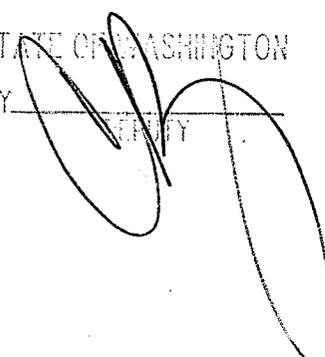


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DIVISION II

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STATE OF WASHINGTON

BY 

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Matter of the Estate of
ROSE P. SOWDER,

SANDRA MITCHELL, and
DIANE THOMPSON,

Appellants,

v.

The Estate of ROSE P. SOWDER, and
CYNTHIA PICHA, as Personal
Representative,

Respondents.

No. 40930-5-II

UNPUBLISHED OPINION

WORSWICK, J. — Sandra Mitchell and Diane Thompson appeal a summary determination that Cynthia Picha properly reduced Thompson's share under Rose Sowder's trust. Mitchell and Thompson argue that (1) there are disputed facts regarding Sowder's testamentary intent and application of the trust clause at issue, (2) Picha violated her fiduciary duties requiring her removal as personal representative and trustee, and (3) they are entitled to attorney fees. We affirm.

FACTS¹

Rose Sowder had three daughters, Mitchell, Thompson, and Picha.² Throughout her life, Sowder enjoyed gem collecting and jewelry making. She frequented gem and jewelry shows, often with her daughters. Sowder, thus, owned a substantial collection of gems and jewelry.³ Sowder stored many of her jewels and her silver service in Thompson's in-home safe, but she frequently exchanged the items stored in the safe, depending on what she wished to wear.

On July 30 and 31, 1982, Sowder handwrote and signed nine detailed lists designating which jewelry items she wanted her daughters and granddaughters to have. Of these nine lists, four state "gift today" at the top and the other five show Sowder intended to make a gift of the listed items but do not specifically state "gift today." Clerk's Papers (CP) at 321-329. Nonetheless, Sowder did not actually deliver each of the items mentioned on these lists to their intended recipient but, rather, left the lists and the items with Thompson. Further, even after making these lists, Sowder would "switch out" these items from Thompson's safe if she wanted to wear them.

In 1998, Sowder executed eight notarized lists entitled "Rose P. Sowder Personal Possessions Bequeaths." CP at 330-37. Sowder completed one such list for each of her three daughters and five grandchildren. In these 1998 lists, Sowder designated items of jewelry,

¹ Because Mitchell and Thompson appeal an order granting summary judgment, we set out the facts in the light most favorable to them. *Jones v. State*, 170 Wn.2d 338, 342 n.1, 242 P.3d 825 (2010).

² Sowder also had several granddaughters. Because most of them share a common last name with their mothers, we refer to the granddaughters by their first names. They are: Mariamne (Mitchell) Okrzesik, Lynn Thompson, and Christine Thompson. We intend no disrespect.

³ Sowder focused more on having a representative sample of gemstones rather than high quality specimens.

furniture, and sentimental value for each of her family members. However, some of the same items of personal property appear on both the 1982 and 1998 lists. Furthermore, Sowder had already given some of the items listed on the 1998 lists as birthday or Christmas gifts. Moreover, Sowder did not distribute other items on the 1998 lists until 2001 and, in several instances, she distributed items to a person not listed as the intended recipient. Sowder left other items on the 1998 lists in Thompson's safe, including the rings she designated for her granddaughters because they did not have a secure place to store the rings, as Lynn and Christine were in college and Mariamne was in the military.

In 2001, 97-year-old Sowder moved from Maryland to Manchester, Washington to live with her daughter Picha. About one year after she moved to Washington, Sowder amended her estate plan by executing a new will and a second amendment to a revocable trust she created in 1993. The will named Picha as Sowder's personal representative and poured over all of her estate into her trust. Sowder was both trustor and initial trustee.

Sowder nominated Picha to serve as first successor trustee if Sowder was unable or unwilling to continue as trustee, including any period of incapacity. Sowder selected Picha "based on [Sowder's] trust in [her]" and explicitly waived any inherent conflicts of interest and the application of RCW 11.95.100 through 11.95.150 and RCW 11.98.200 through 11.98.240. CP at 345-46. The trust instrument further stated that successor trustees would neither have the duty to inquire into the acts of any predecessor trustee, nor would successor trustees face liability for any acts or omissions of any predecessor trustee.

