

Philip L. Nelson
Circuit Court Judge
(503) 325-8555



CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLATSOP
Clatsop County Courthouse
749 Commercial
PO Box 835
Astoria, OR 97103

March 14, 2010

Mr. Brooks Cooper
Attorney at Law
520 SW Sixth Avenue, Suite 914
Portland, OR 97204

Mr. Daniel H. Rosenhouse
Ms. Susan A Miller
Assistant Attorneys General
1515 SW Fifth Avenue, Suite 410
Portland, OR 97201

Mr. Peter McKittrick
Farleigh Wada Witt
121 SW Morrison, Suite 600
Portland, OR 97204

RE: Ellis v. Department of Justice and Wintercross Foundation
Clatsop County Circuit Court Case No. 09-2215

Dear Mr. Cooper, Mr. Rosenhouse, Ms. Miller and Mr. McKittrick:

Trial on this matter was held March 2 and 3, 2010. Obviously, there are extensive exhibits which I have now had the opportunity to review in more detail. From the evidence presented, I find as follows:

1. Barry Beutel (hereinafter Beutel), successfully invested in real estate. He took plaintiff (hereinafter Ellis), into his organization known as Jensen Investment in 1988. Beutel taught Ellis how he located and invested in real property. Eventually, Beutel made Ellis an officer in Jensen Investment and turned much of the operation of the company over to her.

2. Beutel developed an interest in South American art. He established The Wintercross Foundation, LTD on September 20, 1990 by incorporating it with the State of Oregon and creating a set of by-laws. Exhibits 130-131. The purpose of Wintercross was to qualify as a tax exempt charitable organization. Beutel established a board of directors, which included Ellis. Even though Wintercross was incorporated in 1990, it was not funded with any assets until Beutel's death. When Beutel died, Wintercross was the beneficiary of several life insurance policies which totaled \$2,350,000.00. Exhibit 173.

Jensen Investment received \$900,000.00, the estate received \$850,000.00 and Ellis received \$750,000.00 life insurance proceeds from Beutel's death. Others received life insurance proceeds as a result of Beutel's death. The Beutel estate paid the estate taxes associated with the passing of life insurance proceeds outside the estate. Wintercross "loaned" the Beutel estate \$410,000.00 in order to pay estate taxes, Wintercross later "forgave" that obligation. Exhibit 165, copy final account.

3. Prior to his death, Beutel through Jensen Investments paid \$100,000.00 earnest money to purchase the Acoma Casitas Apartments (Acoma) in Glendale, Arizona. To complete the purchase, Jensen Investments borrowed \$1,600,000.00 from Wintercross, executing a note with monthly payments of \$12,883.64 and interest at 8.5% per annum. The Wintercross Board of Directors did meet and approve the transaction. Exhibit 122. The estate also wrote a check to Jensen Investments for \$450,000.00. Jensen Investments then completed purchase of Acoma for \$2,700,000.00 and assumed an already existing mortgage against the property. Jensen Investment ownership eventually passed from the estate to Wintercross. Jensen Investments initially made some payments on the note but essentially, no effort had been made to keep the obligation current.

4. At the board meeting to approve the loan, the Wintercross directors discussed its obligation to make minimum distributions to pursue its objective of promoting South American art. Exhibit 122. The board during that discussion indicated it would still have enough cash available to complete that obligation. Ellis was present at that meeting as was the estate lawyer, Redden, and the Wintercross lawyer, Kelly. The mandatory minimum charitable distributions were made for 1999 through 2001. For 2002, Wintercross started to fall behind in those payments and at some point around 2006, stopped making payments altogether. The current minimum amount which should have been contributed is \$189,182.00, which has resulted in tax penalties of \$56,755.00. Since 1998, there have been no other meetings of the Wintercross board; Ellis has maintained operation of that entity as well as Jensen on her own. While the purpose of Wintercross was to promote South American art, contributions were made to other art related organizations. Defendant's concern is not that other arts were funded but that no contributions were made for several years.

5. Wintercross became the owner of several items of South American art from the Beutel estate. The value of the art is \$200,000.00. Exhibits 136-137. Other than one show in Portland, most of the art was kept in the home of Ellis or her mother. A few pieces were kept with other board members or the accountant serving Ellis, Wintercross and Jensen Investments. While evidence was presented indicating there may be a market to rent art, it is insufficient to show any of the art kept by Ellis had a rental value. The art could

have been distributed to another qualifying entity which would have reduced or eliminated the tax penalties for not making the required Wintercross distributions.

