140 Wash.App. 641
Court of Appeals of Washington,
Division 1.

Larry Edwin EISENBACH, Respondent/Cross Appellant,
v.
Stephen F. SCHNEIDER and Jane Doe Schneider; and Roy Allen Eisenbach and Annette Eisenbach, Appellants/Cross Respondents.

No. 58047–7–I. | Sept. 10, 2007.

Synopsis
Background: Beneficiary of trust, who was co-executor of a settlor/trustee's estate, brought action against his brother, who was also beneficiary and co-executor, seeking, inter alia, declaratory relief regarding apportionment of estate taxes between two funds described in trust indenture. Following a bench trial, the Superior Court, King County, Susan J. Craighead, J., ordered reallocation of total estate tax burden to conform to settlors' intent. Defendant appealed and plaintiff cross-appealed.

Holdings: The Court of Appeals, Cox, J., held that:

[1] trust indenture expressed joint intent of settlors to allocate estate taxes pro rata between the taxable portions of the trust;

[2] Internal Revenue Code provision did not require setting aside settlors' clear intent;

[3] amendment of trust indenture did not modify settlors' joint intent to allocate estate taxes pro rata;

[4] even if the federal provision preempted state statute regarding apportionment of estate taxes, the federal provision did not apply.

Affirmed in part, reversed in part, and remanded.

West Headnotes (10)

[1] **Internal Revenue** Estate Tax

Federal law controls the determination of the obligation to pay and the total amount of federal estate tax; however, state law generally retains its traditional role of determining testamentary intent respecting the impact of the estate tax on beneficiaries and distribution of the estate.

Cases that cite this headnote

[2] **Appeal and Error** Review Dependent on Whether Questions Are of Law or of Fact

Appeal and Error Cases Triable in Appellate Court

On appeal from trial court's judgment ordering reallocation of estate tax burden to conform to trust settlors' intent, issue of whether federal law required the allocation of paid estate taxes according to the provisions of federal estate

tax statute rather, than as stated in the trust indenture, was a question of law that the Court of Appeals would review de novo. 26 U.S.C.A. § 2207A(a).

Cases that cite this headnote

[3] **Internal Revenue** Testamentary Directions Concerning Payment

Indenture of trust language stating that trustee would pay "a ratable share" of estate taxes "determined by the proportion which the taxable portion of the trust estate bears to the net taxable estate of the Settlor," unambiguously expressed the joint intent of the settlors to allocate estate taxes pro rata between the taxable portions of the trust.

1 Cases that cite this headnote

[4] **Trusts** Application of General Rules of Construction

Wills Intention of Testator

In construing a will or trust, testamentary intent controls.

4 Cases that cite this headnote

[5] **Trusts** Application of General Rules of Construction

Whenever possible, the intent of the settlors of a trust should be ascertained from the language of the instrument itself.

2 Cases that cite this headnote

[6] **Wills** Questions for Jury

Testamentary intent is a question of fact.

1 Cases that cite this headnote

[7] **Internal Revenue** Testamentary Directions Concerning Payment

Internal Revenue Code provision allowing estate to recover federal estate taxes attributable to Qualified Terminable Interest Property (QTIP) trust from remainder beneficiaries did not require setting aside settlors' clear intent that estate taxes be apportioned pro rata between taxable portions of the trust, even though settlors failed to specify that they waived right of recovery as to QTIP. 26 U.S.C.A. § 2207A(a).

1 Cases that cite this headnote

[8] **Trusts** Modification

Surviving settlor's amendment of trust indenture, to delete addendum, did not modify settlors' joint intent to allocate estate taxes pro rata between the taxable portions of the trust, although the addendum was consistent with such intent; language stating that settlors intended taxes to be apportioned pro rata was not modified, and surviving settlor could not validly amend distribution of deceased settlor's one-half of the community property.

Cases that cite this headnote

[9] **Internal Revenue** Testamentary Directions Concerning Payment

States Revenue and Taxation

Even if the Internal Revenue Code provision allowing estate to recover federal estate taxes attributable to Qualified Terminable Interest Property (QTIP) trust from remainder beneficiaries preempted Washington statute regarding apportionment of estate taxes, the federal provision did not apply to apportionment of taxes that was based solely on settlors' testamentary intent as expressed in the trust indenture. 26 U.S.C.A. § 2207A.

1 Cases that cite this headnote

[10] Appeal and Error Points and Arguments

On appeal from trial court's judgment ordering reallocation of estate tax burden to conform to trust settlors' intent, defendant failed to provide sufficient appellate argument to support his contention that trial court miscalculated apportionment of taxes because it did not take tax exempt portion of settlors' estate into account, and thus the Court of Appeals would decline to address the argument.

Cases that cite this headnote

Attorneys and Law Firms

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Opinion

PUBLISHED IN PART

COX, J.