The trust directed the trustee to distribute as much of the income and principal as Sowder requested. The trust further directed the successor trustee to distribute Sowder's personal property after Sowder's death to the recipients designated on a list in accordance with RCW 11.12.260. The trust gave the trustee absolute discretion to distribute, sell, donate, or discard all of Sowder's personal property that she did not distribute by list. However, the trust instrument did not specify whether the "list" by which Sowder intended to distribute her personal property referred to either her 1982 or 1998 lists.

The distributions section of the trust also contained the provision that led to the present dispute. In Article IV.B.3 (penalty provision), Sowder wrote:

I have certain items of jewelry and sterling silver and other tangible personal property, which I own, but are currently held by my daughter, Diane. I have requested that such items be returned to me. If they have not been returned to me, I direct the [t]rustee deduct the sum of Fifty Thousand Dollars (\$50,000.00) from the share otherwise due Diane and add Twenty-Five Thousand Dollars (\$25,000.00) each to the share due Sandra and Cynthia To make the determination as to whether or not such items have been returned to me, I direct that any written correspondence from me or from the [t]rustee to my attorney shall be conclusive evidence that such items have been returned. In the event of no such confirmation, it shall be determined that such items have not been returned.

CP at 348-49. Finally, the trust directed the trustee to distribute the remainder of the trust's property, income and principal, in equal shares to Mitchell, Picha, and Thompson subject to any adjustment called for in the penalty provision.

When Sowder died on March 18, 2006 at the age of 102, Picha became successor trustee to the trust. After Sowder's death, Thompson distributed the items she had in her safe according to Sowder's 1998 and 1982 lists. In making these distributions, Thompson had each recipient sign a receipt, which she sent to the trust's attorney, Roger Sherrard. Then, at Sowder's

memorial service, Thompson attempted to distribute jewelry items to Picha as specified in the 1998 and 1982 lists; however, Picha requested that she send them to Sherrard instead.

Thompson complied and sent the items intended for Picha to Sherrard along with a detailed letter and accounting of items she distributed. In this letter, Thompson wrote:

The items highlighted in pink are the ones that I held and have distributed to the specified individuals. As requested, I will have signed statements of received property sent to you by the individuals. . . . The enclosed jewelry items are the last that I have held in safekeeping for any family member. All other items have been distributed.

CP at 360.⁴ As Thompson requested in her letter, Picha signed and returned a receipt for the jewelry. Still, because Thompson held items of Sowder's jewelry at the time of Sowder's death, Picha told Thompson that the trust's penalty provision reduced her share of Sowder's estate by \$50,000.

In response to Picha notifying Thompson that the penalty provision reduced her share of Sowder's estate by \$50,000, Thompson and Mitchell filed a notice of mediation under chapter 11.96A RCW, the Trust and Estate Dispute Resolution Act. In their notice, they claimed that Picha had breached her fiduciary duties as trustee and personal representative. Picha filed a petition with the superior court objecting to the notice for mediation and requesting judicial determination of several specific issues. In its hearing on Picha's petition objecting to mediation and requesting a judicial determination of issues, the trial court found that the matter warranted judicial determination. Specifically, the trial court found that it should determine five issues:

⁴ The record does not include the signed statements of property received, nor does the record include Thompson's pink highlighting, so we cannot specify precisely what property Thompson held and distributed.

1. The distribution of [Sowder's] personal property, including the reduction of . . . Thompson's distributive share by \$50,000;
2. The personal representative's alleged breach of duty;
3. The trustee's alleged breach of fiduciary duty;
4. The removal of the trustee; and
5. The removal of the personal representative.

CP at 45-46.

Thompson and Mitchell moved for partial summary judgment requesting a judicial determination that Sowder had made a complete gift of her silver before drafting the 2002 penalty clause and, thus, that she did not own any silver to which the penalty clause could apply. Thompson and Mitchell further requested that the trial court find that Picha breached her fiduciary duty of loyalty by not disclosing Sowder's gift of her silver service to Lynn, even though Picha referenced this gift in her deposition testimony. Picha countered that whether Sowder owned any silver to which the 2002 penalty provision could apply was a material question of fact. The trial court agreed with Picha, denied this motion for partial summary judgment, and awarded attorney fees to the estate.

