COURT OF APPEALS
DECISION
DATED AND RELEASED

NOVEMBER 14, 1995

No. 95-0715

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

IN RE THE ESTATE OF MARILYN J. KANESHIRO:

DALE W. JOHNSON,

Appellant,

v.

ESTATE OF MARILYN J. KANESHIRO and WESTERN SURETY COMPANY,

Respondents.

APPEAL from a judgment of the circuit court for Washburn County: WARREN WINTON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Dale Johnson appeals a judgment against him for $85,988.10 arising out of neglect and bad faith as personal representative of the estate of Marilyn Kaneshiro. Johnson argues that the trial court (1) erroneously found that he acted in bad faith and failed to keep proper accounts and (2) erroneously calculated the amount of surcharge due. Because the record supports the trial court's findings, we affirm.

Kaneshiro died on December 24, 1989. Her will named her two daughters, ages seventeen and nineteen, and Johnson, her companion, as heirs. Her will left Johnson a life estate in her home and the balance of her estate in trust to her daughters until the age of twenty-five, at which time the remaining trust assets would be distributed to them. She named Dale Johnson as personal representative and trustee.

On February 16, 1990, application for informal administration initiated probate proceedings. After Johnson was appointed personal representative, he filed an inventory indicating $186,111.59 of property subject to administration and $7,877.11 not subject to division. Johnson retained attorney Thomas Kissack to assist his administration of the estate.

At trial, Johnson testified that he received $12,263.45 as proceeds from an auction of Kaneshiro's personal property that was not reflected on the inventory. He also testified that he received $50,849.08 from Allstate Insurance Co., and $5,340 from Banker's Life Insurance Co., payable to the estate, and neither sum was reflected on the probate inventory. Johnson further testified that he received a check for $34,484.74 from Benson-Thompson, Inc., representing proceeds from the sale of estate property. Johnson admitted that he endorsed the check and deposited it into his personal checking account. Johnson further testified that he received various other checks from Kissack's office amounting to $119,392.03.

In June 1990, Johnson took $110,500 from the estate, paid for real estate in Florida, titling the property in his name.[1] On October 5, 1990, Dale W. Johnson & Associates, by Johnson, owner, loaned itself $33,884.74 of estate funds, and executed a five-year promissory note at 7.5% annual interest to repay the estate. On September 12, 1991, Johnson loaned himself $5,000 and executed a five-year $5,000 note to the estate, with annual interest at 7.5%. Johnson testified that he credited himself $24,441.62, the value of his life estate, which he released with the sale of Kaneshiro's home.

[1] Johnson signed the offer to purchase December 5, 1989. On December 15, 1989, Johnson submitted a financial statement in connection with a loan application showing his net worth to be $2,000.

In 1990 Johnson retained an attorney to represent him in adoption proceedings of Kaneshiro's two daughters. The estate was presented the bill for services that included adoption proceedings. Johnson testified he charged the estate for the children's living expenses until they moved out. One married and moved out in August 1991 and the other moved out in January of 1992. Johnson testified that his distributions to the two girls amounted to $46,230. Johnson conceded that at all times he acted solely as personal representative of the estate and at no time assumed the role as trustee for the trust the will provided for Kaneshiro's daughters.

On February 24, 1995, the account filed by attorney Eugene Harrington, Kissack's successor appointed to close the estate, showed assets in the sum of $20,828.49. The trial court concluded that Johnson exercised bad faith as personal representative

> in buying real estate in Florida and putting title in his own name; in making loans to himself from estate funds without Court approval; in omitting substantial sums from his inventory and placing some of those funds in his personal accounts; in failing to communicate with his attorney or timely answer the attorney's inquires and in so doing causing the Court to appoint another attorney and auditor; and in wrongfully supporting himself and the daughters of the decedent from estate funds and without properly accounting for such expenditures.

Johnson challenges the trial court's findings and argues that the trial court erroneously found that he acted in bad faith. We disagree. Bad faith in discharge of one's duties is a tort generally confined to circumstances where one acts in a fiduciary capacity. *See* ***Ford Motor Co. v. Lyons,*** 137 Wis.2d 397, 423, 405 N.W.2d 354, 365 (Ct. App. 1987). In probate proceedings, a personal representative acts as a fiduciary in managing another's assets. ***In re Estate of Scheibe,*** 30 Wis.2d 116, 118, 140 N.W.2d 196, 198 (1966). A personal representative must exercise good faith. ***Id.*** Where a fiduciary fails to perform its duty to manage the assets for the benefit of the beneficiary and applies the assets to personal benefit to the detriment of the beneficiary, the action demonstrates bad faith. *See* ***In re Estate of Becker,*** 56 Wis.2d 356, 366-67, 202 N.W.2d 681, 686-87 (1972). "If an administrator breaches the duty to make the

estate productive, the trial court may, in its discretion, assess a surcharge against the administrator to compensate the estate for interest it could have earned had the duty been fulfilled." ***In re Estate of Kugler,*** 117 Wis.2d 314, 322, 344 N.W.2d 160, 164-65 (1984).

