



## Klein v. Estate of Klein

130 Wash.App. 1029 (2005) | Cited 0 times | Court of Appeals of Washington | November 21, 2005

JUDGES Concurring: Faye Kennedy Susan Ward Cook

### UNPUBLISHED OPINION

Kenneth Dale Klein, Richard James Klein, Robert Keith Klein, Sheri Lynn Lewis, and Ronald Allen Klein (the grandchildren), appeal the trial court's decision to grant summary judgment and dismiss their claims against the Estate of their father, John Robert Klein (the Estate). We conclude material issues of fact exist regarding whether the grandchildren knew or reasonably should have known they were beneficiaries of the trust created by John Klein, their grandfather, in his will and whether their father breached his fiduciary duties as trustee. We reverse and remand for trial.

### FACTS

John and Winifred Klein owned and farmed several pieces of property. They had one son, John Robert Klein, and five grandchildren. The five grandchildren, Kenneth Dale Klein, Richard James Klein, Robert Keith Klein, Sheri Lynn Lewis, and Ronald Allen Klein are the children of John Robert and Carol Klein. John Robert and Carol divorced in 1976. John Robert married Anita Klein in 1978. Anita has two children from a prior marriage. In 1983, John and Winifred executed reciprocal wills. John died in November 1989. Under John's will his assets were placed in two trusts, a credit shelter trust and a marital deduction trust. Winifred was the lifetime beneficiary of the trusts. Winifred was also named as executor of John's estate, which was appraised at over \$1.137 million. Under the terms of the will, Winifred was to pay herself annually 'all the net income' from both trusts. Upon Winifred's death, any remaining income would be distributed to Winifred's estate and the remaining trust assets were to be distributed equally to John Robert and the five grandchildren, i.e., one-sixth to John Robert and one-sixth to each of the five grandchildren.<sup>1</sup> John's will further provided:

I request that a full and detailed statement of receipts and disbursements and of the assets remaining in these Trusts be prepared annually, and a copy thereof given to the beneficiaries of these Trusts, and for that purpose an outside accountant may be employed, if such is deemed necessary, to prepare such annual statements.

The grandchildren received notice of the hearing on the final report and petition for decree of distribution of John's estate. The notice provided:

NOTICE is hereby given that WINIFRED E. KLEIN, as Personal Representative of the {estate of



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John Klein}, has filed in the Office of the Clerk of the above Court the Final Report and Petition for Decree of Distribution, asking the Court to approve the Report, distribute the property to the person entitled thereto, and discharge the Personal Representative. The final Report and Petition for Decree of Distribution will be heard on June 26, 1990{.} . . . {A}ny person interested in the above estate may appear and file objections to and contest the Final Report.

The order approving the final accounting and petition for distribution of John's estate was filed on June 4, 1990. The Estate concedes that the grandchildren did not receive a copy of John's will or the final accounting.

For approximately the next 10 years, Winifred lived frugally and received little from the trusts as the lifetime beneficiary. John Robert managed the trusts initially through his relationship with his mother, later by power of attorney, and beginning in March 1997 as trustee. Winifred died July 2, 1999. Her last will, dated October 28, 1996, named John Robert the executor of her estate. The 'Inventory and Appraisement' of Winifred's estate, filed April 3, 2000, stated that she had an undivided one-half interest in six separate parcels of land: the 'Hanson Place' in Snohomish, Washington; the 'Thompson Place' in Snohomish, Washington; two parcels of real property in Sedro Wooley, Washington; and two parcels of real property in Wisconsin.

The final account and petition for distribution of Winifred's estate was filed on October 29, 2000. The grandchildren received a form notice of the hearing. The order approving the final account and petition for distribution of Winifred's estate and property in Washington was entered on November 15, 2000. Under Winifred's will, John Robert was to receive five of the properties, as well as personal items, household goods, cars, and boats; the grandchildren were to receive the Thompson Place; and the balance of Winifred's estate was to be distributed equally between John Robert and the five grandchildren. The Estate concedes that the grandchildren did not receive a copy of Winifred's will, or the final accounting.<sup>2</sup>

The grandchildren also received notice of an ancillary probate of the property in Wisconsin. The grandchildren signed a waiver consenting to John Robert acting as personal representative in the probate in Wisconsin. The Wisconsin probate was finalized on December 29, 2000.