A few months later, Picha moved for summary judgment asking the court to dismiss all claims against her with prejudice and for a judicial determination that the trust's penalty provision required the trustee to reduce Thompson's distributive share of Sowder's estate by \$50,000. In response to Picha's motion, Thompson and Mitchell provided affidavits of Lynn, Christine, and Mariamne averring that Sowder made lifetime gifts to them of the items listed on her 1982 and 1998 lists. Mitchell submitted an affidavit in opposition to Picha's motion for summary judgment; Thompson did not. After a hearing on this motion, the trial court took the matter under advisement. Shortly thereafter, the trial court issued an order granting Picha's motion for summary judgment, finding that Picha had not breached her fiduciary duties and that

Picha should reduce Thompson's share of Sowder's estate by \$50,000 under the penalty clause. Because this order granting summary judgment in favor of Picha did not list the evidence the trial court considered in making the ruling as required by CR 56(h), the parties agreed to submit an order of dismissal, confirming the summary judgment and containing a list of the evidence the trial court considered; the trial court entered this order. Thompson and Mitchell timely appealed the summary judgment in Picha's favor.

ANALYSIS

I. STANDARD OF REVIEW

We review orders for summary judgment de novo, performing the same inquiry as the trial court. *Aba Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). Summary judgment is appropriate only if there are no issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party bears the burden of showing there is no issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). We construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

II. REDUCTION OF THOMPSON'S DISTRIBUTIVE SHARE

Mitchell and Thompson argue that there are material questions of fact regarding Sowder's testamentary intent and regarding whether the trust's penalty provision applies under these facts. Picha counters that the trust's penalty provision is unambiguous and applies here. We agree with Picha.

A. *Testamentary Intent*

In construing a will or a trust, the intent of the testator or trustor controls. *Eisenbach v. Schneider*, 140 Wn. App. 641, 651, 166 P.3d 858 (2007). Whenever possible, courts should determine testator's intent from the trust's language. *Eisenbach*, 140 Wn. App. at 651; RCW 11.12.230. Courts gather intent from the trust instrument as a whole, giving effect to each part. *In re Estate of Sherry*, 158 Wn. App. 69, 78, 240 P.3d 1182 (2010). In general, determining a testator's intent is a question of fact. *Eisenbach*, 140 Wn. App. at 651. However, interpreting a will or trust provision is a question of law. *See Sherry*, 158 Wn. App. at 76. If a trust's language is unambiguous, then the trust does not require either interpretation or construction. *Templeton v. Peoples Nat'l Bank of Wash.*, 106 Wn.2d 304, 309, 722 P.2d 63 (1986) (quoting 90 C.J.S. *Trusts* § 161, at 18-19 (1955)). Thus, if a trust's language is unambiguous, a court cannot alter the trustor's intent by interpreting or construing the language used differently. *Templeton*, 106 Wn.2d at 309. Nonetheless, if a trust term is ambiguous, extrinsic evidence may explain the language used. *Sherry*, 158 Wn. App. at 82. Terms are ambiguous if they are susceptible to more than one reasonable interpretation. *Waits v. Hamlin*, 55 Wn. App. 193, 200, 776 P.2d 1003 (1989).

Here, the trust provision at issue states:

I have certain items of jewelry and sterling silver and other tangible personal property, which I own, but are currently held by my daughter, Diane. I have requested that such items be returned to me. If they have not been returned to me, I direct the [t]rustee to deduct the sum of Fifty Thousand Dollars (\$50,000.00) from the share otherwise due Diane and add Twenty-Five Thousand Dollars (\$25,000.00) each to the share due Sandra and Cynthia

CP at 348-49. Mitchell and Thompson argue that this language is ambiguous because Picha offered different interpretations of it. Specifically, they state that Picha argued to the trial court

that she thought having Thompson return the items to the estate would prevent operation of the penalty provision and further Sowder's intent but, on appeal, Picha argues that the provision's language is unambiguous and requires the penalty provision to apply if Thompson did not return the items to Sowder herself.