[1] ***645** ¶ 1 Federal law controls the determination of the obligation to pay and the total amount of federal estate tax.[1] However, state law generally retains its traditional role of determining testamentary intent respecting the impact of the estate tax on beneficiaries and distribution of the estate.[2] Here, the settlors of the trust indenture at issue in this case clearly intended that the burden of paid estate taxes should be allocated pro rata between two funds described in the trust indenture. Neither the statutory right of recovery provision under the Internal Revenue Code[3] nor other law requires setting aside their clear expression of testamentary intent. We also conclude that the trial court properly exercised its discretion with respect to the other matters challenged on appeal with one minor exception.

¶ 2 Marvin and Martha Eisenbach, husband and wife, executed a restated indenture of trust dated August 1995 that named them as settlors and trustees. Their two sons, Larry and Roy, are among the named beneficiaries in the trust indenture.[4] They are also the principle parties to this appeal.

****860** ¶ 3 Marvin Eisenbach died testate in December 1997. Martha Eisenbach died testate in November 2002.

¶ 4 Following the death of Martha Eisenbach, Roy, as co-executor under her will, supervised the preparation and ***646** submission of federal estate tax returns as well as payment of the federal estate tax. He did so without permitting Larry, the other co-executor of her estate, to participate. The manner in which Roy allocated the estate tax burden between Larry and the other beneficiaries of certain trusts described in the trust indenture is a major issue in this case.

¶ 5 In late 2003, Larry retained counsel to assist him in obtaining more information about Martha Eisenbach's estate from her attorney, Stephen Schneider, and from Roy. Unsatisfied with the information he received, he commenced this lawsuit, asserting numerous claims against Schneider and Roy. Larry also sought, among other things, declaratory relief regarding the apportionment of estate taxes between two funds described in the 1995 trust indenture of the brothers' parents.

¶ 6 After a bench trial, the trial court concluded that Marvin and Martha Eisenbach clearly expressed their joint intent in the trust indenture that federal and state estate taxes be apportioned pro rata between two trusts described in the trust indenture. The court also concluded that they had effectively waived the application of the recovery provisions of 26 U.S.C. § 2207A. Thus, the court concluded that Roy's decision in administering Martha Eisenbach's estate to allocate the burden of estate taxes in accordance with the recovery provisions of the latter statute was incorrect. Accordingly, the court ordered a reallocation of the total estate tax burden to conform to the testamentary intent of the settlors, as set forth in their trust indenture. The court made other determinations that we shall discuss later in this opinion. Finally, the court awarded attorney fees pursuant to RCW 11.96A.150.

¶ 7 Roy appeals. Larry cross-appeals. [5]

*647 TESTAMENTARY INTENT

¶ 8 Roy argues that he properly allocated the estate tax burden pursuant to the provisions of 26 U.S.C. § 2207A after paying the full amount of estate taxes. He claims that the trial court erroneously adopted the pro rata allocation of the tax burden stated in the trust indenture of the settlors, Marvin and Martha Eisenbach. We hold that the trial court properly gave effect to the testamentary intent of the settlors, as expressed in the indenture of trust.

[2] ¶ 9 The primary issue is whether the provisions of § 2207A require the allocation of paid estate taxes according to the provisions of that statute rather than as stated in the trust indenture. That is a question of law that we review de novo. [6]

¶ 10 We start with the observation that it is undisputed that the full amounts of estate taxes have been paid, both for Martha Eisenbach's estate as well as for the estate of her deceased husband, Marvin Eisenbach, who predeceased her. The taxes for both estates were paid in 2003. Thus, we deal here with the allocation of the amount of paid estate taxes between two taxable trusts named in the indenture.

¶ 11 We also note that Roy does not assign error to most of the factual findings of the trial court. Accordingly, most of the findings are verities on appeal. [7]

Estate Plan

¶ 12 In May 1979, Marvin and Martha Eisenbach established a trust indenture. In a document dated August 11, 1995, they amended the trust indenture by executing a restated indenture of trust. That document included an Addendum A listing assets that then constituted the corpus ***648** of the trust. Substantially all of the settlors' property was community property.

****861** ¶ 13 The restated trust indenture identified Roy and Larry as beneficiaries of the trust upon the death of the last surviving settlor. Annette Eisenbach, the wife of Roy, as well as their two children, were also beneficiaries. Annette and the children were to receive smaller percentages of the trust than either Larry or Roy.

¶ 14 The trust indenture provided that income from the trust estate was to be paid to Marvin and Martha Eisenbach during their joint lives. Upon the death of either of them the indenture provided as follows:

> 1. The Trustee shall divide the trust estate into two parts, to be known as Fund A and Fund B. Fund A shall consist of the surviving Settlor's share of the community property. Fund B shall consist of the deceased Settlor's share of community property. Actual segregation of the property shall not be required unless the Trustee deems it advisable to do so.

