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Court of Appeals
Division III
State of Washington
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SUPREME COURT
STATE OF WASHINGTON
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COA NO. 350541

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

**IN RE THE MATTER OF THE ESTATE OF DAN MCANALLY
AND THE RISTE TRUST**

**Darrell Riste,
the beneficiary of the Estate and the Riste Trust,**

Appellant/Petitioner

v.

**Baker Boyer Bank,
the Personal Representative of the Estate of Dan McAnally and
the Trustee of the Riste Trust**

Appellee/Respondent

**ON REVIEW FROM THE SUPERIOR COURT
OF WASHINGTON FOR YAKIMA COUNTY**

MOTION FOR DISCRETIONARY REVIEW

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1 **A. IDENTITY OF PETITIONER:**

2 Darrell Riste asks this court to accept review of the decision or parts of the decision
3 designated in Part B of this motion.
4

5 **B. DECISION BELOW:**

6 Petitioner requests review of the Court of Appeals' Decision (35054-1) affirming the
7 Yakima Superior Court's order in Case # 12-4-00514-8 denying Petitioner's request to remove
8 the Personal Representative of the Estate of Dan McAnally and/or the Trustee of the Riste Trust
9 and denial of fiduciary fees (attached as Appendix A). Petitioner also requests review of that
10 portion of the Court of Appeal's Decision which decides the matters herein based on the legal bar
11 of Laches because the Respondent did not make any Laches argument in the Superior Court or in
12 the Court of Appeals.
13

14 **C. ISSUES PRESENTED FOR REVIEW**

15 1) Was Petitioner's Constitutional right(s) to Due Process violated A) When the Court
16 made findings which exceeded the scope of its authority? B) When the Court refused to grant the
17 Petitioner's request for a continuance, discovery and/or a jury trial?

18 2) Does RCW 11.12.250 require a Trust be evidenced by a written instrument separate
19 from a Will or can a Will make a valid gift of realty to a Trustee of a Trust which was not funded
20 during the Testator's lifetime without compliance with RCW 11.12.250?

21 3) Does the Probate Court have jurisdiction to order the sale of Estate Real Property
22 intended by the Decedent to pass in kind under the residuary clause of the Will where the Estate
23 has sufficient liquidity to pay all debts, expenses and taxes of administration without the sale?
24 Where title to the realty is vested in the beneficiary by Statute?

25 4) Does a Non Intervention Personal Representative breach any fiduciary duty by selling
26 Estate Real Property which was intended by the Decedent to pass in kind under the residuary
27

1 clause of the Will? Where title was vested by Statute in the beneficiary? Where the sale was not
2 necessary to pay any debts, expenses and/or taxes of administration? Where the beneficiary's
3 opposed the sale?

4 5) Does the Personal Representative of an Estate breach any fiduciary duty to the
5 beneficiary(s) or the Court when he misleads both the beneficiary and the Court by informing
6 them that he has a mandatory duty to diversify the Estate's commercial realty when in fact RCW
7 11.68.090 specifically provides that no duty to diversify exists?

8 6) Is a Non Intervention Personal Representative and/or Trustee required to provide the
9 beneficiary's of an Estate and/or Trust all relevant material information necessary to protect their
10 interests? Where the PR and/or Trustee privately carry out a business scheme to degrade property
11 value for the purpose of underselling business assets and real property of the deceased estate.

12 7) Does a Non Intervention Personal Representative and/or Trustee breach any fiduciary
13 duty by providing the beneficiary's of an Estate and/or Trust incorrect factual information,
14 withholding factual information and/or providing incorrect explanations of the statutory legal
15 requirements of administration?

16 8) Was the Petition for Removal barred by laches as opined by the Court of Appeals?
17 Where the Respondent hasn't raised a Laches Defense in the Superior Court?

18 9) Can a Petition for Removal of a Personal Representative and/or a Trustee be brought at
19 any time during administration?

20 10) Is a Non Intervention Personal Representative required to abide by any statutory
21 and/or non statutory fiduciary duty's to the beneficiary's of an Estate?

22 11) Does a Non Intervention Personal Representative violate any fiduciary duty when he
23 acts in contravention of the written instructions in the Will?

24 12) Is there a conflict of interest when a Personal Representative of an Estate and a
25 Trustee of a Trust are the same individual/entity and the Estate and Trust have conflicting
26 pecuniary interests in commercial realty with a value of over 1.1 million dollars? Where the
27

1 beneficiary's under the Estate and the Trust are different?

2 13) Is a Personal Representative and/or a Trustee's failure to adhere to the quarterly
3 distribution instructions set forth within the testamentary/trust instrument a breach of fiduciary
4 duty? Where he failed to make any distribution payments at all for several years despite there
5 being adequate funds to make the required payments?

6 16) Did the Personal Representative violate any of the restrictions imposed by the
7 legislature upon the powers of the Personal Representative as set forth under RCW 11.68.090,
8 Chapters 11.97, 11.98, 11.100, 11.56 and/or 11.04 and if so, did the Superior Court as well as the
9 Court of Appeals uphold an illegal violation.

10
11 **D. STATEMENT OF THE CASE:**

12 Petitioner as a beneficiary of the Estate of Dan McAnally and as a beneficiary of the Riste
13 Trust filed a Petition in the Yakima Superior Court to remove the Personal Representative and
14 the Trustee who were the same individual/entity, namely, Baker Boyer Bank. Petitioner filed his
15 Petition for Removal in conjunction with a civil complaint for damages for harm caused by the
16 Personal Representative and Trustee. In accordance with statutory requirements Petitioner filed
17 his Petition for Removal based upon the prima facie evidence which was available to him at that
18 time. The Petition for removal was the legislatively authorized legal process to prevent further
19 damages which were appropriately claimed by the Beneficiary's in the civil complaint that was
20 yet to be decided before the Superior Court itself. The Petition for Removal alerted the Probate
21 Court of the corresponding civil complaint seeking damages in excess of sixteen million dollars
22 and that the Probate Court should continue the removal hearing until after discovery was
23 completed in the civil matter if further evidence was needed to justify permanent removal. The
24 Probate Court Commissioner erroneously exceeded the scope of his authority/jurisdiction at the
25 removal hearing by making conclusive findings of fact on the underlying fiduciary's acts rather
26 than restricting his findings to determining whether or not the prima facie evidence justified
27 removal and/or to continue the matter until after further discovery in the Superior Court civil
28 matter was completed. The Commissioner's unauthorized findings/ruling has prejudiced

1 Petitioner's duly filed civil complaint which has also been erroneously precluded based upon the
2 Commissioner's unauthorized findings which effectively resulted in a denial of Petitioner's
3 Constitutional rights to Due Process and being restored the assets entirely. The Commissioner
4 was not authorized or requested to make conclusive findings on the underlying breaches of
5 fiduciary duty's at issue in the civil matter and was only authorized to make a finding that
6 removal was or was not justified based upon the statutorily authorized prima facie evidence.
7 Petitioner is seeking review of the Court of Appeals affirmance of the Superior Court's order and
8 findings which exceeded the scope of the jurisdiction of the probate court and unconstitutionally
9 denied Petitioner his Due Process rights and illegally alienated the beneficiary's from real estate
10 and business property specifically designated by the deceased, Dan McAnally.