Specifically, in her briefing for us, Picha points out that the penalty provision is the only trust provision in which Sowder refers to herself in the first person, stating, "I have requested [the items] be returned to *me* [and if] they have not been returned to *me*," then Sowder directed the trustee to apply the penalty provision. CP at 348-49 (emphasis added). Sowder's decision to refer to herself in the first person in the penalty provision alone makes the only reasonable interpretation of it that Sowder intended the provision to apply if Thompson did not return the items to Sowder herself, during her lifetime.

Further, Sowder provided a "conclusive evidence" test to determine whether Thompson returned the items to her in the penalty provision. CP at 349. Then, in the following trust provision, Sowder stated that "[a]fter distributions have been made in parts 1 thru [the penalty provision], above," the rest of the trust's principal and income "shall be distributed in equal shares to . . . Mitchell . . . Picha, and . . . Thompson [but] subject to . . . [a]ny adjustment called for in [the penalty provision]." CP at 349. The language of the trust as a whole specifically incorporates the changes to Thompson's distributive share that Sowder intended under the penalty provision. Therefore, the trust language is not susceptible to multiple reasonable interpretations because it maintains Sowder's longstanding plan to distribute her estate evenly between her daughters but subject to the \$50,000 reduction of Thompson's share if the objective, conclusive evidence test she drafted into the trust remained unsatisfied.

Because the language is unambiguous, we must determine Sowder's intent from the language she used in the trust instrument. Because language throughout the trust instrument confirms Sowder intended the penalty provision to apply if her conclusive evidence test remained unmet, Sowder's intent in drafting the provision is not a disputed fact. Thus, the argument that the trial court erred by granting summary judgment and in determining that the penalty provision reduced Thompson's share by \$50,000 based on ambiguity of Sowder's intent fails.

B. *Triggering the Penalty Provision*

Mitchell and Thompson argue that there is a genuine question of material fact as to whether the penalty provision applies because they dispute that Thompson held any of Sowder's property at the time of her death, that Sowder requested, and that Thompson had failed to return. We disagree.

The inquiry as to whether the penalty clause applies is limited by the terms of the trust to whether or not Sowder's attorney received written correspondence from either Sowder or Picha stating that Thompson returned Sowder's items to her. It is undisputed that neither Sowder nor Picha sent such a writing to Sherrard. Thus, the penalty provision applies under the terms of the trust.

Mitchell and Thompson continue to argue that, despite the plain language of the exclusive evidence clause of the penalty provision, the penalty provision should not apply unless Picha establishes that Thompson held items belonging to Sowder, that Sowder requested, and that Thompson had failed to return. But as we discussed above, the language Sowder used in drafting the trust shows that she intended the penalty provision to apply if Thompson failed to

return Sowder's property during Sowder's life. Moreover, it is undisputed that Sowder requested Thompson to return items she held.⁵ It is undisputed that Thompson held items that Sowder included in her 1982 and 1998 lists. It is undisputed that Thompson distributed items of jewelry and personal property in accordance with those lists after Sowder's death. Implicit in the fact that Thompson distributed items after Sowder's death is the conclusion that, if Thompson held these items at the time Sowder died, she did not return them to Sowder during her life. Thus, resolution of this argument turns on whether Sowder actually owned those items at the time of her death.

Sowder executed the 1982 and 1998 lists designating specific family members to receive items of her jewelry and personal property in Maryland. Under Maryland law, a completed gift requires present donative intent, delivery, and acceptance. *Rogers v. Rogers*, 271 Md. 603, 607, 319 A.2d 119 (1974). Furthermore, in delivering a gift, the donor must transfer control of the property. *Rogers*, 271 Md. at 607. A gift is not completed if, after delivery, the donor reserves the power to revoke the gift or continues to exercise dominion over the subject matter of the gift. *Rogers*, 271 Md. at 607. However, following an actual delivery of the gifted property from the donor to the donee, if the donee delivers the gifted property back to the donor for a limited purpose and as the donor's principal, then the gift is still valid. *Rogers*, 271 Md. at 608.