6. In the course of managing the Acoma property, Ellis purchased a home adjoining Acoma. Ellis then had the Acoma property owner live in the home. Acoma paid the mortgage and utilities on the manager's home even though title remained with Ellis. By having the manager not live in an actual Acoma unit, a unit was available to rent. Ellis benefitted by having her obligations for the manager's house covered by Acoma while she maintained ownership.

7. At some point in 2002, Jensen Investments refinanced the Acoma property. Some of the proceeds went for improvements to the real property. It appears there was another \$400,000.00 realized from the refinance which has not been accounted for, although the Acoma money market account shows a "loan" to Jensen for \$440,300.98 on October 1, 2002. Exhibit 129. The decision to refinance and how to spend the proceeds was made by Ellis. Exhibit 128 indicates \$440,300.98 was deposited by "exchangor" Jensen Investment as part of a final settlement statement to purchase apartments in Seaside dated October 3, 2002. Exhibit 128.

8. Jensen Investments, at the direction of Ellis, purchased residential apartments in Seaside, Oregon. Ellis purchased an adjoining group of apartments approximately a year later in her own name. Ellis provided her accountant a summary of how that took place in exhibit 140. Ellis acknowledges she sold her apartments as well as those she purchased in Jensen Investments name 17 months later. Ellis admits she structured the sale so she would receive the cash portion of the transaction and Jensen Investments would carry the balance of the deferred purchase price. The purchaser was unable to pay the total obligation to Jensen Investments and as a result, Jensen lost \$70,000.00 in principal and \$95,000.00 interest. Had the cash/debt been prorated, Ellis would have faced 28% of the loss and Jensen Investments would have faced 72%.

9. Ellis, through Jensen Investments, arranged to sell the Acoma property on February 6, 2004. At the time of the sale, the Fidelity Title closing statement indicates Jensen received \$2,300,296.75. Exhibit 148. Ellis turned that around and used the proceeds from Fidelity Title, which by August 13, 2004, had increased to \$2,304,462.38, to purchase what is called the Gearhart property. Exhibit 150. (I recognize a difference between the amount in escrow and the amount spent for the Gearhart property in the next paragraph. I have not been able to determine where that difference went but will assume it went to cover Jensen Investments/Wintercross operating expenses.)

10. The Gearhart property purchase price was \$8,000,000.00. By piecing together the testimony and exhibits, Ellis had to deposit

\$2,178,745.66 cash from the Acoma transaction to purchase the Gearhart property. She also executed a note and trust deed with Bank of Astoria for \$3,000,000.00 and the seller financed the balance, also apparently another \$3,000,000.00. Since taking control of the Gearhart property, the vacancy rate increased which decreased the cash flow. The recession in the real property market started October, 2007, and as a result, the value of the Gearhart property has decreased by 24% to where encumbrances exceed the appraised value. Ellis did not obtain her own appraisal regarding the value of the Gearhart property in 2004. An appraisal done by Hickok for the Bank of Astoria in 2004 indicated the property had a value of less than the purchase price Ellis paid.

11. The purchase of the Gearhart property was structured pursuant to IRS code section 1031. According to the accountant Mr. Lajoy, with operating losses, there would have been a taxable gain of approximately \$700,000.00 (he started at \$1,100,000.00 and as he thought it through, estimated it might end up below \$700,000.00). As a result, the gain which would have resulted in an income tax liability of \$225,000.00 for federal purposes was deferred. He indicated the state rate was 6.6% which was also deferred (which would have resulted in state taxes of \$46,200.00) using his figures. Mr. Lajoy told Ellis she should consider paying off the Jensen Investment note, paying the required distributions and putting all the proceeds in a safer investment, such as bank certificate of deposits. Ellis instead relied on a statement previously made by Beutel indicating investment in the Gearhart, Oregon area would some day be profitable.

12. As she did with the Acoma property, Ellis purchased a home near the Gearhart property. She made the home available for the maintenance person for the Gearhart property. Jensen Investments or Silverstone paid for the mortgage and other expenses.

13. Ellis had no training or instruction operating charitable foundations. When she took on operation of Wintercross, according to her testimony, she did not receive any warnings from members of the board or legal counsel representing Wintercross, Jensen Investments or herself as personal representative regarding the standard of care she should consider. By her testimony, she thought she could keep the art work in her home rather than pay to store it. There were enough issues that came up over the years that Ellis should have been aware about rules against the appearance of self-dealing and the need to be a careful investor of foundation assets. In fact, one of the instructions from Beutel himself raised that concern. Exhibit 208.