John Robert died on April 10, 2003. His will left all of his assets in two trusts to Anita and named her as trustee and personal representative of his estate, with her children as successor trustees and optional personal representatives.

During the probate of John Robert's estate, the grandchildren received a copy of John's will and learned of the existence of the trusts created by their grandfather and that they were residuary beneficiaries. On August 6, 2003, the grandchildren filed suit against the Estate of John Robert. The grandchildren alleged that, along with John Robert, they were beneficiaries of the trusts after Winifred's death; that John Robert breached his fiduciary duties as trustee because the testamentary



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trusts were not properly funded; John Robert exerted undue influence or used the power of attorney to transfer to himself or other defendants the bulk of John's and Winifred's estates; no accountings on the trusts were ever made despite the requirement in John's will and upon Winifred's death they received only a small partial distribution of assets from the trust. The grandchildren also claimed they worked on the farms for decades with the express agreement that in exchange for their labors they would inherit the properties. In addition, the grandchildren alleged that Anita failed to provide the required accounting; that she failed to prepare a proper inventory and appraisal; failed to disburse the trust property, and that Anita had appropriated the assets they were entitled to from the trusts and was in the process of selling or transferring the assets for less than full and fair consideration. The grandchildren sought an accounting of the property that should have been in the trusts and imposition of a constructive trust.

The Estate moved for summary judgment dismissal, arguing that the grandchildren's claims were barred because they received notice when John's and Winifred's estates were closed, and failed to object.

The trial court ruled that John's and Winifred's estates were closed after proper notice to the grandchildren and that the estates were final as to all inventoried property and could not be reopened on any basis. The court granted summary judgment to the Estate and dismissed with prejudice all grandchildren's claims except the claim for contract to devise.

The grandchildren appeal.

### ANALYSIS

This court reviews summary judgment de novo, engaging in the same inquiry as the trial court and reviewing the facts and inferences in the light most favorable to the nonmoving party. *Trimble v. Washington State Univ.*, 140 Wn.2d 88, 92-93, 993 P.2d 259 (2000) (citations omitted). Summary judgment is only appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Trimble*, 140 Wn.2d at 93 (citing *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); CR 56(c)).<sup>3</sup>

The grandchildren contend that the trusts established by John's will exist separately from the probate of John's and Winifred's estates; that the closing of the estates did not bar their claims related to the existence and management of the trusts, including the failure to provide accountings; and that the closing of the estates did not limit the remedies available against the trustee and successor trustees. Fundamental to the grandchildren's argument is their assertion that until John Robert's death, they were unaware of even the existence of the trusts created in their grandfather's will.

The Estate responds that the trial court was correct in determining that the closing of John's and



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Winifred's estates, to which the grandchildren received notice and did not object for over thirteen years now bars any claim to the assets. The Estate cites *Castanier v. Mottet*, 14 Wn.2d 615, 128 P.2d 974 (1942), which sets forth the well-established principle that a decree of distribution made upon due notice from which no appeal is taken is final and conclusive as to all parties, and that complaints against such a decree must be made within the time limits established by law. *Castanier*, 14 Wn.2d at 626-27 (citing *Farley v. Davis*, 10 Wn.2d 62, 70-71, 116 P.2d 263 (1941)). See also RCW 11.76.030 (closing of estate by legal representative).

But, as it did below, in the trial court, the Estate mischaracterizes the grandchildren's claims. The grandchildren are not contesting the closing of John's and Winifred's estates or attempting to reopen them. Instead their action against the Estate of John Robert is based on claims that John Robert breached his fiduciary duties as trustee.