The trust indenture further stated with respect to "Fund B" as follows:

> 3. Fund B shall be divided into two subshares, Subshare B–1 and Subshare B–2, as follows:
>
> (a) To Subshare B–1, there shall be allocated that portion of the assets of Share B as is equal to the exemption equivalent available for federal estate taxes in the year of Settlor's death. As used herein, the exemption equivalent is that amount which will result in a federal estate tax equal to the unified credit for the year of Settlor's death pursuant to Section 2010 of the Internal Revenue Code as it presently exists or as subsequently amended, and for which the state death tax credit is available pursuant to Section 2011 of the Internal Revenue Code as it presently exists or subsequently amended (provided the use of this credit does not require an increase of the state death taxes paid). In funding Subshare B–1, the Trustee is instructed to take into consideration all property in which the deceased Settlor has an interest, including property passing outside the terms of this trust, and other provision of this trust which do not qualify for the marital deduction. In the event that the ***649** value of the property of Fund B allocated to Subshare B–1 is less than the amount of property which is subject to federal estate tax, and for which the state death tax credit is available, Subshare B–1 shall be comprised of such lesser amount.
>
> (b) Subshare B–2 shall consist of the residue of Fund B, and shall be added to and transferred to Fund A to be held and administered as a part of Fund A, and shall constitute the property of the surviving Settlor. Notwithstanding anything herein to the contrary, the surviving Settlor shall have the right at his or her election, to disclaim all or any portion of Subshare B–2, and in the event of such disclaimer, the disclaimed portion of Subshare B–2 shall be added to and held as a part of Subshare B–1.

¶ 15 On December 5, 1997, Marvin Eisenbach predeceased Martha Eisenbach. Pursuant to the terms of the trust indenture, the trust estate was divided into two parts, known as Fund A and Fund B. As the trust indenture further specifies, Marvin Eisenbach's one-half interest in the marital community's property was divided into two subshares, Subshare B–1 and Subshare B–2. The trustee allocated approximately $600,000 to the former subshare (the "B–1 trust" or "Credit Shelter Trust"). The trustee also allocated approximately $1.6 million to the latter subshare (the "B–2 trust" or "Qualified Terminable Interest Property ('QTIP') trust"). Pursuant to applicable law, the trustee deferred payment of estate taxes that otherwise would have been due upon Marvin Eisenbach's death.

¶ 16 Martha Eisenbach's one-half interest in the marital community's property became Fund A under the terms of the trust indenture upon her husband's death. The parties also refer to this fund as the "B–3 trust." The income from the B–3 trust was periodically distributed to her during her remaining lifetime.

¶ 17 Martha Eisenbach amended certain provisions of the trust indenture following her husband's death. In 2000, she amended the provisions of the trust indenture, reducing the percentages of her estate that Larry and Roy would receive on her death and ****862** increasing the percentages her grandchildren would receive.

***650** ¶ 18 The following year, she amended the trust again. After providing Larry an early distribution from her estate of $200,000, she modified the trust to provide the following distributions from her estate, the B–3 trust: 25 percent to Roy, 25 percent to Annette, and 50 percent to the trustee of the Eisenbach Education Irrevocable Trust for the benefit of their children. Thus, she effectively disinherited Larry from taking anything under her estate plan.

¶ 19 Martha Eisenbach died on November 26, 2002. Roy became trustee of the B–1 and B–2 trusts, which had been funded by Marvin Eisenbach's share of the marital community's property after his death in 1997. Roy also became trustee of the B–3 trust, which had been funded by Martha Eisenbach's share of the marital community's property upon Marvin's death.

Estate Administration

[3] ¶ 20 Under the terms of Martha Eisenbach's will, Larry and Roy are co-executors of her estate. Her will provides by its terms that her estate is to pour-over to the trust, which is controlled by the terms of the trust indenture.

¶ 21 Larry and Roy liquidated the B–1 trust established in the trust indenture without conflict. Part of the income from the B–2 trust was the subject of a dispute that we describe later in this opinion.

¶ 22 The major dispute between Larry and Roy, however, concerns the allocation of the estate tax burden between Martha Eisenbach's estate (the B–3 trust) and the taxable portion of Marvin Eisenbach's estate (the B–2 trust). Specifically, we must determine the testamentary intent of Marvin and Martha Eisenbach. Should the estate tax burden be shared pro rata between these two trusts, or should another allocation control?

¶ 23 Roy assigns error to the trial court's finding that Marvin and Martha Eisenbach intended that "estate taxes be allocated pro rata." We hold that this finding is supported by substantial evidence in the record.

[4] **[5]** **[6]** ***651** ¶ 24 In construing a will or trust, testamentary intent controls.[8] Whenever possible, the intent of the settlors should be ascertained from the language of the instrument itself.[9] Testamentary intent is a question of fact.[10] We review whether substantial evidence supports the findings of fact.[11] "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise."[12]

¶ 25 Here, Article VI of the indenture of trust states as follows:

> The Trustee shall pay out of principal, to the extent that this trust shall be included in the gross estate of either Settlor ***for the purposes of determining federal estate taxes or Washington estate taxes, a ratable share of such taxes determined by the proportion which the taxable portion of the trust estate bears to the net taxable estate of the Settlor*** (after exemptions and deductions are taken) as determined for estate tax purposes by the authority assessing the tax.[13]

¶ 26 The above language plainly and unambiguously expresses the joint intent of the settlors, Marvin and Martha Eisenbach, that estate taxes shall be paid "ratably" among the taxable portions of the trust. While the trust indenture was amended in other ways before and after the death of Marvin Eisenbach, this provision for the pro rata payment of estate taxes remained unchanged.

