

NO. 74201-9-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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In Re:

MARITAL TRUST B CREATED UNDER THE LAST WILL AND  
TESTAMENT OF FELECIA A. GRAHAM DATED OCTOBER 26,  
1988 F/B/O FREDERICK A. GRAHAM,

BANK OF AMERICA,

Respondent,

adv.

FREDERICK A. GRAHAM,

Appellant.

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APPELLANT'S REPLY BRIEF

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Mark S. Davidson, WSBA #06430  
Stanbery Foster, Jr., WSBA #01996  
Scott B. Henrie, WSBA #12673  
Attorneys for Appellant  
WILLIAMS, KASTNER & GIBBS PLLC  
601 Union Street, Suite 4100  
Seattle, WA 98101-2380  
Ph. (206) 628-6600  
Fx: (206) 628-6611  
Email: [mdavidson@williamskastner.com](mailto:mdavidson@williamskastner.com)  
[sfoster@williamskastner.com](mailto:sfoster@williamskastner.com)  
[shenrie@williamskastner.com](mailto:shenrie@williamskastner.com)

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## I. INTRODUCTION

The Trustee defends the trial court's orders by continuing to erroneously assert that the owner of the vested remainder interest, *i.e.*, the future interest to which remaining Trust assets will be transferred upon Frederick Graham's death, is unascertained. To the contrary, however, the Trust explicitly provides that the owner of that interest is Frederick Graham's estate, a fact which the Trustee elsewhere concedes. The Trustee's position, which it successfully urged the trial court to adopt, is that the owner of the remainder interest is both the estate and "unascertained remaindermen," a legally impossible inconsistency. The only explanation for the Trustee's argument is its erroneous conflation of the estate of Mr. Graham with the takers from his estate (his heirs or devisees). Washington law unequivocally holds that those persons have no cognizable legal interest prior to the principal's death,<sup>1</sup> so the takers from Mr. Graham's estate cannot be the present legal owner of the remainder interest.

Since an estate consists entirely of property a testator owns at his death or which is payable to him on his death, Washington law also holds

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<sup>1</sup> "An heir's interest in his ancestor's estate does not vest until that ancestor's death. Prior to that event, there is no 'heir'." *In re Estate of Wiltermood*, 78 Wn.2d 238, 240, 472 P.2d 536 (1970). *See also* RCW 11.04.250 ("no person shall be deemed a devisee until the will has been probated"). Similarly, potential appointees under a power of appointment have a mere expectancy and no present interest in the Trust. Resp. Br. at 11-12, citing *In re Hall's Estate*, 159 Wash. 236, 241, 292 P. 401 (1930); CP 153.

that an estate is owned by the testator. The Trust property, which is payable to Mr. Graham's estate upon his death, will be owned by his estate at that time in fee simple absolute. No one else owns or can own the estate, then or during his lifetime. Thus, the trial court erred in accepting the Trustee's argument that the vested "remaindermen" are unascertained, leading to its error in concluding that the future interest is separate from, and potentially in conflict, with Mr. Graham.

Because the Trustee advocated for the Court's recognition of an interest held by non-existent unascertained remaindermen, *i.e.*, the takers from Mr. Graham's estate, it violated its fiduciary duty to Mr. Graham, who is the *only* beneficiary with an interest in the Trust assets. The Trustee also breached its fiduciary duty to Mr. Graham by considering the non-existent interest of the takers in making its determination not to provide him with discretionary distributions of principal in amounts sufficient to allow him to continue living in the manner to which he has become accustomed.

