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CASE NO. A120245

STATE OF MINNESOTA
IN COURT OF APPEALS

In the Matter of:

The Estate of Tod R. Holmberg,

Decedent.

APPELLANT LISA A. ROY'S REPLY BRIEF

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LEGAL ARGUMENT

1. The holding in Martignacco specifically provides payment of a nominated personal representative's disbursements under Minn. Stat. §524.3-720.

In her brief, Respondent misrepresents the holding of Estate of Martignacco v. Estate of Adolph L. Martignacco, 689 N.W.2d 262 (Minn. Ct. App. 2004) to this Court by asserting that the Martignacco court only authorized payment of fees and expenses "incurred after and as a result of that appointment [as personal representative] by the Court." (Resp. Br. at 9) However, the holding of the District Court which was upheld by the Court of Appeals in Martignacco specifically provides that the appellant "be compensated for their services from the inception of the case through May 7, 2003." Martignacco, 689 N.W.2d at 265. The inception of a probate matter commences with the filing of a petition for probate, which includes the nomination of an individual to serve as a personal representative, not when the personal representative is appointed.

The appellant in Martignacco was in the same position as Ms. Roy in this matter: He was not named in a will and he was entitled to his fees and disbursements from the filing of the petition nominating him to serve as personal representative through his appointment. He continued to be entitled to his fees and disbursements as the appointed personal representative until the time the Court found that he was no longer acting in good faith by ignoring evidence of the existence of a biological son of the decedent. *Id.*

2. The naming of a person to serve as personal representative in a Probate Petition constitutes a "nomination" of a personal representative.

Respondent focuses her argument on the belief that an individual cannot "nominate" themselves as a personal representative for the purpose of Minn. Stat. § 524.3-720. This is a misstatement of how the probate process works. While a testator may identify the testator's choice for an executor of the testator's estate in a will, that identification has no effect until someone actually commences a probate by filing a petition and nominates an executor.[1]

Whether a will names an executor or not, the majority of petitions are submitted by the person nominated in the petition to serve as personal representative, including the Respondent in this matter.[2] The request to name a personal representative included in a probate petition is a nomination regardless of who actually submits the petition or whether a will names someone appropriate to serve as personal representative.

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[1] Although a will names a testator's choice of a personal representative, the Court must determine whether the individual named is "suitable" to serve in that capacity. In re Estate of Crosby, 15 N.W.2d 501, 506 (1944).

[2] By her logic, Respondent would not be entitled to her fees and disbursements for this matter prior to her appointment as personal representative, including her legal fees for the underlying trial, because she was not named personal representative in a will, nominated herself to serve, and had not yet been named personal representative. To the contrary, because she was not found to have acted in bad faith, Respondent, like Appellant, is entitled to her fees and disbursements for prosecuting this action as a nominated personal representative until the time Respondent was appointed to serve as personal representative.

3. Proper Application of Minn. Stat. §524.3-720 does not obviate the circumstances when "interested persons" are able to claim fees.

Respondent argues that Ms. Roy is merely an "interested person" and permitting her to assert a claim under Minn. Stat. § 524.3-720 would open the door to anyone making a claim for fees under the statute. This is simply not true. Both Ms. Roy and Respondent are interested persons as heirs and beneficiaries. However, Ms. Roy petitioned for appointment as personal representative based on a belief that Ms. Roy had priority because Respondent was not suitable to serve as personal representative. [3] The Probate Court found that Ms. Roy acted in good faith in filing her petition and in prosecuting this matter.

Properly applying § 524.3-720 and awarding Ms. Roy her fees and disbursements does not provide that "[a]ny interested person could simply file a petition seeking an appointment as personal representative in order to insure an award of attorney fees" as Respondent argues. (Resp. Br. At 7) While technically any person, interested party or not, could file a petition with the Probate Court nominating themselves to serve as personal representative of an estate, they are not entitled to disbursements and fees under §524.3-720 unless they act in good faith. A low priority creditor who nominates himself as personal representative despite knowing the decedent had living descendants including at least one qualified descendent with priority who had also petitioned for

[3] While the Court applies statutory priority in naming a personal representative, starting with a person named in a will and, where no will names an executor, by following a statutory list of priority, the Court still must determine that the person claiming priority is "suitable." *See* In re Estate of Crosby, 15 N.W.2d at 506.

appointment would not be entitled to fees and disbursements because the Court would not likely find good faith.