14. Even with the current recession, investing in a 60/40 split between stocks and bonds would yield an annual return of three percent.

15. There is no indication or evidence Ellis directly diverted Wintercross or Jensen Investments assets to herself. She used her control to benefit when the Seaside apartments were sold. She benefitted when she forgave the note to the estate and did not pay the estate for the taxes it incurred due to her receipt of life insurance benefits. By purchasing real estate next to investment properties, she benefitted by having managers stay in her properties and having those expenses paid by entities that should have benefitted Wintercross.

16. On April 28, 2009, Ellis paid attorney Redden \$40,000.00 from the Jensen Investments account for future legal services related to this proceeding. Pursuant to stipulation, those funds have remained in attorney Redden's trust account. Earlier in the month, Ellis made several large payments to the accountant and attorney Redden for services rendered to Jensen Investments. Ellis also had Jensen Investments pay her \$80,000.00 for "loan payback" in July, 2009. Exhibit 166.

RULINGS

Ellis did not make prudent investments. In light of what has happened to our economy, I could understand a reluctance to invest in stocks today, but in 2004, that should not have been a concern. Putting some assets into real estate might not be unreasonable but putting everything into one venture is against all prudent investment standards. Ellis failed to diversify the investments for Wintercross and as a result, all the assets are gone. She also put her interest first when she took the cash out of the Seaside apartments sale and left Jensen Investments with the risk of future payment defaults. She did not follow the advice of the accountant, Mr. Lajoy, to pay off the note and look to safer investments. She can claim ignorance but she took on the responsibility of handling the affairs of Wintercross and in the process, benefitted herself. Ignorance of her duties does not create a defense to her liability.

Wintercross suffered losses twice as a result of actions by Ellis. When she invested the Acoma proceeds into the Gearhart properties, she ended up losing \$2,178,745.66. Mr. Cooper is correct to point out that had she not made that investment, Jensen Investments and Wintercross would have had to pay the IRS \$225,000.00 and the Oregon Department of Revenue \$46,200.00 for taxes. Therefore, defendants will be awarded a judgment for \$1,907,545.66 for that transaction. In addition, interest will be imposed at three percent per annum from March 1, 2004 until the date the judgment in this case is entered.

By putting her own interests first, Ellis also caused Jensen Investments, and as a result Wintercross, a loss of \$165,000.00. Even though Ellis said she would take responsibility for the full amount of the loss, Jensen Investments should have faced 72% of the risk and an

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actual loss of \$118,800.00. Defendants will also have judgment for the reduced amount and interest at three percent from the date Ellis received her cash proceeds from the Seaside apartment sale until the date the judgment in this case is entered.

Defendants have pointed out other costs and liabilities Wintercross incurred due to Ellis not following legal requirements. Even though she did not pay the mandatory contributions, she is being charged for the loss in assets. If the assets are now gone, then the things she should have done are pretty much moot. Also, with the in-kind distribution of the art work and the ability to file an amended return for the last three years, much of that penalty may be removed.

The \$40,000.00 in attorney Redden's trust account shall be immediately paid to the receiver. Those proceeds belong to Wintercross and are not available to Ellis for filing or defending her personal action in this proceeding. In fact, I am surprised there is a contention those funds should go to attorney Redden or as much as his name came up during this proceeding he would file the initial complaint. The amount of judgment against Ellis will be reduced by the amount the receiver recovers from the trust account.

The assets of Wintercross, as well as all entities that Wintercross owns, will continue to be placed with the receiver. The receiver shall continue to handle all affairs for Wintercross and determine the best way to wind up its affairs. Ellis shall be removed as a director and officer for Wintercross and the entities it controls.

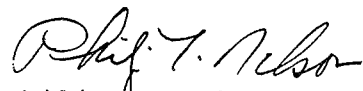
Ellis is permanently enjoined from serving as a trustee, officer, director or fiduciary for any charitable trust, foundation or other entity.

Even though the Department of Justice requested an accounting, it has had at least a year to investigate and go through financial records. There is no indication any other records will be found or other evidence of loss by Ellis will be located.

Any claims Ellis has for further compensation from Wintercross or its entities and any further claims for loans she claims to have made to Wintercross or its entities are denied.

Mr. Rosenhouse can submit an appropriate judgment. Claims for costs and attorney fees will be handled pursuant to ORCP 68.

Sincerely,



Philip L. Nelson
Judge