## II. REPLY ARGUMENT

### A. Mr. Graham Owns the Lifetime Interest and the Remainder (Future) Interest in the Trust.

The Trustee states that under the Trust document it has duties to two interests: (1) Mr. Graham as life beneficiary, and (2) his estate. Resp. Br. at 18. It notes that the trial court understood this distinction and

agreed that a separate remainder interest existed. *Id.* However, the crux of this dispute is whether anyone other than Mr. Graham owns either interest. It is undisputed that he owns the lifetime interest. Accordingly, if Mr. Graham also owns the interest of his estate, then, because he owns both interests, he can have no conflict in representing both, no GAL appointment is required to represent either interest owned by Mr. Graham under any circumstance, and the Trustee must consider only him in making its determination as to the amounts of discretionary distributions.<sup>2</sup>

Conceptually, the legal and beneficial interests in the Trust property were divided when the Trust was created. The lifetime beneficial interest devolved to Mr. Graham. The legal interest devolved to the Trustee, subject to the terms of the Trust. When Mr. Graham dies, the legal interest will be transferred to his estate, the Trust will terminate,<sup>3</sup> the legal and beneficial interests will merge, the estate will own the transferred property in fee simple absolute, and Mr. Graham, through his estate, will have the unrestricted right of disposition of his property.<sup>4</sup>

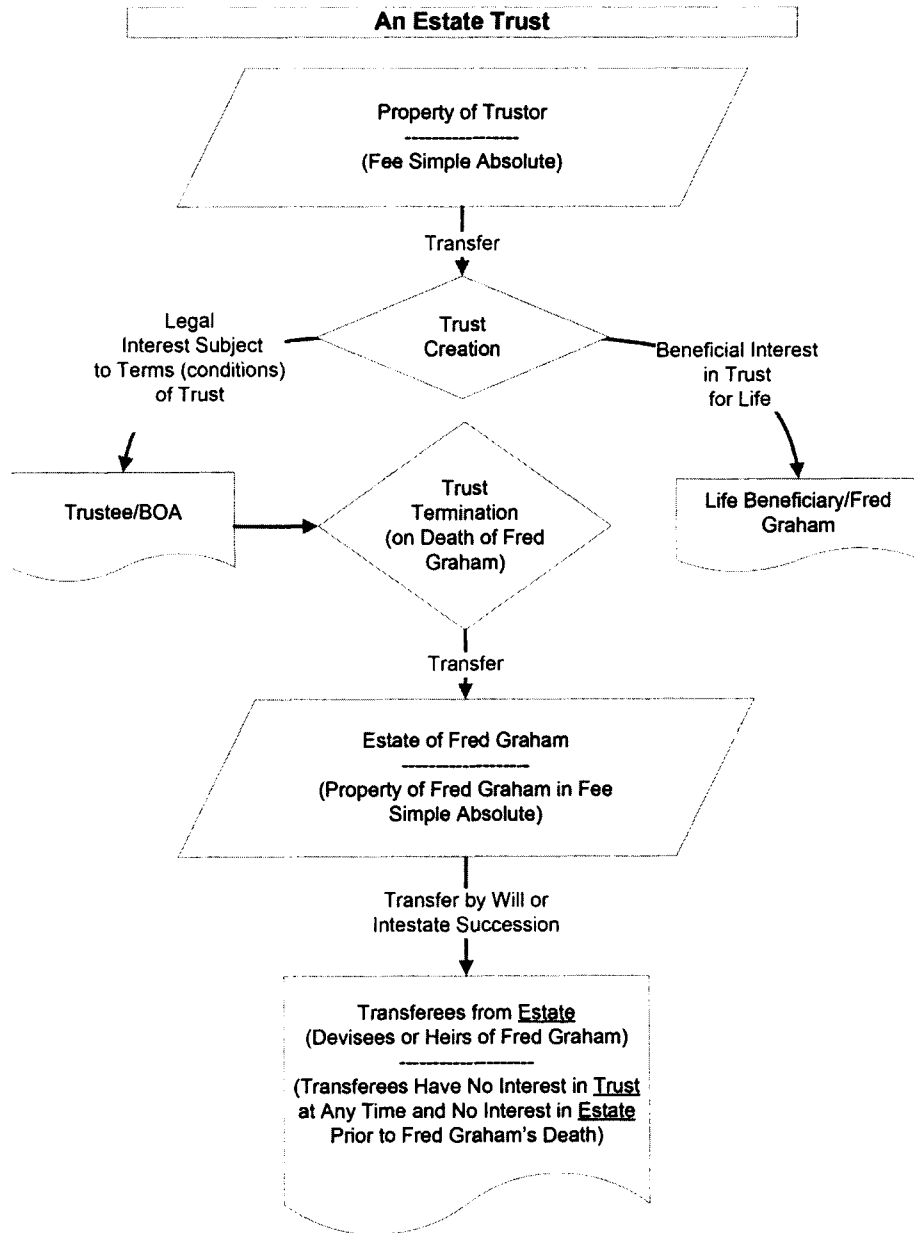
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<sup>2</sup> While the Trustee asserts that its conduct seeks to effectuate the desires of the trustor, it must not be forgotten that the trustor expressly stated her desire that the Trustee exercise its discretion to distribute principal in amounts sufficient to allow Mr. Graham to continue living in the manner to which he has become accustomed. CP 41, 44-45.