¶ 27 We note that Addendum A to the indenture trust is consistent with our reading that estate taxes are to be ***652** shared pro rata between the taxable portions of the trust.[14] ****863** For example, Exhibit 9 at trial shows a listing of the then assets in the trust, estimated taxes, and tentative distributive shares to Larry, Roy, and the other beneficiaries. The amounts of the estimated distributive shares are most consistent with a pro rata allocation of estate taxes, as the language of the indenture trust specifies.

¶ 28 Notwithstanding the clear and unambiguous directive in the trust indenture to allocate the estate taxes pro rata between the B–2 trust and the B–3 trust, Roy elected to allocate the paid estate taxes between the trusts in a different manner. Specifically, he elected to apply 26 U.S.C. § 2207A, which permits a right of recovery to a decedent's estate in certain circumstances.

26 U.S.C. § 2207A

¶ 29 Roy contends the trial court failed to correctly apply this provision in this case, thereby directing an incorrect allocation of the paid estate taxes between the B–2 and B–3 trusts. Specifically, he argues that Martha Eisenbach's estate, the B–3 trust, has a right of recovery against the B–2 trust, the taxable portion of Marvin's estate, to the extent of the amount of estate taxes her estate paid based on the value of Marvin's B–2 trust included in her estate. We disagree.

¶ 30 In 1981, the Internal Revenue Code was amended as part of the Economic Recovery Tax Act, to extend the marital deduction to property in Qualified Terminable Interest Property, or QTIP trusts. [15] A QTIP trust gives ***653** a surviving spouse all of the income from the trust property during his or her life. Upon the surviving spouse's death, the remaining assets are distributed to remainder beneficiaries originally named in the trust instrument. The election of QTIP treatment under 26 U.S.C. § 2056(b)(7) allows the surviving spouse, by means of a marital deduction taken by the testator's estate, to defer payment of the federal estate taxes until the surviving spouse's death. [16] Upon the surviving spouse's death, the QTIP trust is included in the survivor's estate for taxation purposes. [17] HOWEVER, THE SURVIVor's estate is entitled to recover from the qtip remainder beneficiaries the federal estate taxes attributable to the QTIP trust, unless the decedent directs otherwise. [18]

¶ 31 26 U.S.C. § 2207A(a), which was last amended in 1997, currently provides:

> (a) Recovery with respect to estate tax.
>
> (1) In general. If any part of the gross estate consists of property the value of which is includible in the gross estate by reason of section 2044 (relating to certain property for which marital deduction was previously allowed), the decedent's estate shall be entitled to recover from the person receiving the property the amount by which—
>
> (A) the total tax under this chapter which has been paid, exceeds
>
> (B) the total tax under this chapter which would have been payable if the value of such property had not been included in the gross estate.
>
> ***(2) Decedent may otherwise direct.*** Paragraph (1) shall not apply with respect to any property to the extent that the decedent in his will (or a revocable trust) ***specifically indicates an intent to waive any right*** ***654** ***of recovery under this subchapter with respect to such property.*** [19]

¶ 32 Article VI of the trust indenture before us provides that the federal and state estate taxes should be apportioned pro rata:

> A. The Trustee shall pay out of principal, to the extent that this trust shall be included ****864** in the gross estate of either Settlor ***for the purposes of determining federal estate taxes or Washington estate taxes, a ratable share of such taxes determined by the proportion which the taxable portion of the trust estate bears to the net taxable estate of the Settlor*** (after exemptions and deductions are taken) as determined for estate tax purposes by the authority assessing the tax. [20]

[7] ¶ 33 As we have discussed earlier in this opinion, the trial court correctly found that Marvin and Martha Eisenbach intended that estate taxes be apportioned pro rata. Thus, the issue is whether § 2207A requires a different allocation. We hold that it does not.

¶ 34 The Congressional committee reports for the 1997 amendment provide that "the right of recovery with respect to QTIP is waived only to the extent that language in the decedent's will or revocable trust specifically so indicates (e.g., by a specific reference to QTIP, the QTIP trust, section 2044, or section 2207A)." [21] The report also states that a general provision specifying that all taxes be paid by the estate is no longer sufficient to waive the right of recovery. [22] Roy relies on these reports to argue that because his parents did not specifically refer to § 2207A or the QTIP trust in the trust indenture, they did not effectively waive § 2207A.