11 Petitioner is also requesting review of the Court of Appeals affirmance of the Superior
12 Court's refusal to remove the Personal Representative of the Estate of Dan McAnally and/or the
13 Trustee of the Riste Trust who were the same individual, namely, Baker Boyer Bank for their
14 various misdeeds committed during administration and/or their stark conflict of interest.
15 Petitioner presented the Superior Court un-controverted prima facie evidence and legal argument
16 proving the Personal Representative and Trustee breached several of their respective duties to the
17 beneficiary's and that removal was justified for the individual breaches or in the aggregate.
18 Petitioner cited to all of the evidence and legal argument within the Record before the Superior
19 Court in his Appeal Brief by citing to the numerous documents proving individually and/or
20 collectively that the breach of fiduciary duty occurred. The Court of Appeal opined that
21 Petitioner's citations to these multiple pages of the Record collectively rather than individually
22 was an error in citation for which they declined to review the alleged Superior Court's errors.
23 Petitioner's citations to all the documentary evidence of the fiduciary's breaches of duty's could
24 not have been cited in any other manner as there was more than one instance of the particular
25 breach found within the documentary evidence cited. There were in fact numerous violations of
26 the fiduciary duty(s) and Petitioner necessarily referenced the record by citing to all of the
27 evidence in the Record which proved the point exactly as it was brought forth in the Superior
28 Court. The Court of Appeals has repeated the Superior Court's failure to address the Petitioner's

1 evidence and arguments including that the Decedent's intentions were not followed in regards to
2 the limitations imposed upon the PR/Trustee's right to sell real property as set forth by the
3 written instrument and as required by the legislature; the Court of Appeals erroneously affirmed
4 without discussion. The Superior Court incorrectly applied the law in determining that there was
5 a valid gift from the Estate to the Trustee of the Riste Trust because the Riste Trust was not
6 evidenced by a written instrument separate from the Will as required by the legislature and the
7 Court of Appeals failed to address Petitioner's assignment of error under RCW 11.12.250 &
8 11.98.008. The Superior Court erroneously found that the Personal Representative and/or
9 Trustee's violation of the Trust's requirement to make quarterly payments of income to the
10 beneficiary's was not a breach of fiduciary duty and the Court of Appeals erroneously affirmed.
11 The Superior Court erroneously found that the the Personal Representative and/or Trustee was
12 not required to provide the beneficiary with all relevant material information necessary to protect
13 their interests as set forth by the legislature and the Court of Appeals erroneously affirmed. The
14 Superior Court erroneously found that a Personal Representative and/or Trustee's Non
15 Intervention powers exempted him from all statutory and non statutory fiduciary duty's and the
16 Court of Appeals erroneously affirmed. The Superior Court erroneously found that there was no
17 conflict of interest between the Personal Representative of the Estate and the Trustee of the Trust
18 where both the Estate and the Trust had competing interests in commercial realty valued over 1.1
19 million dollars and/or where the Trustee had a personal interest in yearly trustee and investment
20 fees he would earn if the Trust was valid; the Court of Appeals erroneously affirmed without
21 comment.

22
23 **E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED:**

24
25 **1) VALIDITY OF A GIFT BY WILL TO THE TRUSTEE OF AN UNFUNDED TRUST**
26 **WHICH DOES NOT COMPLY WITH THE LEGISLATURES REQUIREMENTS AS**
27 **SET FORTH BY RCW 11.12.250 & 11.98.008.**

28 Review should be accepted because the decision of the Court of Appeals is in conflict

1 with decision(s) of the Supreme Court and decisions of the Court of Appeals which require a
2 Personal Representative to protect an Estate from doubtful claims. (RAP 13.4 (b)(1)&(2);
3 *Peoples Nat'l Bank v. Livingston*, 8 Wn. App. 519 (1973) – “He must perform his duties not only
4 for the benefit of the legatees but must also protect the estate from invalid and doubtful claims”)
5 (*State ex rel. Smith v. Superior Court*, 142 Wash. 300 (1927) – Indicating that the Court will
6 remove an unfaithful executor who participates in a fraudulent conveyance or fails to claim
7 property)

8 Petitioner presented uncontradicted evidence and citation to legal authority that the
9 validity of the gift by the Will to the Trustee of the Riste Trust was invalid and that therefore the
10 Personal Representative breached his fiduciary duty by failing to contest the validity of the Riste
11 Trust and allowing the commercial realty valued at over 1.1 million dollars to pass to the Riste
12 Trust rather than as specified in the Will. (AOB 32, 36; ARB 11-12) The Superior Court’s
13 finding that the validity of the Riste Trust was not doubtful and that the Riste Trust was valid was
14 based upon inapplicable legal authority. (Id.) The Superior Court erroneously found that the
15 Riste Trust was valid by relying upon legal authority which was applicable only to the creation of
16 a Trust by transfer of property to a Trustee during the Trustor’s lifetime and was inapplicable to a
17 gift from a Will to a Trustee and the corresponding requirements for creation of a valid Trust
18 after the death of the Trustor; which was the situation which existed in the Estate of Dan
19 McAnally and the purported gift by Will to the Trustee of the Riste Trust. (Id.) The legislature
20 specifically required that a gift by a Will to a Trustee and the corresponding creation of a valid
21 trust (which had not been funded during the Trustor’s lifetime) was required to be evidenced by a
22 written instrument separate from a Will. (Id.; see, RCW 11.12.250 and RCW 11.98.008)
23 Without a valid gift to the Trustee of the Riste Trust which was unfunded during the Testator’s
24 lifetime rendered the Riste Trust invalid for failure to comply with the legislatures requirement
25 for funding. (Id.) Petitioner presented the Court of Appeals with the error to which no response
26 was provided in the unpublished opinion. (Id.) The Court of Appeals affirmance is in clear
27 contravention of the legislatures express requirements for the gifting of property by a Will to a
28 Trustee and the corresponding creation of a valid Trust after death of a Trustor who had not

1 otherwise funded the Trust during his lifetime. (Id.) The valid gifting of property by Will to a
2 Trustee and the corresponding creation of a valid Trust which was otherwise unfunded during the
3 lifetime of the Testator is also an important question of law and/or an issue of public importance
4 justifying the Supreme Court's review as this issue will affect all persons in the State of
5 Washington who may attempt to create a gift by Will. (RAP 13.4 (b)(3)&(4))

6
7 **THE SUPERIOR COURT'S FAILURE TO CONSIDER THE DECEDENT'S INTENT AS**
8 **DISCRENED FROM THE FOUR CORNERS OF THE WILL AND THE COURT OF**
9 **APPEAL'S FAILURE TO REMAND OR CORRECT THE ERRONEOUS FAILURE TO**
10 **CONSIDER THE DECEDENT'S INTENT UNCONSTITUTIONALLY CONTRAVENES**
11 **WELL SETTLED LEGAL AUTHORITIES AND NECESSITATES SUPREME COURT**
12 **REVIEW**

13
14 The Court of Appeals decision directly conflicts with the well settled decision(s) of the
15 Supreme Court and Court of Appeals which require the Decedent's lawful intent to be considered
16 above all and therefore should be reviewed RAP 13.4 (b)(1)&(2),

17 [w]hen called upon to construe a will, the paramount duty of the court is to give
18 effect to the testator's intent. *In re Estate of Riemcke*, 80 Wn.2d 722, 728 (1972).
19 Such intention must, if possible, be ascertained from the language of the will itself
20 and the will must be considered in its entirety and effect must be given every part
21 thereof. *In re Estate of Douglas*, 65 Wn.2d 495, 499 (1965); *Elder v. Seattle First*
22 *Nat'l Bank*, 33 Wn.2d 275, 278 (1949). The interpretation of a will or trust
instrument, including the determination of whether a will contains an ambiguity,
is a question of law subject to de novo review. *In re Estate of Bernard*, 182 Wn.
App. 692, 704, 332 P.3d 480, review denied, 181 Wn.2d 1027 (2014). The
purpose of construing a will is to give effect to the testator's intent.