<sup>3</sup> Restatement (Third) of Trusts, § 61 (2011), com. b; Restatement (Second) Trusts, § 341 (1959).

<sup>4</sup> *Presbytery v. King County*, 114 Wn.2d 320, 329-30, 787 P.2d 907 (1990).

This structure is visualized as:





The Trustee argues that Mr. Graham does not own the remainder interest, stating that a benefit to him, as the life beneficiary, *i.e.*, a discretionary distribution of principal, negatively impacts the remainder beneficiary (which must be someone else or there would be no negative impact). Resp. Br. at 15. As the Trustee puts it,

A dollar distributed to the lifetime beneficiary is a dollar that the remainder beneficiary or beneficiaries will never enjoy.

*Id.* at 13. Substituting names for the labels, the Trustee's argument is:

A dollar distributed to Mr. Graham is a dollar that Mr. Graham's estate will never enjoy.

But if Mr. Graham owns his estate, then the Trustee's argument becomes absurd:

A dollar distributed to Mr. Graham is a dollar that Mr. Graham will never enjoy.

In other words, if Mr. Graham owns both interests, distributing a dollar to him has no impact. It would be like putting the dollar in one pocket instead of another.<sup>5</sup>

Accordingly, we turn to the determinative issue: Who owns the remainder interest? As reflected in the chart above, the answer is simple: The remainder interest is the future interest in the Trust property after the

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<sup>5</sup> A deposit in one pocket being a current interest; a deposit in the other pocket being a future interest. Both pockets belong to Mr. Graham.

end of the life interest, and it is owned by Mr. Graham as a part of his estate because it is payable to his estate on his death.

Mr. Graham's estate consists of the property he owns at his death or which is payable to his estate at his death. *Hansen v. Stanton*, 177 Wash. 257, 260, 31 P.2d 903 (1934); *see also* Restatement (Third) of Prop.: Wills and Other Donative Transfers § 1.1(a) (1999) ("The probate estate consists of property owned by the decedent at death and property acquired by the decedent's estate at or after the decedent's death").<sup>6</sup> Thus, Mr. Graham owns his estate and the future remainder interest in the Trust property.

At no time does anyone other than the Trustee and Mr. Graham own any interest in the Trust property, Mr. Graham's interests being his life and future interests. Accordingly, because no beneficiary other than Mr. Graham has an interest in the Trust property, the beneficial interests are not separate, and Mr. Graham has no conflict with any Trust interest and can have no such conflict. Ergo, Mr. Graham is the only person whose interests the Trustee may consider in making its determination as to discretionary principal distributions.

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<sup>6</sup> The example in Illustration 15 to § 1.1 is exactly the situation we have here:

15. *Estate trust.* G was the income beneficiary of a trust. The corpus of the trust was payable to G's estate upon G's death. The trust property is included in G's probate estate.