'A trustee is a fiduciary who owes the highest degree of good faith, diligence and undivided loyalty to the beneficiaries.' In re Estate of Ehlers, 80 Wn. App. 751, 757, 911 P.2d 1017 (1996) (citing *Estate of Jordan v. Hartford Accident & Indem. Co.*, 120 Wn.2d 490, 502, 844 P.2d 403 (1993)). These duties include the responsibility to inform the beneficiaries fully of all facts that would aid them in protecting their interests. *Esmieu v. Schrag*, 88 Wn.2d 490, 498, 563 P.2d 203 (1977). Accord *Allard v. Pacific Nat'l Bank*, 99 Wn.2d 394, 404, 663 P.2d 104 (1983) (if beneficiaries are to hold trustee to proper standards of care and honesty, they must know what the trust property consists of and how it is being managed); In re Marriage of Petrie, 105 Wn. App. 268, 275, 19 P.3d 443 (2001). These principles apply to all trustees, whether the original trustee or a successor. *Tucker v. Brown*, 20 Wn.2d 740, 776-81, 150 P.2d 604 (1944) (successor trustee assumed all duties and was charged with all obligations of original trustee, including making an accounting). In other words, the death of a trustee does not bar inquiry into the trustee's management of a trust. See *Grady v. Dashiell Royal Indem. Co.*, 24 Wn.2d 272, 285-86, 163 P.2d 922 (1945) (where trustee, now deceased, had improperly distributed funds from trust of incapacitated person, court affirmed reimbursement to the trust from the trustee's estate the amounts that were improperly distributed) (overruled in part on other grounds by In re Estate of Phillips, 46 Wn.2d 1, 278 P.2d 627 (1955)).

'Any beneficiary, including one who holds only a present interest in the remainder of a trust, is entitled to petition the court for an accounting.' *Estate of Ehlers*, 80 Wn. App. at 758 (citing *Nelsen v. Griffiths*, 21 Wn. App. 489, 493, 585 P.2d 840 (1978)). In *Ehlers*, the grandfather willed his estate in trust for the life time benefit of his wife, and directed that the remainder of the trust assets be distributed equally to his children upon the wife's death. One of the children was named trustee. The wife died five years later and another of the children contested the distribution of the trust assets and requested an accounting. The *Ehlers* court did not refuse to address the trust claims merely because the estate of the decedent who had created the trust had been closed years before the claim for accounting was filed. *Estate of Ehlers*, 80 Wn. App. at 757, 761. See also *Farley*, 10 Wn.2d at 79-80.

Based on this record, when John died in 1989, the grandchildren received nothing more than the



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mere statutory notice of the hearing on the final report and petition for decree of distribution of John's estate. This statutory notice alone was insufficient to place them on notice that they were beneficiaries of the trusts created by John's will. See *Aberdeen Fed. Sav. & Loan Ass'n v. Hanson*, 58 Wn. App. 773, 777, 794 P.2d 1322 (1990) (in action to set aside alleged fraudulent conveyance of property, imputation of constructive notice from a recorded document was appropriate only if ordinary prudence and business judgment required examination of the record). The grandchildren received neither a copy of their grandfather's will, which established the trusts, nor a copy of the order of final accounting. John Robert was the trustee beginning in March 1997. Despite the terms of the will, John Robert provided no accounting to the grandchildren. When Winifred died in 1999, the grandchildren received a form notice of the hearing on the final account and petition for distribution of her estate but they received neither a copy of her will, which did not mention the trusts, nor a copy of the final accounting. During the next four years preceding John Robert's death in 2003, the grandchildren received no final accounting for or notice of the trusts. In short, although it is undisputed that the grandchildren are beneficiaries of the trust created by John's will, they have never received an accounting.

John Robert, as trustee holding the property for the benefit of the beneficiaries, had a fiduciary duty to inform the grandchildren of all facts that would aid them in protecting their interests, including the existence of the trust and accountings of that trust.<sup>4</sup> *Esmieu*, 88 Wn.2d at 498. The grandchildren, as beneficiaries who hold a present interest in the remainder of the trust, are entitled to petition the court for an accounting. *Estate of Ehlers*, 80 Wn. App. at 758. We conclude that the trial court erred in granting summary judgment and dismissing the grandchildren's claims against John Robert's estate.