23
24 (*In re Estate of Bergau*, 103 Wn.2d 431, 435-36 (1985); AOB 17-24, 45-46; ARB 13-29) The
25 Superior Court's findings erroneously failed to consider the Decedent's intent at all regarding the
26 limitations imposed upon the Personal Representative and/or Trustee's rights to sell commercial
27 real estate and the Personal Representative and/or Trustee's duty to make quarterly income
28 payments to the beneficiary(s). (Id.) The Decedent's intentions were set forth in the Will and

1 expressly limited the circumstances under which the commercial real estate could be sold (CP 1-
2 6, Will Sec. 6.1 & 10.3) and required quarterly income payments to the beneficiary(s) (Will Sec.
3 7.1) both of which were shown through uncontradicted evidence to have been violated. (Id.) The
4 Superior Court's findings that the Non Intervention Personal Representative and/or Trustee had
5 authority to sell the commercial realty without compliance with the Decedent's express
6 limitations and that failure to make income distribution payments as specifically instructed by the
7 Will/Riste Trust was not a breach of his fiduciary duties is erroneous. (Id., see CP 609) The
8 requirement for paramount consideration of the Decedent's intent is an important question of law
9 and/or represents a significant public interest as the failure to do so will impact all state resident's
10 attempting to create testamentary dispositions which effectuate their intent. ((RAP 13.4
11 (b)(3)&(4))

12
13 **A NON INTERVENTION PERSONAL REPRESENTATIVE IS NOT EXEMPT FROM**
14 **THE LEGISLATURES STATUTORY REQUIREMENTS WHICH INCLUDES i)THE**
15 **REQUIREMENTS TO PROVIDE THE BENEFICIARY(S) WITH ALL RELEVANT**
16 **AND MATERIAL INFORMATION WHICH IS NECESSARY TO PROTECT THEIR**
17 **INTERESTS, ii) THE STATUTORY DUTYS AND iii) THE DUTY OF LOYALTY**
18

19 i) The decision conflicts with the decision(s) of the Supreme Court and the Court of
20 Appeals which require a Personal Representative and/or Trustee to provide the beneficiary with
21 all relevant material information which is necessary to protect their interests and therefore
22 justifies review under RAP 13.4 (b)(1)&(2), (*In re Estate of Jones*, 152 Wn.2d 1 (2004) -
23 "breaches included using estate property for personal use, commingling estate funds, and
24 refusing to disclose information to the beneficiary(s)"). (*Laier v. Adams*, 7 Wn. App. 495, 500
25 (1972) – Indicating, that concealing the true value of an asset subject to administration is a
26 breach of the fiduciary duty owed by the administrator of a decedent's estate) (The administrator
27 of a decedent's estate is an officer of the court and stands in a fiduciary relationship to those
28 beneficially interested in the estate. In the performance of his fiduciary duties he is obligated to

1 exercise the utmost good faith and to utilize the skill, judgment, and diligence which would be
2 employed by the ordinarily cautious and prudent person in the management of his own trust
3 affairs. [Citing cases.] Concealing the true value of an asset subject to administration, to the
4 detriment of an heir, is clearly a breach of [fiduciary duty] ((*In re Estate of Novolich*, 7 Wn. App.
5 495, 501-02 (1972))

6 Petitioner presented uncontradicted evidence that the beneficiary requested all relevant
7 material information regarding the Personal Representatives intended sale of the Estate's
8 commercial realty and in fact was forced to hire an attorney to assist him in requesting that
9 information from the PR/Trustee and that despite numerous requests and stated opposition to any
10 sale only false, misleading and/or incorrect information was provided. (AOB 26-31, 40, 43; ARB
11 19-24) Furthermore, the Personal Representative filed a Petition for Court Authorization to Sell
12 the Estate's realty in which the Personal Representative was caught red handed misleading the
13 beneficiary and the Court regarding his superceding requirement to diversify. (Id.) Contrary to
14 the Personal Representatives claims which he made to both the Court and the beneficiary the
15 legislature specifically exempted the Personal Representative of any duty to diversify estate realty
16 during administration where the realty was not acquired after the Decedent's death for
17 consideration. (Id., see, RCW 11.100.047 & 11.100.060) The realty in question had been in the
18 Decedent's family for more than 30 years. Clearly, the Personal Representatives false
19 representations of his superseding legal requirement to diversify intentionally and/or negligently
20 mislead both the Court and the beneficiary of relevant material information. (Id.) The Personal
21 Representative's dissemination of this false information was a breach of his fiduciary duty and
22 was directly responsible for fraudulently inducing both the beneficiary and the Court to acquiesce
23 in the Personal Representatives wishes to sell the Estate's realty without objection. (Id.) The
24 interpretation of whether the legislature intended to require a Non Intervention PR/Trustee to
25 abide by the duty to provide relevant and material information is a significant question of law
26 and/or has great public interest as this will affect every PR/Trustee in the State and all those
27 beneficiaries who need to be informed of all relevant and material information. ((RAP 13.4
28

1 (b)(3)&(4)

2
3 ii) The Legislatures set forth several statutory restrictions, limitations and requirements which are
4 mandatory duty's imposed upon a Non Intervention PR and/or Trustee. (AOB 17-48; ARB 13-
5 29, see also, Will Sec 10.1 - CP 1-6) The legislatures mandates were specifically enumerated
6 within RCW 11.68.090 which requires a Non Intervention Personal Representative to abide by
7 the Statutory restrictions set forth in Chapters 11.98 & 11.100. (Id.) Additionally, RCW
8 11.97.900 specifies that all statutes in Chapter 11.97 are applicable to Chapters 11.98 & 11.100.
9 (Id.) Accordingly, RCW 11.97.020 further indicates that the rules of construction applicable to
10 the disposition of property by a Will as set forth in Chapters 11.56 & 11.04 apply to the
11 disposition of property by a Trust. (Id.) Petitioner set forth the applicable statutes which were
12 violated by the PR/Trustee and the Superior Court erroneously found that a Non Intervention
13 Personal Representative was exempt from all of the legislatures statutory requirements in
14 contravention of the legislative intent and purposes. (Id.; see, CP 601-612) The Court of Appeals
15 erroneously affirmed without comment simply finding that the Superior Court's ruling was
16 supported by substantial evidence. Accordingly, a significant question of law is raised by the
17 Court of Appeals affirmance of an order which fails to consider the legislatures express
18 limitations, restrictions and requirements imposed upon a Non Intervention PR and/or Trustee
19 and/or the applicability of these statutes to a Non Intervention PR and/or Trustee is a matter of
20 great public importance and should be reviewed by this Court. ((RAP 13.4(b)(3)&(4))