The problem with the Trustee's analysis is that despite its express acknowledgements that Mr. Graham's estate "has a vested remainder interest in the Trust" and that the takers from his estate "have only a mere expectancy and are not Trust beneficiaries," CP 153,<sup>7</sup> the Trustee remains wedded to the concept that the remainder interest resides in those "unascertained" takers. For example, in arguing that the owners of the remainder interest are presently unascertainable, it asserts, "Mr. Graham's estate (*and more specifically, the parties who will receive the assets of the estate*) will be ascertainable when he dies." Resp. Br. at 12 (emphasis supplied). *See also* Resp. Br. at 6-7, (the remainder beneficiaries are unascertained, "which means that their exact identity is not at present known"). These arguments are fundamentally in error; Mr. Graham's estate is the sole remainder beneficiary, and its exact identity *is* at present known. It is only the identity of the takers from the estate that is not presently known; however, since they are not beneficiaries of the Trust and have no presently cognizable rights, that fact is irrelevant. In sum, it is not the remainder beneficiary that is unascertained, it is the takers from

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<sup>7</sup> The Trustee's acknowledgement concerning the takers is consistent with longstanding Washington law. As established by the authorities cited in footnote 1, *supra*, heirs and devisees have no cognizable legal interest in a testator's property prior to his death. Similarly, appointees under a general power of appointment have no such interest. The takers have only an expectancy, which is not a property interest during the life of the source through whom the interest is claimed. *In re Estate of Baird*, 131 Wn.2d 514, 521, 933 P.2d 1031 (1997). *See also* Restatement (First) of Property § 315, com. a (1936).

the estate of Mr. Graham who are unascertained, which is inconsequential to the Trustee's duties.

The Trustee has consistently considered the interests of persons who have no interest in the Trust assets, asserting to the trial court that, "Even if Mr. Graham's estate is simply a bundle of property rights, *someone* other than him is entitled to those property rights...." CP 235 (emphasis in original). This assertion demonstrates a fundamental misconception as to both property law and trust law. The *someone* the Trustee refers to can only mean the heirs and devisees of Mr. Graham's estate, and, because they have no rights under the Trust at any time and no rights under the estate prior to Mr. Graham's death, their interests may not be considered by the Trustee in making its distribution decision.

The GAL was similarly misguided, arguing to the trial court, "To the extent that Trust distributions are made to Mr. Graham during his lifetime, there will be less remaining in the Trust for *whoever* will receive the remaining Trust assets after his death...." CP 228 (emphasis supplied). The GAL identified "whoever" as "the appointees under [Mr. Graham's] general testamentary power of appointment or the ultimate beneficiaries of his estate." *Id.* But it is simply wrong to equate Mr. Graham's estate with those who will take the assets of the estate, persons who have no rights whatsoever in the Trust or in Mr. Graham's property

interests, and so cannot own the remainder interest in the Trust. In sum, the owner of the future interest in the Trust is presently ascertainable: It is Mr. Graham, because he is the owner of his own estate and because no one else has any ownership in that future interest until his death.

Astoundingly, the Trustee states that it and Mr. Graham agree that Mr. Graham holds the authority to choose who receives the Trust assets upon his death. Resp. Br. at 18. The Trustee completely misinterprets Mr. Graham's position and turns the law and the facts on their heads. Mr. Graham holds the authority to choose who receives the assets from his estate, not to choose who receives the Trust assets. It is *the Trust* which specifies who receives the Trust assets upon Mr. Graham's death. CP 45. Again, the Trustee conflates Mr. Graham's estate, which receives the Trust assets on his death, with the takers from his estate, who receive the assets from the estate. A hypothetical demonstrates the point: Were the Trustee to refuse to transfer the Trust assets to Mr. Graham's estate upon his death, only the personal representative of the estate would have standing to bring suit to compel the transfer; the heirs would have no standing to do so. *See* RCW 11.48.010, 11.48.090.