By contrast, applying Respondent's interpretation would not only be contrary to this Court's prior application of the statute, it would leave other good faith actors at risk of significant expense while properly seeking to administer an estate. This would include anyone who, in good faith, believed they had priority and who incurred disbursements and legal fees prior to appointment and later learned that they did not have priority. From commencement of this case until the Probate Court's decision to appoint Respondent, Ms. Roy believed in good faith that she had priority of appointment based on, among other things, Respondent's misrepresentation of assets in her petition and offering of what Ms. Roy believed was an adulterated will. While the Court disagreed with Ms. Roy after trial, the Probate Referee and Judge Quam held that Ms. Roy acted in good faith in prosecuting the matter. Ms. Roy's nomination in her Probate Petition was never challenged nor has the Probate Court's finding of good faith been contested by Respondent prior to or during this appeal.

The opportunity for an interested person who does not have a good-faith basis to petition to be named personal representative to be entitled to claim fees under other provisions of §524.3-720 continues. Because she was a nominated personal representative who prosecuted the matter in good faith, Ms. Roy is entitled to disbursement and fees under the portion of the statute that covers nominated personal representatives rather than those that exclusively cover other interested persons.

4. **Respondent fails to establish ambiguity in the language of Minn. Stat. §524.3-720 and asks this Court to create an unworkable algorithm for determining when a nominated personal representative is entitled to fees and disbursements.**

As previously briefed by Ms. Roy, Respondent must show that the language of Minn. Stat. §524.3-720 is ambiguous before looking to other sources to interpret the language of the statute. Respondent does not attempt to argue that the statute is ambiguous in her brief.

Rather, Respondent proposes that the language of Minn. Stat. §524.3-720 that provides fees and disbursements to "[a]ny personal representative or person nominated as personal representative," means the following: 1) If you are appointed as a personal representative by the Court and act in good faith, you are entitled to the provisions of §524.3-720 regardless of whether you are named by a will to serve as a personal representative; and, 2) if you are nominated to serve as a personal representative, you are entitled to the provisions of §524.3-720 if you were named in a will to serve as personal representative and act in good faith, but you are not entitled to the provisions of §524.3-720 if you were nominated without a will and act in good faith. There is no reasonable basis to expect anyone reading the plain, unambiguous language to discern such a rule.

Moreover, the rule has no rational basis for differentiating between nominated personal representatives who act in good faith any more than a rule that would differentiate between appointed personal representatives acting in good faith based on the source of their priority. At the time someone is nominated to serve as a personal

representative, they have the same fiduciary responsibility to the estate regardless of the source of their priority.

The active portion of the Court's analysis is whether the prosecution of a matter by a nominated personal representative is conducted in good faith. Just as any person, whether nominated or appointed as personal representative, who does not act in good faith is not entitled to fees and disbursements under §524.3-720 without regard to the source of their priority for appointment, any party nominated or appointed who acts in good faith is so entitled, regardless of the source of their priority.

CONCLUSION

Based on the plain language of Minn. Stat. §524.3-720, this Court's application of the statute in Martignacco, Ms. Roy's nomination as personal representative, and the Probate Court's finding that Ms. Roy acted in good faith in bringing her action, the decision of the Probate Court that §524.3-720 does not apply should be reversed. Ms. Roy requests an order directing the Probate Court to award her necessary expenses and disbursements including reasonable attorney's fees to be paid by the Estate of Tod R. Holmberg. Ms. Roy further requests an order permitting her to supplement her attorney's fees request to add fees incurred in bringing her motion, review, and appeal.

ROSHA LEGAL GROUP, PLLC

Dated: April 16, 2012

By _____

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CERTIFICATE OF COMPLIANCE

WITH MINN. R. APP. P. 132.01, Subd. 3

The undersigned certifies that the brief submitted herein was prepared using Microsoft Word 2007, complies with the typeface requirement of Minn. R. App. P. 132.01, and contains 1,708 words.

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