21
22 iii) The decision conflicts with several decisions of the Supreme Court and/or Court of Appeals
23 which impose upon a Non Intervention Personal Representative and/or Trustee a duty of loyalty
24 as set forth by **RCW 11.98.078** and also a **SOLE** duty to the beneficiary **RCW 11.100.045**
25 which would include providing the beneficiary all relevant and material information necessary to
26 protect their interests **RCW 11.98.108**, ensuring that the beneficiary were provided with accurate
27 factual and legal information, disclosing any personal and/or conflicting interests and challenging
28 any and all doubtful claims and therefore should be reviewed. ((RAP 13.4 (1)&(2)) The

1 PR/Trustee owes to the beneficiaries the highest degree of good faith, care, loyalty, and integrity.
2 ((*Esmieu v. Schrag*, 88 Wn.2d 490, 498 (1977); *Monroe v. Winn*, 16 Wn.2d 497, 508 (1943); see
3 also, *In re Estate of Ehlers*, 80 Wn. App. 751, 757 (1996) Citing, *Estate of Jordan v. Hartford*
4 *Accident & Indem. Co.*, 120 Wn.2d 490, 502 (1993) - “a trustee is a fiduciary who owes the
5 highest degree of good faith, diligence and undivided loyalty to the beneficiaries.”)) (([t]he
6 trustees, as fiduciaries, owe to the beneficiaries the highest degree of good faith, care, loyalty and
7 integrity. *Monroe v. Winn*, 16 Wn.2d 497 (1943); Bogert, *Trusts and Trustees* § 543 (2d ed.
8 1960). This duty includes the responsibility to inform the beneficiaries fully of all facts which
9 would aid them in protecting their interests. See *United States v. Bennett*, 57 F. Supp. 670 (E.D.
10 Wash. 1944); 90 C.J.S. *Trusts* § 247 (1955). At the very least, this would require the trustees to
11 notify the beneficiaries of [...] which directly affected the disposition of the trust property.
12 Though the trustees and defending beneficiaries were adversaries [...] the trustees' duty of loyalty
13 and care was at no time suspended (*Esmieu v. Schrag*, 88 Wn.2d 490, 498 (Wash. 1977)

14 Petitioner presented the Superior Court with un-controverted evidence which indicated
15 that the PR and/or Trustee provided the beneficiary inaccurate factual and legal information,
16 failed to disclose his personal and/or conflicting interests and failed to challenge the validity of
17 the Riste Trust thereby losing an assets worth between 1.1-1.7 million dollars. (AOB 12-48; ARB
18 11-29; CP 142-247) The Superior Court’s finding that the PR and/or Trustees did not violate his
19 duty of loyalty is contradicted by the evidence and an abuse of discretion which the Court of
20 Appeals should have found prejudicial. (CP 601-612) Perplexingly, the Court of Appeals did not
21 discuss the PR and/or Trustee’s duty of loyalty and simply found that the Superior Court’s
22 decision was supported by substantial evidence. Review is also warranted under RAP 13.4
23 (b)(3)&(4) due to the potential impact upon the public’s trust and reliance upon the fiduciary who
24 should be informed and provided every opportunity to make an informed decision.

25
26
27 ///
28 ///

1 **THE PROBATE COURT DOES NOT HAVE JURISDICTION TO ORDER THE SALE**
2 **OF ESTATE REALTY WHICH IS BY STATUTE VESTED IN THE BENEFICIARY**
3 **UPON THE DEATH OF DECEDENT AND A NON INTERVENTION PERSONAL**
4 **REPRESENTATIVE DOES NOT HAVE A RIGHT TO SELL ESTATE REALTY**
5 **UNLESS THE ESTATE DOES NOT HAVE THE ABILITY TO PAY ALL DEBTS,**
6 **EXPENSES AND TAXES OF ADMINISTRATION WITHOUT THE SALE**

7 The Decision conflicts with numerous Supreme Court and Court of Appeals decisions
8 which indicate that the probate court does not have jurisdiction and the personal representative
9 does not have authority to sell estate realty where the estate is otherwise solvent and able to pay
10 all debts, expenses and taxes of administration without the sale and therefore review is necessary
11 under RAP 13.4 (b)(1)&(2) . *English-McCaffery Logging Co. v. Clowe*, 29 Wash. 721 (1902)
12 Indicating, Court is without jurisdiction to order sale of realty where title has vested in devisees
13 under nonintervention will; “The estate being solvent, upon a showing of that fact it passes from
14 under the immediate jurisdiction of the court, and the court would have no jurisdiction to enter an
15 order of sale,” “Nor could it assume jurisdiction unless there was a showing of 'failure to
16 execute the trust faithfully” . ((*In re estate of Megrath*, 142 Wash. 324, 327 (1927) citing,
17 *English-McCaffery Logging Co. v. Clowe*, 29 Wash. 721, (1902) and *Guye v. Guye*, 63 Wash.
18 340) (“[o]n intestate's death, realty vests at once to heirs, subject only to right of administrator to
19 dispose of it to raise money to pay estate's debts.” emphasis added, ((RCW § 11.04.250; *Bickford*
20 *v. Stewart*, 55 Wash. 278 (1909); *Dennis v. Godfrey*, 122 Wash. 207 (1922), modified, (1923);
21 *North Pacific Mortg. Co. v. Sieler*, 146 Wash. 530 (1928); *Lynch v. McNulta*, 168 Wash. 397
22 (1932); *In re Binge's Estate*, 5 Wn.2d 446 (1940); See also, (*Demaris v. Barker*, 33 Wash. 200,
23 (1903) - executor could not sell estate's real property, without court order) (*Dennis v. Godfrey*,
24 *supra* at 211 - “the administrator is entitled only to the possession of the real estate, and to sell
25 the same in the course of administration if there is not sufficient personal property to pay the
26 debts of the decedent.”; *Kerns v. Pickett*, 49 Wn.2d 770, 772-773 (1957 Wash.) - the power of
27 executors to manage and control an estate exists for the protection of creditors and for the
28 purpose of paying expenses and other proper charges against the estate; *In re Estate of Verchot*,
4 Wn.2d 574, 582 (1940) - the estate vests immediately upon the death of the ancestor in the heir
or devisee entitled thereto, subject only to the rights of creditors.; *Corcoran v. Bell*, 36 Wash.

1 217 (1904)- alleged heirs were entitled to notice and hearing, where administrator sought to pay
2 out funds derived from realty.))

3 Uncontradicted evidence indicated that the Estate was solvent with the ability to pay all
4 debts, expenses and taxes of administration and the Personal Representative never alleged that
5 the sale was necessary to pay any debts, expenses and/or taxes of administration. (AOB 17-18,
6 26-30) Due to the significant question of law regarding a fiduciary's rights, limitations and
7 requirements and the potential impact upon all testamentary fiduciary's and the named
8 beneficiary's review should be granted under RAP 13.4 (b)(3)&(4).

9
10 **CAN A PERSONAL REPRESENTATIVE OF AN ESTATE AND A TRUSTEE OF A**
11 **TRUST WHO HAVE COMPETING INTERESTS IN THE SAME COMMERCIAL**
12 **REALTY NOT HAVE A CONFLICT OF INTEREST WHEN THEY ARE THE SAME**
13 **INDIVIDUAL/ENTITLY AND THEY STAND TO EARN YEARLY TRUSTEE AND**
14 **INVESTMENT FEES IF THE TRUSTEE OBTAINS THE RIGHTS TO THE**
15 **COMMERCIAL REALTY**

16 Review is necessary under RAP 13.4 (b)(1)&(2) because the Superior Court's decision
17 and the Court of Appeals affirmance is contrary to Supreme Court and Court of Appeals
18 decisions which require removal where there is a conflict of interest,

19 [a] personal representative must administer the estate in the best interest of the
20 beneficiary(s). If a representative has a conflict of interest, whether he be
21 appointed or named in a nonintervention will, he will not be able to fulfill his
22 fiduciary duty(s). Therefore, a conflict of interest may disqualify a person from
23 acting as the personal representative.