Once liberated from the misconception that the takers from Mr. Graham's estate have an interest in the Trust property (a misconception urged by the Trustee despite its express admission that they do not have

such an interest, CP 153), even the Trustee will be unable to deny that Mr. Graham has no conflict and can have no conflict, and that his interest is the only interest which may be considered by the Trustee in making its determination whether to make discretionary distributions necessary to enable Mr. Graham to continue to live in the manner to which he is accustomed.

B. Mr. Graham's Argument Properly Ignores the Spendthrift Clause in the Trust, Which Is Irrelevant.

The Trustee argues that Mr. Graham's contention that he owns the remainder interest "cannot be reconciled with the Trust's spendthrift clause." Resp. Br. at 19. However, this argument mischaracterizes Mr. Graham's contention as asserting that he presently owns the legal interest in the Trust assets as well as the beneficial interests ("The spendthrift clause clearly precludes Mr. Graham from alienating trust property—principal and income—during his life. If he cannot alienate it now, then he does not own it now"). Resp. Br. at 20. However, Mr. Graham does not claim that he owns the legal interest in the Trust assets during his lifetime. He recognizes that the Trust owns that interest. His position is that because he owns all beneficial interests in the Trust property during his lifetime, and will own all legal and beneficial interests in the property

after his death, his interest is the only interest which the Trustee may consider in administering the Trust.

In accusing Mr. Graham of making an argument which, if accepted, would contravene the spendthrift clause, Resp. Br. at 22, the Trustee mischaracterizes his argument. He does not argue, as the Trustee alleges, that he owns the full “bundle of property rights” *during his life*. Instead, he argues what cannot be disputed: His estate consists of “the Bundle of Property Rights He Will Own at Death.” CP 115. The Trustee asserts that the trustor did not give him the full bundle of property rights in the Trust assets. While that assertion is partly true, it is also partly false. Accurately stated, the trustor gave Mr. Graham the beneficial interest in the Trust property during his lifetime and the beneficial and legal interests in it on his death, *i.e.*, he will own the full bundle of rights upon his death, when it will be transferred to his estate in fee simple absolute. Mr. Graham has never asserted that he presently owns the legal rights to the Trust assets and is free to alienate them. The Trustee’s argument about the spendthrift clause is a classic case of setting up a straw man and knocking him down. Because Mr. Graham has not made the argument the Trustee attributes to him, its argument is both meritless and irrelevant.

C. The Trustee's Argument that It Considered Only Mr. Graham's Lifetime Interest in Making Its Determination of the Amount of Discretionary Principal Distributions to be Made to Mr. Graham Contradicts Its Earlier Statements and Is Illogical Because, if True, It Would be an Admission of a Breach of Fiduciary Duty Owed to the Putative Separate and Conflicting Interest the Trustee Contends Exists.

The Trustee states that it considered only Mr. Graham's lifetime interest in making its determination as to discretionary principal distributions. Resp. Br. at 26-27. While it acknowledges that its distribution plan "offers protection of the remainder interest of the Trust by making it more likely that there will remain a trust corpus upon Mr. Graham's death," *id.*, at 27-28, it asserts that this "was not the factor which limited the amount the Trustee determined it could distribute." *Id.* at 28. Presumably, the Trustee makes this argument in an attempt to moot or minimize the issue of who owns the remainder interest. It implies that if protecting that interest was not a consideration in the determination of the amount of distributions, then the issue need not be reached. To the contrary, however, the Trustee has previously stated on multiple occasions that it did consider the remainder interest in making its distribution determination. Moreover, unless this Court addresses the issue of ownership of the remainder interest, neither the parties nor the trial court will know whether a GAL must be appointed in any subsequent dispute resolution process.