***655** ¶ 35 The trial court rejected this argument and concluded that the Eisenbachs' intent is clear, and stated:

> To interpret Section 2207A to override the testators' intent because they failed to use magic words enacted after their testamentary documents had been drafted and signed would constitute a broad reach for a federal statute, especially where the federal government has nothing to gain from the interpretation. [23]

¶ 36 The court reasoned that the Internal Revenue Service does not care how estate taxes are apportioned as long as the total amount of tax paid is correct. Further, the court relied on *Riggs v. Del Drago* in which the United States Supreme Court held that apportionment of federal estate taxes is a matter of state law. [24] We agree.

¶ 37 In *Riggs*, the Supreme Court held that in the absence of congressional enactments to the contrary, state law governs the allocation of the burden of estate taxes. [25] In Washington, testamentary intent controls the construction of a will or trust. [26]

¶ 38 Congress amended § 2207A to require a settlor to specifically waive recovery, reasoning that "persons utilizing standard testamentary language often inadvertently waive the right of recovery with respect to QTIP." [27] Congress attempted to avoid this confusion by requiring specific reference to the Internal Revenue Code section or the QTIP. The amendment was to ensure that the testator's intent effectively controlled. Nowhere in the legislation or in its legislative history is there any suggestion that a clear statement of testamentary intent regarding the allocation of the tax burden is to be displaced by the provisions of the statute.

***656** ¶ 39 Here, it is clear that the Eisenbachs intended for their estate taxes to be apportioned pro rata. The trust indenture is unambiguous in this respect. Because testamentary intent controls the apportionment of the burden of federal and state estate taxes, and the Eisenbachs jointly agreed that estates taxes were to be apportioned pro rata, we conclude that the trial court properly ****865** directed allocation of the estate taxes in that manner.

¶ 40 Roy relies on several cases to support his argument to overturn the clear testamentary intent of the settlors that is stated in the trust indenture. All are distinguishable. In short, the cases that concluded that the testator did not sufficiently waive reimbursement under § 2207A all contained general pay-all-taxes clauses and involved the former version of the statute. Unlike this case, they did not involve a specific statement of intent directing pro rata allocation of estate taxes and did not involve the current version of the statute.

¶ 41 *In re Estate of Klarner* [28] is the only case Roy relies on that involved the current statute. However, there, the parties agreed that § 2207A applied to federal estate taxes. The issue was whether § 2207A preempted the Colorado statute that governed the apportionment of state estate taxes. [29] The court held that § 2207A preempted conflicting Colorado law with respect to state taxes, and the parties conceded that the testamentary language was insufficient to waive § 2207A. [30] Because our state statute governing apportionment of estate taxes is not at issue, *Klarner* does not apply.

¶ 42 In *Firstar Trust Co. v. Cooney*, the decedent's will contained a general pay-all-taxes clause. [31] It did not reference the QTIP trust or the federal ***657** reimbursement statutes. [32] The Wisconsin Supreme Court held that the testator did not sufficiently waive reimbursement under former § 2207A because the will contained a general tax clause provision, which was insufficient to shift the tax burden from the QTIP remainder beneficiaries to the decedent's estate. [33] The court followed the reasoning of New York's court in *In re Estate of Gordon*, which held that a general tax clause was insufficient to waive former § 2207A reimbursement. [34] The *Gordon* court reasoned that there is a presumption that testators do not intend to apply a general tax exoneration clause to QTIP property, and if applied in that case, it would have totally eliminated the decedent's residuary gift to charity. [35] The court noted that nothing in the decedent's will evidenced a clear intent to do so.

¶ 43 Similarly, in *Cooney*, the court noted that if the QTIP beneficiaries were exonerated from paying taxes, no funds would remain in the decedent's residuary estate to satisfy her specific bequests to family and charity. [36] The court reasoned that the will revealed no intent to benefit her husband's remainder beneficiaries at this expense. [37]

¶ 44 In *In re Estate of Kramer*, the New York Supreme Court similarly held that the general tax clause stating that taxes were to be paid from the residuary estate was insufficient to waive former § 2207A. [38]

¶ 45 In contrast here, the Eisenbachs did not have a general pay-all-taxes clause in the trust. Rather, they specifically stated that taxes shall be apportioned pro rata. ***658** They also incorporated an addendum to the trust indenture, which further shows their intent to apportion the taxes pro rata.

[8] ¶ 46 Roy argues that in 2001, Martha Eisenbach amended Article I, section D of the trust indenture entirely, including all references to Addendum A, and replaced it with a new paragraph that made no reference to an addendum. He asserts that in doing this, she revoked the addendum and it can no longer be considered.

¶ 47 Although Martha Eisenbach amended the language of section D, which referred to ****866** the addendum, the tax provision located in Article VI, section A, was never amended. In any event, Martha could only validly amend the distribution of her one-half of the community property, the B–3 trust. She could not validly amend the distribution of Marvin Eisenbach's one-half of the community property, the B–1 and B–2 trusts.

¶ 48 In short, even without the addendum, the trust indenture clearly states that the Eisenbachs intended for the estate taxes to be apportioned pro rata, and this language was never modified.

