Accordingly, Janet could not recover against Kathleen (and hence her bond) as representative of the insolvent estate.

Janet has no recovery under Washington law. She admittedly has no recovery under California law. The choice of laws would not result in a different outcome. Hence, there was no real conflict; this case involved a false conflict. Accordingly, the judgment dismissing this action is affirmed.

*Attorney Fees*

Janet seeks attorney fees on several different theories. Liberty Mutual seeks fees on the basis that this appeal is frivolous.

Janet did not prevail in this appeal and is not entitled to any fees. She prevailed in the trial of Morris's claim concerning the validity of the waiver of inheritance and was appropriately awarded fees for preserving Reva's estate. However, she has not prevailed in her efforts to enforce that award and cannot claim new fees.

RAP 18.1 and 18.9(a) provide that this court may award attorney fees on appeal where authorized by law, court rule, or where the appeal is frivolous. *Harrington v.*

*Pailthorp*, 67 Wn. App. 901, 913, 841 P.2d 1258 (1992). An appeal is frivolous if it presents no debatable issues upon which reasonable minds could differ and it is so devoid of merit that no reasonable possibility of reversal exists. *Id.* Further, all doubts as to whether an appeal is frivolous are resolved in favor of the appellant. *Lutz Tile, Inc. v. Krech*, 136 Wn. App. 899, 906, 151 P.3d 219 (2007). "An appeal that is affirmed merely because the arguments are rejected is not frivolous." *Halvorsen v. Ferguson*, 46 Wn. App. 708, 723, 735 P.2d 675 (1986).

Although Janet's theory was novel, it was not frivolous. Accordingly, we exercise our discretion and decline Liberty Mutual's request for attorney fees.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, C.J.

WE CONCUR:

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Brown, J.

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Kulik, J.