The Estate contends, however, that even if the closing of John's and Winifred's estates did not bar the grandchildren's claims related to the trusts, the grandchildren failed to file their action for breach of fiduciary duty within the applicable statute of limitations. The grandchildren disagree, arguing that it is undisputed they were unaware of the existence of the trusts until after John Robert's death in April 2003 and they filed their complaint shortly thereafter, in August 2003. Actions against the administration of a trust are subject to the time limit provisions of RCW 11.96A.070(1), which provides in part: An action against the trustee of an express trust for a breach of fiduciary duty must be brought within three years from the earlier of: (i) The time the alleged breach was discovered or reasonably should have been discovered; (ii) the discharge of a trustee from the trust as provided in RCW 11.98.041 or by agreement of the parties under RCW 11.96A.220; or (iii) the time of termination of the trust or the trustee's repudiation of the trust.

RCW 11.96A.070(1)(a) (emphasis added).

Thus, claims against a trustee for breach of a fiduciary duty must be brought within three years from the earlier of either the time the alleged breach was discovered or reasonably should have been discovered, the discharge of the trustee, or the termination of the trust.<sup>5</sup> *Gillespie v. Seattle-First*



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Nat'l Bank, 70 Wn. App. 150, 161, 855 P.2d 680 (1993). The Estate argues that the trusts terminated upon the death of Winifred in 1999. But testamentary trusts do not terminate until a final accounting by the trustee and the end of the trust, and a trustee is not discharged from his duties until all of the property in the trust is accounted for and distributed after 30 days notice to the beneficiaries. See Gillespie, 70 Wn. App. at 164; RCW 11.98.041. There has never been an accounting of trust property. Thus, the grandchildren's complaint for breach of fiduciary duty was commenced within the statute of limitations unless barred by the discovery rule. See Gillespie, 70 Wn. App. at 161. The grandchildren contend that they did not discover and reasonably could not have discovered, John Robert's alleged breach of fiduciary duties until his death. The grandchildren admit that they received the only notice required by law for John's and Winifred's estates. But they contend that until John Robert died, they did not know that they were the intended beneficiaries of their grandfather's will; that properties would be placed in trust for their benefit, or that they were entitled to an annual accounting.<sup>6</sup> The Estate admits that the grandchildren did not receive copies of John's will or the final accounting, which both mentioned the trust, or copies of Winifred's will or final accounting.

In Gillespie, the trust beneficiaries knew of the existence of the trust and knew that the trust had suffered significant losses, but did not know the cause. This court concluded that, if the beneficiaries 'could not know, because of professional malpractice, self-reporting or concealment of information by the Bank, of the cause of their losses, they were not yet aware of all the essential elements of their claim, specifically, duty, breach, causation and damages.' Gillespie, 70 Wn. App. at 167. Viewing the evidence in the light most favorable to the nonmoving party, there is evidence that the grandchildren had no knowledge of the existence of the trust, much less John Robert's duties as trustee and his alleged breach of those duties. There is a disputed issue of material fact regarding whether the grandchildren reasonably should have earlier discovered the elements of their claims for breach of fiduciary duties. The trial court erred in granting summary judgment and dismissing the grandchildren's lawsuit. We reverse the order granting summary judgment and remand for trial.

Because the issue may arise on remand, we set forth certain principles of constructive trusts. The trial court ruled that John's and Winifred's estates were final as to all inventoried property and could not be reopened on any basis with respect to said inventoried property. A person who becomes administrator of the estate of a deceased trustee steps into such trustee's shoes and becomes the successor trustee of the trust. Tucker v. Brown, 20 Wn.2d at 770-71. If the trial court concludes that the grandchildren's claims are not time-barred, imposition of a constructive trust may be appropriate.