[9] ¶ 49 Roy also argues that a private letter ruling in another case supports his position. We make two observations in response. First, by it terms, the ruling expressly states "This ruling is directed only to the taxpayer requesting it." Section 6110(k)(3) of the Internal Revenue Code provides that the private letter ruling may not be used or cited as precedent. Second, in any event, we see nothing in the facts or law stated in the ruling that affects our disposition of this case.

¶ 50 Next, Roy argues that § 2207A preempts our state statute, which governs the apportionment of estate taxes. This argument is unpersuasive.

¶ 51 The trial court ordered the estate taxes to be apportioned pro rata pursuant to the Eisenbachs' testamentary intent, as expressed in the trust indenture. Thus, our state statute is not relevant to the question of apportionment.

***659** ¶ 52 Roy also argues that the trial court's ruling harms Martha's beneficiaries, and benefits Marvin's. However, both Eisenbachs jointly intended to allocate the estate taxes pro rata, as the trust indenture specifies. Theoretical harm to beneficiaries of one of the settlors is not a basis for upsetting their clear statement of testamentary intent.

[10] ¶ 53 Roy further argues that the trial court miscalculated the apportionment of taxes because it did not take into account the tax exempt portion of Martha Eisenbach's estate. We decline to address this argument due to insufficient ***660** argument and failure to support the argument with relevant citations to the record. [39]

¶ 54 Finally, Roy argues that the trial court's ruling could expose Martha Eisenbach's beneficiaries to federal gift tax liability. This argument is speculative, and does not change our analysis.

¶ 55 We affirm the trial court's judgment to the extent it allocated the state and federal estate taxes pro rata.

¶ 56 The remaining issues of this opinion are not of precedential importance. Accordingly, pursuant to RCW 2.06.040, the remainder of this opinion is unpublished.

Unpublished Text Follows

CONVERSION

¶ 57 Larry argues that the trial court abused its discretion in dismissing his conversion claim with prejudice. We agree.

¶ 58 Civil Rule 41(a)(1)(B) allows a plaintiff to move for a voluntary dismissal before he or she rests at the conclusion of his or her opening case. "Unless otherwise stated in the order of dismissal, the dismissal is without prejudice...." [40] This court reviews an order regarding a motion to dismiss for an abuse of discretion. [41]

¶ 59 Here, Larry voluntarily dismissed his conversion claim before he rested his opening case. Nothing in the record establishes that he had previously dismissed this claim for any reason. Nevertheless, the trial court dismissed Larry's remaining claims "with prejudice."

¶ 60 Larry argues that the dismissal should have been without prejudice. He cites *Lawrence v. Department of Health.* [42] There, the court held that the dismissal without prejudice was proper because the Commission did not decide the case on its merits. [43] The rationale of that case applies here.

¶ 61 Nothing suggests that the trial court here decided Larry's conversion claim on the merits. Because it was Larry's first voluntary dismissal before adjudication on the merits, the conversion claim should have been dismissed without prejudice. [44]

ATTORNEY FEES

¶ 62 Larry also argues that the trial court abused its discretion in denying part of his attorney fees. Specifically, he argues that it was an abuse of discretion for the court to deny his fee request based on its conclusion that Roy did not breach his fiduciary duties as trustee. We disagree.

¶ 63 Whether to award attorney fees under RCW 11.96A.150 is within the discretion of the court, and we will not interfere with the trial court's fee determination absent an abuse of that discretion. [45] A court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. [46]

¶ 64 Larry challenges the trial court's denial of fees based on its conclusion that Roy did not breach his fiduciary duties despite the fact that Roy withheld information from him. Whether the trial court's findings of fact support its decision is a question of law that we review de novo. [47] Larry does not challenge the trial court's findings regarding the breach of fiduciary duty. Thus, they are verities on appeal. [48]

¶ 65 Larry assigns error to the court's conclusions of law, which distinguish *Allard v. Pacific National Bank* [49] and *Wilkins v. Lasater:* [50]

> 4. Although these were serious lapses, they do not rise to the level of a breach of fiduciary duty to provide information to a beneficiary. Larry has not argued that he could have taken advantage of information if only it had not been concealed from

him. His position stands in contrast to that of the beneficiaries in *Allard v. Pacific National Bank.* There, had the beneficiaries been informed of an anticipated transaction, they could have offered a higher price on a piece of property that was sold by the Trustee for below market rate. ***While Larry contends that this litigation could have been avoided if the information had been provided, the failure to do so completely and quickly does not constitute a breach of fiduciary duty.***

5. At no point did Larry or Ahrens [Larry's attorney] specifically request an accounting, although it is clear from Ahrens' requests that he was trying to gather enough information to do his own accounting. The nature of the accounting required of a trustee depends on the context. For example, where self-dealing was an issue in *Wilkins v. Lasater*, the trustee's complete failure to produce billing and other business records led to the conclusion he had failed to disprove the allegation that he had breached the duty of loyalty. Here, Roy provided ample documentation of the management of the B–2 Trust, albeit pursuant to discovery requests. Under these circumstances, ***I cannot find Roy breached his duty to provide an accounting.*** [[51]]