In asserting that it did not consider the remainder in making its distribution determination, the Trustee ignores its statements to the trial court that it did consider that putative separate and conflicting interest, and that it was *required* to do so by its fiduciary duties. For example, in its Petition for Instructions, the Trustee stated that “it cannot exhaust the Trust to permit Frederick Graham to maintain such a standard of living without considering various factors, including the beneficial interest of the remaindermen of the Trust.” CP 28. Later in the Petition, it stated, “The Trustee’s Method for Determining the Amount of Discretionary Distributions...Balances the Competing Interests,” CP 33, identifying one of the “competing interests” as “the remainder interest.” CP 35. If a conflicting interest exists, as the Trustee has consistently argued, then, by its own admission, “An unascertainable beneficiary still has an interest in the Trust that **must be both considered by the Trustee** and represented as a necessary party to this matter.” CP 102 (emphasis supplied). It must consider that putative interest, the Trustee stated, because it “has a duty to adhere to its fiduciary duties to all classes of beneficiaries,” CP 232. Accordingly, by the Trustee’s own concessions, if the remainder interest existed separate from and in conflict with the interests of Mr. Graham, then either it did consider that interest in making its distribution decision-- or it did not consider the interest and thereby violated its fiduciary duty.

In sum, the Trustee's argument here that it did not consider the putative remainder interest lacks credibility. It conflicts with the Trustee's statements to the trial court, and, if true, constitutes the unlikely admission that it violated its fiduciary duty to that interest.

D. In Denying that It Breached Its Fiduciary Duty, the Trustee Mischaracterizes Its Petition and Its Conduct in the Trial Court.

The Trustee defends its actions by citing authorities which authorize trustees to commence litigation under TEDRA for a judicial determination of contested issues. Contrary to the statement that "Mr. Graham has argued repeatedly that the Trustee has breached its fiduciary duty to him by ... (c) filing a Petition for Instructions with the trial court," Resp. Br. at 28, Mr. Graham has consistently argued that it was the *content* of the Petition which gives rise to his claim. Specifically, Mr. Graham points to the partiality which characterizes the Petition, and the Trustee's advocacy in favor of an interest separate from, and in conflict with, Mr. Graham's interests. In fact, not only does Mr. Graham concede that the Trustee had authority to file a petition for instructions, but the cases cited in his Opening Brief recognize and approve of trustees filing interpleaders and petitions. *See, e.g.*, Appellant's Brief at 28- 30, 35. The problem arises where, as here, a trustee goes beyond the impartial role of supplying the court with the underlying facts and the different

interpretations that could be drawn from them and argues in a manner beneficial to one beneficiary and detrimental to another.

The Trustee argues that in its Petition, it was “permitted to articulate its view to the Court when asking the court to resolve a question between it and a beneficiary.” Resp. Br. at 29. It cites no supporting authority, but asserts that, “Holding otherwise would render [RCW 11.96A.030(2)(b) & (c); -.080; -.090] meaningless.” *Id.* This is hardly the case, especially where, as here, a GAL had been appointed to represent the putative separate and conflicting remainder interest on whose behalf the Trustee chose to advocate. The proceeding below would not have been meaningless had the Trustee filed a Petition which impartially set forth the underlying facts and different interpretations that could be drawn from them and allowed Mr. Graham and the GAL to litigate the outcome. By advocating for an outcome that recognized an interest in conflict with Mr. Graham’s interests, the Trustee took sides, which it was prohibited from doing. Worse, actually, it not only advocated for an outcome adverse to Mr. Graham, its Petition asserted as fact that a separate and conflicting interest exists rather than asking the court to determine if such a conflicting interest exists. *See, e.g.*, CP 29, where the Trustee wrote in the “Argument and Authority” section of its Petition, “...Frederick Graham’s Conflict of Interest Prevents Him from Virtually Representing [the]

Remainder Interest.”<sup>8</sup> Consistent with the Trustee’s fiduciary duties of impartiality and loyalty, the Petition should have and could have simply stated the issues (“Who Owns the Remainder Interest? Is it in Conflict With the Life Beneficiary’s Lifetime Interest?”). The Petition should have and could have advised the Court that a Special Representative (GAL) had been appointed to represent the putative separate and conflicting remainder interest, that the GAL and Mr. Graham would advocate for their respective positions on the issue raised by the Petition, and that the Court should decide the issue and instruct the Trustee accordingly.