24 ((*In re Estate of Jones*, 152 Wn.2d 1 (2004) at 19; See also, *Trask v. Butler*, 123 Wn.2d 835,
25 844, (1994) - "[a] conflict of interest arises in estate matters whenever the interest of the personal
26 representative is not harmonious with the interest of a[] [beneficiary]."; See also, *Porter v.*
27 *Porter*, 107 Wn.2d 43, 55 (1986)- "[r]easonable cause may include conflict of interest between
28 the trustee and the trust beneficiary(s)."; See also, *Westerman v. Cary*, 125 Wn.2d 277, 280
(1994) "conflict of interest exists when a prosecutor's representation of two different public
bodies requires the prosecutor to take directly adversarial positions...". A conflict of interest or a
material question of fact regarding the existence of a conflict of interest is a reasonable cause for
removal, "[r]easonable cause has been found in situations involving conflict of interest and bad
will generated by litigation" *Estate of Ehlers*, 80 Wn.App. 751, 761 (1996). ("they are

1 antagonistic to [its'] responsibilities as [PR] in conserving the assets of the estate for the benefit
2 of all the creditors as well as the heirs of the estate" *In re Estate of Livingston*, 7 Wn.App. 841,
3 844 (1972) *State ex ref. Smith v. Superior Court*, 142 Wash. 300 (1927) - Indicating that the
4 Court will remove an unfaithful executor who participates in a fraudulent conveyance or fails to
5 claim property.))

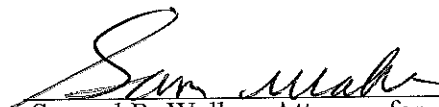
6 Uncontradicted evidence indicated that the determination of the correct disposition of the
7 Estate's commercial realty valued at over 1.1 million dollars was either to be distributed to
8 Darrell Riste outright or to the Trustee of the Riste Trust to be administered as provided therein.
9 If the commercial realty was distributed outright the Trustee would not earn any yearly trustee
10 and investment fees over the expected life of the Trust of over 40 years. Clearly, the Trustee has
11 a personal interest and a conflicting pecuniary interest. Further uncontradicted evidence showed
12 that the Riste Trust's claim to the commercial realty was doubtful due to the failure to comply
13 with RCW 11.12.250 and the gift should have been and would have been challenged by any
14 Personal Representative acting solely in the interests of the beneficiary of the Estate as required
15 by law. As such, the Superior Court's finding that there was no personal and/or conflicting
16 interest is erroneous and the Court of Appeals affirmance without comment or discussion is also
17 erroneous. Review should also be granted under RAP 13.4 (b)(3)&(4) due to the importance of
18 the law regarding what constitutes a conflict/personal interest which requires removal and/or due
19 to the potential impact upon all fiduciary's and beneficiary's of testamentary dispositions.
20

21 **F. CONCLUSION**

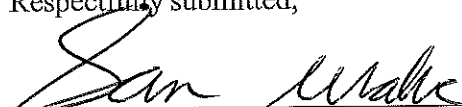
22 This Court should accept review in order correct the Court of Appeals erroneous
23 affirmance of the Superior Court's findings/order which was based upon incorrect legal
24 authority, incorrect application of the laws, erroneous findings of fact which were controverted
25 by the evidence and an abuse of discretion. The Court of Appeals affirmance without discussion
26 of Appellant's legal challenges as set forth herein and opinion to simply affirm based upon
27

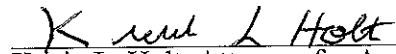
1 substantial evidence does not provide the Appellant's his guaranteed right to have the Superior
2 Court's order reviewed as intended by the Constitution of the State of Washington nor the United
3 States. Appellant believes he has been denied his constitutional rights to litigate his complaint
4 before the Superior and Court of Appeals which is paramount to a denial of due process of law in
5 both the Superior Court and the Court of Appeals and requires review by this honorable court.
6
7

8 Date: 6/1, 2018


Samuel R. Walker, Attorney for Appellant,
Pro Hac Vice

9
10 Respectfully submitted,

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Date: June 1, 2018

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**THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

In Re the Matter of:

CASE No. 350541

The Estate of Dan McAnally

**DECLARATION OF SERVICE OF
PETITION FOR DISCRETIONARY REVIEW
RAP 13.1 & 13.4**

and

The Riste Trust.

Appellant/Petitioner,

Darrell Riste

v.

Respondent(s)

The Personal Representative of the
Estate of Dan McAnally and the
Trustee of the Riste Trust

Date: June 1, 2018

Time:

Dept:

DECLARATION OF SERVICE

I, Samuel Walker, hereby declare that on June 1, 2018, I caused copies of the **PETITION FOR DISCRETIONARY REVIEW RAP 13.1 & 13.4** to be mailed by First Class United States Mail, postage prepaid, to the following:


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Date: 6/1, 2018


Samuel R. Walker, Attorney for,
Appellant/Petitioner, Darrell Riste

THE LAW OFFICE OF SAM WALKER

June 01, 2018 - 3:45 PM

Transmittal Information

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Appellate Court Case Number: 35054-1
Appellate Court Case Title: Estate of Dan McAnally
Superior Court Case Number: 12-4-00514-8

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MAY 3, 2018
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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In the Matter of the Estate of)	No. 35054-1-III
)	
DAN MCANALLY,)	
)	UNPUBLISHED OPINION
Deceased.)	
)	

LAWRENCE-BERREY, C.J. — Will and trust beneficiary Darrell Riste appeals after a court commissioner denied his petition that sought various forms of relief. At issue here is whether the court commissioner erred when it denied his petition to remove Baker Boyer Bank as personal representative of the Estate of Dan McAnally. We determine that the court commissioner’s findings of fact are supported by substantial evidence and that its legal conclusions are correct. We therefore affirm the court commissioner.

FACTS

Mr. McAnally died testate on September 22, 2012. His estate consisted of a personal residence, tangible personal property, bank accounts, and—the major subject of this appeal—commercial property in Selah, Washington, known as the Viking Village Shopping Center.

On September 25, 2012, Baker Boyer Bank successfully petitioned Yakima County Superior Court to admit the will to probate and confirm the bank as personal representative (PR) with nonintervention powers. Baker Boyer Bank provided notice as required by law. No party contested the terms or validity of the will.

Mr. McAnally's will contained certain specific bequests in favor of Darrell Riste and Fred Wickholm. The will also directed the PR to pay from the residue of the estate all costs and taxes payable because of Mr. McAnally's death. The will directed that the remaining residue go to a testamentary trust, referred to as the Riste Trust, for the initial benefit of Mr. Riste.

As for the specific bequests, the will bequeathed Mr. McAnally's residence, all of his tangible personal property, and 30 percent of his bank accounts and deposits to Mr. Riste. The will bequeathed another 30 percent of his bank accounts and deposits to Mr. Wickholm. The PR fulfilled all of these specific bequests.