¶ 66 Here, the trial court found that Roy provided very little information to Larry concerning the B–2 trust and Martha Eisenbach's estate until Larry retained counsel. It was after Larry retained counsel that Roy turned over the documents in response to Larry's requests for production. The trial court properly distinguished *Allard.*

¶ 67 There, Pacific Bank was trustee of a piece of property for the benefit of the deceased's children. [52] Credit Union was lessee of the property and offered to purchase the property from Pacific Bank. Pacific Bank demanded at least $200,000 for the property, and Credit Union purchased it for that amount. Pacific Bank informed the beneficiaries after the sale. The beneficiaries sued Pacific Bank alleging breach of fiduciary duties, and the trial court dismissed their action. Our supreme court reversed, holding Pacific Bank breached its fiduciary duties by failing to warn the beneficiaries of the sale of trust property. [53] The court reasoned that the beneficiaries could have offered to purchase the property at a higher price than the offer by Credit Union, forcing Credit Union to pay a higher price to exercise its right of first refusal. [54] The court awarded the beneficiaries fees based on the trustee's breach of its fiduciary duties. [55]

¶ 68 In contrast here, although there was a delay in the production of documents, Roy eventually provided Larry all of the information requested. Larry's interest in the trust property was not diminished by this delay. Even if Roy breached his fiduciary duties, Larry fails to show any damage. Thus, it was entirely proper for the trial court to minimize or disregard this claim in making its discretionary decision on the amount of fees to be awarded in this case.

¶ 69 The record also supports the court's conclusion that Roy did not breach his duty to provide an accounting. *Wilkins* is distinguishable. In that case, the court held that the trustee failed to produce records to overcome the presumption that he breached his duty of loyalty by leasing trust land to himself. [56] Unlike *Wilkins,* this case does not involve an allegation of a breach of loyalty, and Roy produced the documents requested by Larry. Roy did not breach his duty to provide an accounting.

¶ 70 Larry also contends that Roy breached his duties as trustee when he erroneously interpreted the trust instrument and applied § 2207A in allocating estate taxes. Larry never raised this issue below, and told the court that he was not alleging that the allocation of estate taxes was a breach of fiduciary duty. We will not review an issue raised for the first time on appeal. [57]

¶ 71 The trial court's partial denial of fees was a proper exercise of discretion. Larry requested $21,841.92 in attorney fees incurred by his first attorney, Douglas Ahrens, and $96,367 in fees incurred by his second attorney, Michael Zeno. The court awarded Larry all of the fees incurred from Ahrens, and $5,375.00 in fees incurred from Zeno. The court held Roy personally liable for Ahrens' fees for his response to Ahrens' inquiries through November 2004, and for his failure to explain to Ahrens how the B–2 trust was funded.

¶ 72 The trial court was within its discretion to only award Larry a portion of the attorney fees incurred by Zeno because Larry only prevailed on two issues. The court considered the interests of all of the beneficiaries and concluded it was equitable for Larry to bear his own attorney fees incurred after February 2005. This was a proper exercise of discretion.

¶ 73 It was also within the trial court's discretion to require Larry to pay 20 percent of the trustee's attorney fees, and requiring the B–2 trust to pay the remainder. The court based its decision on the fact that although Larry restored more than $250,000 to the B–2 trust, he is the beneficiary who predominately benefits. The court considered the interests of all of the beneficiaries and determined this award to be equitable. This was not an abuse of discretion, and Larry fails to persuade us that it was.

¶ 74 The trial court also properly exercised its discretion in requiring the B–2 trust to pay the trustee's attorney fees incurred post-trial because as trustee, Roy was defending the trust, and thus, entitled to fees.

¶ 75 Larry also challenges part of finding of fact 19, which states that the claims on which "[Larry] prevailed could have been disposed of in summary fashion without the expense of a trial." The record does not support this finding. However, this does not affect the trial court's exercise of discretion with regard to the amount of attorney fees granted to Larry.

¶ 76 In sum, we conclude that the trial court did not abuse its discretion in partially denying Larry's request for attorney fees.

¶ 77 Finally, both parties request fees on appeal. Because Larry successfully defended the B–2 trust, he is entitled to fees under 11.96A.150 upon timely compliance with RAP 18.1. The fees on appeal should be limited to defending against Roy's appeal, and should not include his cross-appeal. Roy is not entitled to fees.

¶ 78 We affirm the trial court's judgment to the extent it allocated the state and federal estate taxes pro rata and awarded attorney fees. We reverse the judgment to the extent it dismissed the conversion claim with prejudice. We award fees to Larry, subject to his timely compliance with RAP 18.1.

End of Unpublished Text

WE CONCUR: SCHINDLER, A.C.J., and BAKER, J.

Parallel Citations

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Footnotes

1 *Riggs v. Del Drago*, 317 U.S. 95, 63 S.Ct. 109, 87 L.Ed. 106 (1942).

2 *Id.*

3 26 U.S.C. § 2207A(a).