Here, it is undisputed that Sowder delivered many items on her 1982 and 1998 lists to Thompson rather than to the listed recipients. Then, because it is undisputed that Sowder would exchange items of jewelry from the cache of items Thompson held in her safe depending on what Sowder felt like wearing, Sowder continued to exercise dominion over the items Thompson held.

⁵ Sowder stated in the penalty clause of her trust that she requested Thompson return items to her and Thompson presented no evidence to call this assertion into question.

In reclaiming and wearing these pieces of jewelry as she wished, Sowder did not act as an agent of the recipient designated on her lists; rather, she acted like the owner of those pieces. Because Sowder continued to exercise her control over the items Thompson held, Sowder did not effectively deliver them. Thus, Sowder cannot have made a valid lifetime gift under Maryland law of the items she listed in 1982 and 1998 and delivered to Thompson rather than the recipient designated on the list. Instead, Sowder continued to own those items.

Also, it is undisputed that Sowder listed certain items, like her sapphire pin and earrings, on both her 1982 and 1998 lists. Since Sowder made duplicate entries on her gift lists, it follows that Sowder did not intend the lists to immediately transfer the property. Rather, Sowder intended the lists to bequeath property because Sowder directed her successor trustee to distribute her personal property to the recipients designated by list and stated that she intended the trustee to interpret these lists in accordance with RCW 11.12.260. RCW 11.12.260 authorizes a person to dispose of tangible personal property by a "gift list" specifically referenced by will or by a trust that becomes irrevocable upon the person's death as long as that gift list describes the items with reasonable certainty and is either in the testator's handwriting or signed by the testator. RCW 11.12.260(1),(4). Sowder's 1982 and 1998 lists, then, satisfy the statutory requirements to make testamentary disposition of her tangible personal property under Washington law.

Finally, although Mitchell and Thompson correctly identify that there is a question of fact as to what *specific* property Sowder intended to reference in the 2002 penalty provision of her trust, it is undisputed that Sowder did own personal property, held by Thompson that Sowder

requested to be returned, but which Thompson continued to hold until after Sowder's death.

Thus, this argument fails.

III. FIDUCIARY DUTIES

Mitchell and Thompson argue that there is a material question of fact as to whether Picha breached her fiduciary duties as trustee and personal representative that would require her removal. We disagree.

A trustee is a fiduciary of the trust's beneficiaries and owes them the "highest degree of good faith, care, loyalty, and integrity." *Esmieu v. Schrag*, 88 Wn.2d 490, 498, 563 P.2d 203 (1977). The trustor has authority to include language in the trust instrument to relieve the trustee of "any or all of the duties, restrictions, and liabilities" imposed by statute and, if the trust instrument conflicts with the statute, the trust instrument controls. RCW 11.97.010(1). In determining the trustor's intent regarding the trustee's powers and duties, courts look to the trust instrument itself and consider all of its provisions together. *Cook v. Brateng*, 158 Wn. App. 777, 786, 262 P.3d 1228 (2010). Similarly, a personal representative owes beneficiaries of the estate fiduciary duties that a trustee owes trust beneficiaries. *In re Estate of Ehlers*, 80 Wn. App. 751, 761-62, 911 P.2d 1017 (1996). Although a trial court generally has discretion to remove a trustee or personal representative, it will only order removal for good cause. RCW 11.68.070, 11.98.039(4)(c); *Ehlers*, 80 Wn. App. at 761-62. We generally uphold a trial court's decision to remove or not remove a trustee or personal representative unless the trial court manifestly abused its discretion. *Ehlers*, 80 Wn. App. at 761.

Here, Mitchell and Thompson argue that Picha breached her fiduciary duties as trustee by failing to investigate and inform Thompson of the specific items that triggered the reduction of her share. Instead, Picha had the duty to determine whether the penalty provision applied. Under the language of the trust, the provision applied unless Thompson returned Sowder's property to her and the trustee then satisfied Sowder's "conclusive evidence" test. It is undisputed that Sowder's test remains unsatisfied. Furthermore, Thompson confirmed that she did possess items of Sowder's personal property at the time of Sowder's death. Therefore, even though Picha did not specifically identify each of the particular items that caused the penalty clause to apply, she did show that Thompson still held some of Sowder's items after Sowder's death. Therefore, under the terms of the trust, Picha satisfied her duty to investigate whether the penalty clause applied.