The will appointed Baker Boyer Bank as trustee of the Riste Trust. A testamentary trust provision directed the trustee to pay net income of the trust to Mr. Riste in installments, preferably monthly but at least quarterly. Another provision directed the trustee to invest assets of the trust in a manner that would provide maximum income rather than investing in growth. Several of Mr. Riste's family members were

beneficiaries of the trust upon Mr. Riste's death, concluding with the final trust balance being distributed to the University of Denver.

Various communications

On February 7, 2014, Mr. Riste requested from Baker Boyer Bank, in its capacity as PR, a copy of the inventory and appraisal of the estate and an annual report. Mr. Riste also requested from Baker Boyer Bank, as trustee of the Riste Trust, an itemization of all trust property and an itemization of all receipts and disbursements. Mr. Riste also requested several other documents related to assets and tax liability. The communications show that the lack of information and delay was frustrating Mr. Riste.

Although not at issue in this appeal, a question arose concerning the amount of the pecuniary bequests to Mr. Wickholm and Mr. Riste, and counsel for each filed a notice of appearance. In April and May 2014, both acknowledged their receipt of their full distributive shares of the estate. Mr. Wickholm's counsel withdrew, but Mr. Riste's counsel did not.

The estate made an estate tax payment of \$48,787.00, but later received a refund of \$46,171.23, which included interest.

Viking Village appraisal and sale

An appraiser valued Viking Village at \$1,700,000 at the time of Mr. McAnally's death. The PR sought to sell Viking Village and received an offer of \$1,451,000, subject to an environmental assessment. Mr. Riste, with knowledge of the offer, demanded that the PR not sell Viking Village. The PR listed several concerns it had of the risks associated with keeping Viking Village as a trust asset. Despite having full nonintervention powers, and despite Mr. Riste having already acknowledged receipt of his full distributive share of the estate, on June 5, 2014, the PR petitioned the court to approve the conditional sale for \$1,451,000. The PR noted that the relationship between itself and Mr. Riste had become "sufficiently contentious," that Mr. Riste had resisted signing his full distributive share receipt, that RCW 11.100.140(8) authorized the sale without intervention, but that caution dictated having the court approve the sale. Clerk's Papers (CP) at 226-27.

The court held a hearing on July 8, 2014, and, while counsel for Mr. Riste attended, he did not object to the sale. On that same date in 2014, the court authorized the sale of the Viking Village property.

Fulcrum Environmental Consulting performed the environmental assessment. The assessment disclosed that the property had severe soil contamination. The potential buyer

withdrew from the conditional purchase. A new appraisal was performed, and the property's value was estimated to be \$1,100,000 as of January 15, 2014. A new buyer made an offer of \$1,100,000 for Viking Village. The PR informed Mr. Riste of the new offer. The PR also informed Mr. Riste that although it did not need to go back to court and obtain his consent to the sale, the buyer wished to have Mr. Riste's approval. On March 20, 2015, Mr. Riste authorized the PR to sell the property at \$1,100,000.

Two years later

For two years after the July 8, 2014 order authorizing the conditional sale, no party filed any pleadings in the matter. On September 6, 2016, a new attorney appeared as counsel of record for Mr. Riste. Shortly after, Mr. Riste filed a petition concerning several matters: a request to recuse the judge who had approved the conditional sale of Viking Village, a request to remove Baker Boyer Bank as PR for conflicts of interest and breaches of fiduciary duties, a request for an order requiring the PR to file an accounting, a request for denial of fiduciary and attorney fees, and a request for an order freezing the assets of the estate. The filing alleged multiple problems including dishonesty, the use of estate funds to pay taxes and costs of administration, lack of communication about estate assets, and the sale of the Viking Village property.

Mr. Riste filed an affidavit in support of his petition, as well as e-mails detailing the above-mentioned lack of communication. The affidavit makes several allegations, including but not limited to: the estate had not paid him his full distributive share, the trust had not been making quarterly payments, tax fraud in payment of estate taxes, false filings from Baker Boyer Bank, and the estate had erroneously paid a creditor's claim of \$14,000 to Mr. Wickholm. Mr. Riste also threatened to file a separate civil action under a lengthy list of theories against various entities and individuals.

Two days later, on September 8, 2016, the PR filed a notice and declaration of completion of probate. Mr. Riste filed an objection to the PR's requested fees and completion of probate. On November 10, 2016, the PR filed a response arguing two reasons why Mr. Riste did not have standing to bring his petition. The PR argued that Mr. Riste, years earlier, had acknowledged receipt of his full distributive share of the estate. The PR also argued that the trust was not a party to the probate matter.

In addition, the PR responded to what it considered to be erroneous factual statements by Mr. Riste. For instance, the PR provided an accounting that showed that the estate had not made a payment of \$14,000 to Mr. Wickholm.

Hearing and ruling

On November 18, 2016, a Yakima County court commissioner considered the various issues. The parties made their arguments, and the commissioner asked questions. As the hearing progressed, the commissioner's questions portended a ruling against Mr. Riste. Mr. Riste then asked the commissioner to not make any ruling, so that he could perform discovery in an action he recently filed against the PR and various individuals. Despite Mr. Riste's request, the commissioner announced its decision.

The commissioner declined to rule on the standing issue, preferring instead to reach the merits of Mr. Riste's multiple arguments. The commissioner rejected Mr. Riste's arguments and petition in an oral ruling. It also approved the final accounting and granted the PR's request to close the estate. Mr. Riste then requested written findings and conclusions.

The PR prepared and submitted proposed findings and conclusions. Mr. Riste filed his objections to the findings and conclusions, and the PR responded in writing to those objections.

The commissioner signed the PR's proposed findings and conclusions, made some interlineations, and attached a six-page letter that supplemented the prepared findings and conclusions. This appeal timely followed.

ANALYSIS¹

Unchallenged findings of fact are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). This court reviews challenged findings of fact for support by substantial evidence. *Miller v. City of Tacoma*, 138 Wn.2d 318, 323, 979 P.2d 429 (1999). Substantial evidence is evidence that is sufficient to persuade a rational, fair-minded person of the truth of the finding. *Id.* An appellate court reviews conclusions of law and questions of statutory interpretation de novo. *In re Estate of Jones*, 152 Wn.2d 1, 8-9, 93 P.3d 147 (2004). Whether a party breaches a fiduciary duty is a question of fact. *O'Brien v. Hafer*, 122 Wn. App. 279, 284, 93 P.3d 930 (2004).

A. TRUST AND TRUSTEE ISSUES NOT PROPERLY BEFORE COURT

Mr. Riste makes several arguments about how the PR breached its fiduciary duties as a trustee and treats the PR and trustee as identical parties. The PR responds that this is an appeal from the closing of an estate and that the trust was never a party to the probate proceeding. And for these reasons, any issues raised about the trust or its actions as trustee are not properly before us. Mr. Riste does not respond to this argument. Mr. Riste

¹ RCW 2.24.050 provides that a court commissioner's orders and judgments are subject to review by the superior court within 10 days of the order or judgment being entered; but if no party timely demands review, the order or judgment becomes that of the superior court. In that event, appellate review may be sought in the same fashion as similar orders and judgments.

has also acknowledged a separate civil action he has filed against the trustee. We agree with the PR. Mr. Riste's arguments about the trust and its actions as trustee are not properly before this court.