4 Because Roy Eisenbach and Larry Eisenbach share the same last name, we use their respective first names for clarity.

5 Schneider is not a party to this appeal because Roy abandoned those claims below.

6 *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 9, 43 P.3d 4 (2002).

7 *In re Disciplinary Proceeding Against Longacre*, 155 Wash.2d 723, 735, 122 P.3d 710 (2005).

8 *In re Estate of Griffen*, 86 Wash.2d 223, 226, 543 P.2d 245 (1975).

9 *Id.*

10 *In re Estate of Soesbe*, 58 Wash.2d 634, 636, 364 P.2d 507 (1961).

11 *Lewis v. Estate of Lewis*, 45 Wash.App. 387, 389, 725 P.2d 644 (1986).

12 *Id.*

13 (Emphasis added.)

14 The indenture of trust provides that "In order to reduce any possible dissention between the beneficiaries an Addendum A has been prepared which lists all the settlors' assets and allocates some specific assets to specific beneficiaries. This Addendum will be maintained reasonably current during the life of both settlors. The last dated Addendum A. attached hereto and signed by the last living settlor, shall be used as a guide in allocating the assets in accordance with the percentages specified." Exhibit 9 is an Addendum A dated June 5, 1996, and is signed by both settlors.

15 *See* 26 U.S.C. § 2056(b)(7).
16 *Firstar Trust Co. v. Cooney*, 197 Wis.2d 484, 493, 541 N.W.2d 467 (1995).
17 26 U.S.C. § 2044.
18 26 U.S.C. § 2207A(a).
19 (Emphasis added.) The 1997 amendment applies to the estates of decedents dying after the August 5, 1997 date of enactment of the amendment. P.L. 105–34, Sec. 1302(a).
20 (Emphasis added.)
21 H.R.Rep. No. 105–148, at 614 (1997) (Conf.Rep.).
22 *Id.*
23 Clerk's Papers at 346 (Conclusion of Law 24).
24 Clerk's Papers at 346 (Conclusion of Law 22) (citing *Riggs*, 317 U.S. 95, 63 S.Ct. 109, 87 L.Ed. 106).
25 *Riggs*, 317 U.S. 95, 63 S.Ct. 109, 87 L.Ed. 106.
26 *Griffen*, 86 Wash.2d at 226–27, 543 P.2d 245.
27 H.R.Rep. No. 105–148, at 614 (1997) (Conf.Rep.).
28 113 P.3d 150 (Colo.2005).
29 *Id.* at 153.
30 *Id.* at 156.
31 197 Wis.2d 484, 490, 541 N.W.2d 467 (1995).
32 *Id.*
33 *Id.* at 504, 541 N.W.2d 467.
34 *Id.* at 500, 541 N.W.2d 467 (relying on *In re Estate of Gordon*, 134 Misc.2d 247, 252, 510 N.Y.S.2d 815 (1986)).
35 *Gordon*, 134 Misc.2d at 252, 510 N.Y.S.2d 815.
36 197 Wis.2d at 504, 541 N.W.2d 467.
37 *Id.*
38 203 A.D.2d 78, 79, 610 N.Y.S.2d 31 (1994).
39 *See Cowiche Canyon Conservancy v. Bosley*, 118 Wash.2d 801, 809, 828 P.2d 549 (1992) (we will not review an argument absent any reference to the record or citation to authority).
40 CR 41(a)(4).
41 *Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wash.App. 183, 190, 69 P.3d 895 (2003).
42 133 Wash.App. 665, 138 P.3d 124 (2006).
43 *Id.* at 679, 138 P.3d 124.
44 *See* CR 41(a)(4) (a "[voluntary] dismissal is without prejudice, except that an order of dismissal operates as an adjudication upon the merits when obtained by a plaintiff who has once dismissed an action based on or including the same claim....").
45 *In re Estate of Black*, 153 Wash.2d 152, 173, 102 P.3d 796 (2004).
46 *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).
47 *Bartlett v. Betlach*, 136 Wash.App. 8, 18, 146 P.3d 1235 (2006).
48 *Sorenson v. Pyeatt*, 158 Wash.2d 523, 528, 146 P.3d 1172 (2006).
49 99 Wash.2d 394, 663 P.2d 104 (1983).
50 46 Wash.App. 766, 733 P.2d 221 (1987).
51 Clerk's Papers at 249–50 (emphasis added) (citations omitted).
52 *Allard*, 99 Wash.2d at 396, 663 P.2d 104.
53 *Id.* at 396, 403, 663 P.2d 104, *superseded by* RCW 11.100.140 (establishing a statutory duty that a trustee must provide written notice of any "significant nonroutine transaction" to the beneficiaries).
54 *Id.* at 403, 663 P.2d 104.
55 *Id.* at 407–08, 663 P.2d 104.
56 *Wilkins*, 46 Wash.App. at 777–78, 733 P.2d 221.
57 RAP 2.5(a); *Heg v. Alldredge*, 157 Wash.2d 154, 162, 137 P.3d 9 (2006).

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