A trial court's findings of fact will not be disturbed on appeal unless they are clearly erroneous. Section 805.17(2), STATS. We defer to the trial court's assessment of the weight and credibility of testimony. ***Id.***

Johnson argues that buying real estate in Florida and putting title in his own name was done with the advice of legal counsel and, "because Mr. Johnson's acts were consistent with the legal advice given him by two attorneys, he cannot be held in bad faith." (Emphasis in the original.) We reject this argument. Johnson fails to cite any authority that acting on private legal advice abrogates the tort of bad faith. Because this argument is unsupported by legal authority, we do not consider it further. ***State v. Shaffer,*** 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980).

Next, Johnson argues that he did not omit substantial sums from his inventory and did not deposit the sums in his personal account because bank deposit slips are not contained in the trial record. Johnson's own testimony directly refutes his argument. Johnson testified that he omitted from the inventory estate funds received from Allstate and Bankers' Life. He also testified that he deposited funds received from the sale of estate property into his personal account. Deposit slips are not required to support the trial court's findings.

Next, Johnson argues that he properly accounted for expenditures used for living expenses. We are unpersuaded. As a personal representative, the use of the estate's assets for personal living expenses is evidence of bad faith. *Cf.* ***State v. Hartman,*** 54 Wis.2d 47, 56, 194 N.W.2d 653, 657 (1972) (A general authority to deal with assets is not sufficient to exculpate the executor of an estate from charges of self-dealing.). This is particularly true when Johnson conceded that he was not acting as trustee. Johnson contends that the use of estate funds to support the decedent's two daughters is consistent with the intent of the will. We disagree. The intent of the will was to set up a trust for the daughters' benefit. If the estate's funds are used before a trust is set up, the will's intent is thwarted. Johnson's account fails to demonstrate that the funds

advanced were necessary for the daughters' support. Moreover, the will does not evince an intent to support Johnson, yet he admitted using the estate's funds for his own support.

Next, Johnson argues that he did not fail to communicate with his attorney or fail to answer inquiries. Johnson's own testimony refutes this argument. Johnson testified that Kissack "had been asking me for an accounting for sometime (sic)." "At least half a dozen times, mostly by telephone." Kissack also testified that he "did not get the documents and answers to the questions for the final account." The record supports the court's findings.

Next, Johnson argues that making loans to himself from estate funds evidenced by a note at a fair interest rate was consistent with authority granted in the will. We disagree. The will permits the personal representative to lend or borrow money. The court found, however, that the loans were invested in real estate that now is of little value. We conclude that making an unsecured loan to himself without a showing of any ability to repay the loan contravenes the will's intent.

Finally, Johnson argues that the trial court miscalculated the surcharge owed.[2] We are not persuaded. Johnson contends that because the

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[2] The trial court surcharged Johnson as follows:

For loans to himself----------	$ 38,884.74
For his compensation and misapplication of the value of his life estate in his accounting----------	$ 45,883.22
For his claim of expenditures for the support of Susan and Carol where his living expenses and those of the daughters were commingled and then assessed to him and to Susan and Carol on the basis of one-third to each----------	$ 33,899.00
For attorney's fees paid his attorney in Florida but not clearly shown to be for estate purposes but for fees in connection with his purchase of the house and	

accountant's final account included the value of Johnson's life estate, it was not double counted and should not be included as part of the surcharge. Johnson mischaracterizes the court's order. The court surcharged Johnson $45,883.22 for the misapplication of the value of the life estate, but credited Johnson with $37,475.40 as the value of the life estate in the real estate and contents of the house that were sold at auction.

The record supports the imposition of the surcharge. *See* ***Kugler,*** 117 Wis.2d at 322, 344 N.W.2d at 164. Johnson's exhibit 6, page 5, discloses that on May 10, 1990, he distributed $24,441.60 to himself, representing the value of his life estate in the realty. The same exhibit, page 8, discloses that on October 5, 1990, Johnson loaned himself $33,884.74, evidenced by a note, but entered the debit as $9,443.14, indicating that sum as the amount due, less the value of his life estate. The trial court's mathematical inconsistency, if any, benefits Johnson. *See* § 805.18, STATS.

Johnson also contends that the trial court erroneously surcharged $1,212 for attorney fees. Because the bill indicated that Johnson's real estate services and adoption proceedings were included, the court was entitled to find that the fee did not represent a reasonable and necessary charge for the estate.

(..continued)

placing title in his own name, for adoption proceedings and for unexplained estate purposes----------	$ 1,212.00
For attorney's fees of $2,584.54 and fee of auditor of $1,000.00 appointed by the Court to replace Mr. Kissack who withdrew as attorney due to the intransigence of Johnson----------	$ 3,584.54
Total sur-charge due:----------	$123,463.50
Against these sur-charges Johnson is due as a set-off the value of his life estate in the real estate in Vale St., Spooner, Wisconsin, sold for $38,000.00 and his life estate in the contents which were sold at auction for $20,264.00 or a total of $58,264.00 X .64320 based on Johnson's age of 53 at Marilyn Kaneshiro's death----------	$ 37,475.40

Johnson also challenges the trial court's $3,584.54 surtax for professional fees. Johnson argues that the record indicates that any delay in the estate's administration was not his but the estate's attorneys and that he performed his services within the bounds of law and consistent with the will. For the reasons stated above, the trial court found otherwise and the record supports its decision.[3]

By the Court. – Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.

[3] Johnson also contends that the trial court should not have surcharged the $33,899 as living expenses for the decedent's daughters. He merely reiterates his earlier arguments and therefore we do not repeat our discussion.