B. WAIVED ARGUMENTS

A party waives an assignment of error not adequately argued in its brief. *State v. Motherwell*, 114 Wn.2d 353, 358 n.3, 788 P.2d 1066 (1990); RAP 10.3. RAP 10.3(a)(6) requires parties to provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." See *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). The purpose of the rule and related rules "is to enable the court and opposing counsel efficiently and expeditiously to review the accuracy of the factual statements made in the briefs and efficiently and expeditiously to review the relevant legal authority." *Hurlbert v. Gordon*, 64 Wn. App. 386, 400, 824 P.2d 1238 (1992). This court is not obligated to search the record for evidence supporting a party's claim of error. *Heilman v. Wentworth*, 18 Wn. App. 751, 754, 571 P.2d 963 (1977).

Mr. Riste violates the rules of appellate procedure in multiple ways. First, his brief does not contain a statement of facts. RAP 10.3(a)(5) requires such a statement. To the extent he includes assertions of facts in his various arguments, he either does not cite the

record to support his assertion, or he cites an *allegation* in his petition to support his assertion, or he cites to a span of dozens or even hundreds of pages. Further, Mr. Riste’s brief often summarily states his view of the law without any analysis, followed by string citations to statutes and cases.

We will nevertheless address Mr. Riste’s more coherent arguments, even some of which are not accompanied by proper citations to the record or legal argument. To the extent we do not address his arguments, which he sets forth in more than 40 separate headings, it is because we deem them waived by his failure to follow our rules of appellate procedure.

C. CHALLENGED FINDINGS

The court commissioner made a number of findings of fact that Mr. Riste challenges with sufficient particularity for our review:

9. . . . Fred Wickholm [filed a creditor’s claim] in the amount of \$14,392.00, which claim was later withdrawn

. . . .

11. No federal estate tax return was required to be filed. A state estate tax return was filed and following audit, a state estate tax in the amount of \$2,027.00 was paid.

. . . .

19. The testamentary trust (“Riste Trust”) created in Decedent’s Will is a valid trust under the laws of the State of Washington.

. . . .

22. Decedent’s Will did not contain a specific devise of the Viking Village Shopping Center to Darrell Riste.

23. Decedent's Will did not contain any provision prohibiting or restricting the right of the Personal Representative to sell the Viking Village Shopping Center.

24. The Personal Representative did not commingle its assets with the assets of Decedent's estate and did not improperly commingle assets of Decedent's estate with the assets of the Riste Trust.

25. The Personal Representative did not violate any of its fiduciary duties or responsibilities.

....

27. The administration of Decedent's estate is complete and upon the determination and payment of the remaining fees and costs, the assets of the estate shall be transferred to Baker Boyer Bank as the trustee of the Riste Trust.

28. There is no basis for removing the Personal Representative or appointing a successor Personal Representative.

Clerk's Papers (CP) at 593-95.

1. *Creditor's claim of \$14,392 (challenged finding 9)*

Substantial evidence supports this finding by the court commissioner. The accounting documents of the estate in the record reflect no payment of any kind to Mr. Wickholm other than his full distributive share of the estate. Mr. Riste cites only to discussions of the claim, before Mr. Wickholm withdrew it.

2. *Estate taxes (challenged finding 11)*

Substantial evidence supports the finding by the court commissioner that the estate paid only minimal estate taxes. The record reflects the estate's initial estimation and

payment of estate tax liability of \$48,787. The record also reflects the Department of Revenue's actual assessment and the estate's receipt of a refund in excess of \$46,000.

3. *Terms of the will (challenged findings 9, 19, 22, and 23)*

Substantial evidence supports these findings by the court commissioner and its conclusion that Mr. McAnally's will did not contain a specific devise of Viking Village. Mr. McAnally made three specific bequests: cash, residential property, and personal property. The residue of the estate funded the Riste Trust.

Paragraph 4.2.2 of the will is the only provision that supports Mr. Riste's contention that the Viking Village property was directly bequeathed to him. That paragraph provides:

I give to my friend, DARRELL D. RISTE, all of my interest in the real property and improvements located in Yakima County, Washington, *and* occupied by me as my principal residence. That real property is described as:

[Legal description of residential property]

CP at 2 (emphasis added).

"And" is a function word, which generally requires us to construe the preceding phrase and the succeeding phrase as conjunctive rather than disjunctive. *State v. Tiffany*, 44 Wash. 602, 603-04, 87 P. 932 (1906). Construing the phrase conjunctively leads to the

conclusion that the will did not bequeath Viking Village directly to Mr. Riste. Such a construction unfortunately renders the phrase preceding “and” meaningless.

Just prior to oral argument, our Supreme Court issued its decision in *In re Estate of Rathbone*, ___ Wn.2d ___, 412 P.3d 1283 (2018). The court held that when a PR has nonintervention powers, such as the case before us now, only the PR has authority to interpret the will. *Id.* at 1288. Primarily for this reason, we decline to construe paragraph 4.2.2 in a manner different than the PR. To do so would exceed our authority.²

4. *Commingling (challenged finding 24)*

The court commissioner rejected Mr. Riste’s arguments that the PR improperly commingled estate assets. Mr. Riste argues that the commissioner ignored evidence.

Records show that the PR invested residual funds into a separate trust account. Those same documents show that Mr. Riste did not authorize the transfer of estate funds into the separate trust account. But Mr. Riste was not the personal representative of the estate, so his authorization was not required.

² In addition, the doctrine of laches likely prevents Mr. Riste from now asserting a position that he should have asserted before he authorized the PR to sell the Viking Village property. *In re Marriage of Hunter*, 52 Wn. App. 265, 270, 758 P.2d 1019 (1988) (Laches will prevent a plaintiff from enforcing a legal right if the plaintiff’s delay in asserting the right would result in damage to the defendant.).

Tax documents show that the trust paid net income to Mr. Riste from these funds. We do not see that Mr. Riste has cause to complain of the PR's action, which provided him income.

5. *No breach of fiduciary duties (challenged findings 25 and 28)*

Mr. Riste argues that the bank in its capacities as trustee and PR had conflicts of interest that required its removal and that it breached fiduciary duties by refusing to sue itself. Many of these arguments implicate the trust and are not properly before us. To the extent these arguments lack adequate citation to the record or legal authority, we deem them waived. We nevertheless discuss some of these arguments below.

B. FINDINGS PERTAINING TO FIDUCIARY DUTIES AND DECISION NOT TO REMOVE THE PR

“The personal representative has the right to possess and control the estate’s real and personal property until the estate is settled.” *In re Estate of Lowe*, 191 Wn. App. 216, 228, 361 P.3d 789 (2015). A personal representative granted nonintervention powers can administer the estate without further court orders. RCW 11.68.090(1).

But under RCW 11.68.070 and RCW 11.28.250, a personal representative may be removed on a showing that he has failed to faithfully execute his trust, or if he has wasted, embezzled, or mismanaged property of the estate, committed fraud on the estate, is incompetent, has neglected the estate or neglected to perform necessary acts as personal

No. 35054-1-III
Estate of McAnally

representative, or for any other action for which the court deems removal is necessary. *Estate of Jones*, 152 Wn.2d at 9. The court must have valid grounds for removing the personal representative, and the record must support those grounds. *In re Estate of Beard*, 60 Wn.2d 127, 132, 372 P.2d 530 (1962).