"A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." Ellis v. Schwank, 37 Wn.2d 286, 289, 223 P.2d 448 (1950) (quoting Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 122 N.E. 378, 380 (1919)). 'Constructive trusts arising in equity are imposed when there is clear, cogent, and convincing evidence of the basis for impressing the trust.' Baker v. Leonard, 120 Wn.2d 538, 547, 843 P.2d 1050 (1993). Under certain circumstances, the breach by an estate administrator of his or her





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duties to the estate's beneficiaries may justify imposing a constructive trust over estate proceeds distributed improperly. *Hesthagen v. Harby*, 78 Wn.2d 934, 940-41, 481 P.2d 438 (1971). Further, when there is money or other property held by a guardian or trustee, the existence of a trust having been established, the burden is upon the trustee to make or prove satisfactory accounting of the funds coming into his possession. *Grady v. Dashiell Royal Indem. Co.*, 24 Wn.2d at 285-86.

A constructive trust may be imposed over assets that passed through an estate where there exists 'some element of wrongdoing.' *Pitzer*, 141 Wn.2d 539, 549-50, 9 P.3d 805 (2000) (citing *Baker v. Leonard*, 120 Wn.2d 538, 548, 843 P.2d 1050 (1993)). If the assets of an estate have been finally distributed, the concept of finality may provide a valid justification barring valid claims against closed estates. *Pitzer*, 141 Wn.2d at 551 (citing *Mitchell v. Hardwick*, 297 S.C. 48, 374 S.E.2d 681, 683 (1988)). However, where there is a showing of extrinsic fraud, or where the decree of distribution is void, the concept of 'finality' will yield to concerns of justice and fairness and allow imposition of a constructive trust. *Pitzer*, 141 Wn.2d at 551-52 (citations omitted). See also *Ellis*, 37 Wn.2d at 288-89 (imposition of a constructive trust justified where defendant committed extrinsic fraud by destroying will and thereby preventing the daughter of the testator from asserting her claim during probate). Finally, the Estate argues that if the grandchildren believed there were assets of John's or Winifred's estates which were not included in the inventories of their estates, the proper remedy was to apply to the court for letters of administration;<sup>7</sup> or that if the grandchildren believed there were assets which should have been but were not included in the inventory of John Robert's estate, they should have challenged the inventory under RCW 11.44.035.<sup>8</sup> But the imposition of a constructive trust is an equitable remedy and is thus independent of the grandchildren's other statutory remedies. *Pitzer*, 141 Wn.2d at 549.

Reversed and remanded for trial.

1. Although the will mistakenly directs trust assets to be distributed under Paragraph II.B, a section of the will that addresses the creation of one of the trusts and not distribution of assets, the final accounting and petition for distribution of John's estate, signed by Winifred and filed on June 4, 1990, clarified that in creating the trusts, John 'did not intend to give the remainder to his wife after her death, but to his children and grandchildren per paragraph II.C.'

2. Winifred's will does not mention the trust.

3. 'Findings of fact and conclusions of law are not necessary on summary judgment and, if made, are superfluous and will not be considered on appeal.' *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 413, 814 P.2d 243 (1991) (citing *Donald v. Vancouver*, 43 Wn. App. 880, 883, 719 P.2d 996 (1986)). Further, a litigant need not assign error to superfluous findings. *Concerned Coupeville Citizens*, 62 Wn. App. at 413. We reject the Estate's argument that the grandchildren's failure to assign error to specific findings of fact renders them verities on appeal.

4. This common law duty exists in addition to any duty of notice created by the trust or statute. See *Esmieu*, 88 Wn.2d at 498.



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5. The time limit for claims against a trustee for breach of fiduciary duty is different from the time limit for claims against the personal representative of an estate for breach of a fiduciary duty, which must be brought before discharge of the personal representative. RCW 11.96A.070(2); Merryhew v. Gillingham, 77 Wn. App. 752, 754, 893 P.2d 692 (1995) (examining former RCW 11.96.060(2), which is substantially the same as RCW 11.96A.070(2)).

6. The parties dispute whether John's will required annual accountings. The trial court did not reach this issue.

7. RCW 11.76.250 ('A final settlement of the estate shall not prevent a subsequent issuance of letters of administration, should other property of the estate be discovered{.}').

8. RCW 11.44.035 ('Any party in interest in the estate may challenge the inventory and appraisement at any stage of the probate proceedings.')