The remedy for the Trustee’s breach of fiduciary duty is disgorgement of its fees, reimbursement to the Trust for the Trustee’s attorney’s fees and Mr. Graham’s attorney’s fees incurred in this action and paid from the Trust, and remand for a determination of whether Mr. Graham has suffered other damages from the Trustee’s breach of duty.

E. Mr. Graham’s Attorney’s Fees on Appeal Should be Reimbursed by the Trustee or Ordered to be Paid from the Trust.

Pursuant to RCW 11.96A.150, the Court should award fees on appeal to Mr. Graham, to be paid by the Trustee or, in the absence of an order requiring the Trustee to pay, then to be paid from the Trust.

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<sup>8</sup> The inclusion of an “Argument” section in a Petition filed by a fiduciary whose duty to the beneficiary requires it to be impartial reflects that this Trustee has been partial from the inception.

The Trustee agrees that Mr. Graham's reasonable fees may be paid from the Trust. Resp. Br. at 40. For the reasons articulated by Special Master Paris Kallas and incorporated in the trial court's two post-judgment orders on attorney's fees, CP 449-53, Mr. Graham's fees incurred in connection with this appeal are reasonable.

### III. CONCLUSION


The trial court's summary judgment orders should be reversed. This Court should determine as a matter of law that there is and can be no conflict of any kind between the future interest in the Trust that is payable to Mr. Graham's estate and is owned by him and Mr. Graham as the owner of the life beneficial interest since he owns and controls both interests. The Court should further determine as a matter of law that by advocating against Mr. Graham's position, the Trustee breached its fiduciary duty. The Court should require the Trustee to reimburse the Trust for its fees and its attorney's fees incurred in the trial court, to reimburse Mr. Graham's attorney's fees and costs incurred in the trial court and which were paid from the Trust, and remand for trial as to damages on Mr. Graham's claim for breach of fiduciary duty.

In addition, the Court should require the Trustee to bear its fees and attorney's fees and costs for this appeal, and award Mr. Graham his

reasonable attorney's fees and costs on appeal from the Trustee (or, if not, then order that they be paid from the Trust).

RESPECTFULLY SUBMITTED this 18th day of April, 2016.

WILLIAMS, KASTNER & GIBBS PLLC

By   
Mark S. Davidson, WSBA #06430  
Stanbery Foster, Jr., WSBA #01996  
Scott B. Henrie, WSBA #12673  
Attorneys for Appellant Frederick A. Graham

CERTIFICATE OF SERVICE

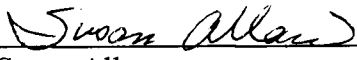
I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 18th day of April, 2016, I caused a true and correct copy of the foregoing document, "APPELLANT'S REPLY BRIEF" to be delivered to the following counsel of record as indicated:

***Attorneys for Respondent/Trustee  
Bank of America:***

Mathew L. Harrington, WSBA #33276  
Karolyn Hicks, WSBA #30418  
RoseMary Reed, WSBA #34497  
Stokes Lawrence, P.S.  
1420 Fifth Avenue, Suite 3000  
Seattle, WA 98101  
T: (206) 626-6000  
F: (206) 464-1496  
E: Rosemary.Reed@stokeslaw.com  
Mathew.Harrington@stokeslaw.com  
Karolyn.Hicks@stokeslaw.com

- Via Legal Messenger
- Via Facsimile
- Via Electronic Mail
- Via United States Mail

DATED this 18th day of April, 2016, at Seattle, Washington.

  
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Susan Allan  
Legal Assistant to Mark S. Davidson

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