Next, Mitchell and Thompson argue that Picha breached her fiduciary duties by engaging in self-dealing. However, Sowder explicitly waived any successor trustee conflicts of interest and specifically waived the default statutory protections of RCW sections 11.95.100 through 11.95.150 and 11.98.200 through 11.98.240. Moreover, the penalty provision explicitly directs the trustee to deduct \$50,000 from Thompson's share and add \$25,000 each to the shares of Mitchell and Picha if the penalty provision applied. Picha did not breach her fiduciary duties by following the terms of the trust even though she benefitted financially as a result because the trust waived any potential conflict of interest that Picha could have encountered as both trustee and a beneficiary.

Because Sowder expressly waived the successor trustee's liability for conflicts of interest and because Picha did not breach her fiduciary duties, there were no grounds for the trial court to remove her as trustee or personal representative. Thus, Thompson's and Mitchell's argument fails.

ATTORNEY FEES

Thompson and Mitchell argue that they are entitled to attorney fees for defending against Picha's motion for summary judgment and for bringing this appeal both under statute and in equity. Picha disagrees and argues in the alternative that she is entitled to attorney fees on appeal. We disagree with both arguments.

Although both trial and appellate courts have broad discretion to grant attorney fees in litigation involving trusts and estates, such awards remain discretionary. RCW 11.96A.150. Specifically,

Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) [f]rom any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

RCW 11.96A.150(1). Yet, we will only reverse a trial court's decision on attorney fees and costs if the trial court clearly abused its discretion. *In re Estate of Black*, 153 Wn.2d 152, 173, 102 P.3d 796 (2004). Thompson and Mitchell have made no such showing. Thus, we affirm the trial court's denial of attorney fees to Mitchell and Thompson on summary judgment.

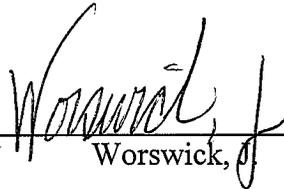
Next, both parties argue that they are entitled to attorney fees on appeal. Thompson and Mitchell ask us to award their attorney fees on appeal from Sowder's estate. Conversely, Picha asks us to award her attorney fees from Thompson and Mitchell. Mitchell and Thompson first argue that they are entitled to attorney fees in equity but their argument fails because it hinges on a finding that Picha breached her fiduciary duties. Since Picha did not breach her fiduciary duties, there is no equitable basis on which to award attorney fees to Mitchell and Thompson.

Then, all parties rely on RCW 11.96A.150 to support their requests for attorney fees. RCW 11.96A.150(1) provides that "any court on appeal may, in its discretion, order costs, including reasonable [attorney] fees . . . in such amount and in such manner as the court determines to be equitable. . . . [T]he court may consider . . . factors . . . which . . . may . . . include whether the litigation benefits the estate or trust involved." But, RCW 11.96A.150(1) is discretionary, not mandatory. *See In re Estate of Tosh*, 83 Wn. App. 158, 163, 920 P.2d 1230 (1996). Washington courts generally consider whether the litigation could ostensibly result in a substantial benefit to the estate before awarding attorney fees from the estate. *In re Estate of Niehenke*, 117 Wn.2d 631, 648-49, 818 P.2d 1324 (1991); *see also In re Estate of Black*, 116 Wn. App. 476, 490, 66 P.3d 670 (2003). If the litigation could not result in any substantial benefit to the estate, we do not award attorney fees from the estate. *Niehenke*, 117 Wn.2d at 648-49.

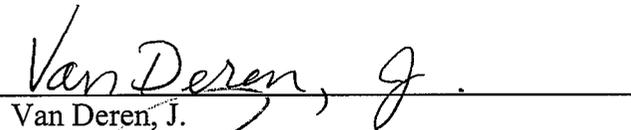
Because this litigation could not benefit Sowder's estate, we decline to award Mitchell and Thompson their attorney fees. Next, although Mitchell's and Thompson's arguments failed, they were not completely meritless and we decline to award attorney fees to Picha.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Worswick, J.

We concur:


Van Deren, J.


Penoyar, C.J.