The trial court has broad discretion in determining whether and for what grounds to remove a personal representative. *In re Estates of Aaberg*, 25 Wn. App. 336, 339, 607 P.2d 1227 (1980). Here, the court commissioner decided not to remove the PR. The question on appeal is whether the trial court's decision not to remove the PR is so arbitrary as to amount to an abuse of discretion. *Id.* at 340. With this standard in mind, we review the court commissioner's decision.

The court commissioner's decision, as amplified by its letter attached to its findings and conclusions, explains why it denied Mr. Riste's request to remove the PR. The commissioner first aptly summarized the fiduciary duties of a personal representative:

“The executor is an officer of the court and in a fiduciary relationship to those beneficially interested in the estate. He is obligated to exercise the utmost good faith and utilize the skill, judgment and diligence that an ordinarily cautious and prudent person would employ in the management of his own affairs. *Hesthagen v. Harby*, 78 Wn.2d 934, 942, 481 P.2d 438 (1971); *In re Estate of Peterson*, 12 Wn.2d 686, 733, 123 P.2d 733 (1942). He must perform his duties not only for the benefit of the legatees but must also protect the estate from invalid and doubtful claims, *In re Estate of*

No. 35054-1-III
Estate of McAnally

Shea's Estate, 69 Wn.2d 899, 421 P.2d 356 (1966), while protecting the rights of valid creditors. *Kerns v. Pickett*, 49 Wn.2d 770, 306 P.2d 1112 (1957). It is his duty to settle an estate as quickly as possible but without sacrifice to the estate, *National Bank of Commerce v. Peterson*, 179 Wash. 638, 644, 38 P.2d 361 (1934), and he is liable for any breach of his responsibility which causes loss to another. *Hesthagen v. Harby*, [78 Wn.2d at 942]. His trust must be fulfilled with conscientious fidelity whether his charge is large or small. [*Wilson's Estate v. Livingston*, 8 Wn. App. 519, 527-28, 507 P.2d 902 (1973).]

CP at 608.

Most of the alleged wrongdoing pertains to the sale of the Viking Village property. In its letter attached to its findings and conclusions, the court commissioner explained why the sale of the commercial property did not grant it cause to remove the bank as personal representative of the estate.

1. Mr. Riste agreed to the sale

Mr. Riste's opportunity to object to the sale, or to object to the conduct of the P.R. relating to the sale, was in July 2014. If Mr. Riste felt that he did not have enough information to form an objection, he could, at a minimum, have sought a continuance. Mr. Riste ultimately agreed to have it sold at \$1,100,000.00.

CP at 609.

The court commissioner's decision is consistent with the record. The record is replete with communications between the PR and Mr. Riste about the

terms of the conditional sale and the eventual sale. This includes Mr. Riste's approval of the eventual sale on March 20, 2015.

2. *The PR had the right to sell the Viking Village property*

The court commissioner, in the body of its letter and in a footnote, explained why it rejected Mr. Riste's argument that the PR lacked the right to sell the Viking Village property.

Mr. Riste also challenges the P.R.'s right to sell the property by citing RCW 11.04.250. Mr. Riste's interpretation is too narrow^[3] and is rejected by RCW 11.68.090 which gives a personal representative with non-intervention power to sell real property without court approval.

CP at 609.

We begin by discussing the authority of a personal representative with nonintervention powers.

RCW 11.68.090(1) provides:

Any personal representative acting under nonintervention powers may borrow money on the general credit of the estate and may mortgage, encumber, lease, sell, exchange, convey, and otherwise have the same powers, and be subject to the same limitations of liability, that a trustee has under chapters 11.98, 11.100, and 11.102 RCW with regard to the assets of

³ ““While the legal title may vest in the heirs immediately upon the death of the ancestor, it vests subject to administration (section 4660, 1 Ballinger's Ann. Codes & St. [Pierce's Code, § 2718]) and is not absolute until after the process of administration, so that the title may be divested by the process of administration.’ *Bickford v. Stewart*, 55 Wash. 278, 286, 104 P. 263, 266 (1909)” (Alterations in original.)

the estate, both real and personal, all without an order of court and without notice, approval, or confirmation, and in all other respects administer and settle the estate of the decedent without intervention of court.

The court commissioner's interpretation of RCW 11.68.090 is plainly correct. The record reflects that the PR sought court approval of the sale out of an abundance of caution because Mr. Riste was adamantly opposed to how it was administering the estate.

3. *The PR's decision to sell the Viking Village property, and the process it followed, were appropriate*

The court commissioner addressed Mr. Riste's additional arguments concerning the PR's decision and the process it followed to sell the Viking Village property.

The P.R. had non-intervention powers. The Shopping Center was not a specific devise. Instead, it passed through the general residual clause of the Will. Thus, the P.R. had the authority to sell the asset. . . . The P.R. gave notice of the hearing. The P.R. provided a rational basis for the sale in that it wanted to diversify the Trust estate. The P.R. obtained an appraisal to determine the value of the property. There were no objections.

CP at 609. The statements contained above are all consistent with the record.

4. *The PR did not provide Mr. Riste false or misleading information*

The court commissioner found, "There is no credible evidence in the record that the P.R. or its agents provided false or misleading information." CP at 610. Mr. Riste does not provide a sufficient citation to the record for us to discern what the PR did or said that misled him. We suspect that the purported misleading information consists of

the PR's interpretation of its own authority and the will, both of which we have confirmed were appropriate.

5. *The PR's delay in providing requested information, while true, was not a sufficient reason to remove Baker Boyer Bank as PR*

The court commissioner found that the PR did delay in providing requested information to Mr. Riste. The court noted a 15-month delay between Mr. Riste's request for an inventory and appraisal and when the PR complied with the request. However, the commissioner used its discretion by weighing the delay against several factors:

When I weigh this failure against several factors, I find that it does not rise to the level of a breach of fiduciary duty. These factors are: the P.R. did finally provide Mr. Riste with a copy, Mr. Riste never sought Court action against the P.R pursuant to RCW 11.44.050, Mr. Riste did not object to the late delivery to the Court until months after the fact, Mr. Riste did not challenge the validity of the information contained in the Inventory and Appraisal and Mr. Riste did not show that the late delivery harmed him.

CP at 611.

The record again supports the court commissioner. Mr. Riste received the information he requested from the PR in May 2014, but waited to complain until September 2016—two days before the PR filed its declaration of completion of probate.

6. *Decision not to remove the PR*

A trial court's decision not to remove a personal representative is subject to very narrow appellate review. We ask whether the decision is so arbitrary as to amount to an abuse of discretion. *See Estates of Aaberg*, 25 Wn. App. at 339-40.

After reviewing the reasons the court commissioner gave for denying Mr. Riste's petition and having noted that the reasons are well supported by the record and the law, we cannot say that the court commissioner's decision was arbitrary. Far from arbitrary, the court commissioner's decision reflects a substantial amount of preparation and consideration.

C. THE PR'S FIDUCIARY FEES AND ATTORNEY FEES

Mr. Riste argues that the court commissioner erroneously approved the PR's fiduciary fees and attorney fees. His arguments depend on his prevailing on the issues. Because he has not, we affirm the award of fiduciary fees and attorney fees.

D. ATTORNEY FEES ON APPEAL

Under a separate attorney fee heading in respondent's brief, the PR states: "The Respondent requests that it be awarded fees under RCW 11.48.210. *Chesnin v. Fischler*, 43 Wn. App. 360, 717 P.2d 298 (1986)." Resp't's Br. at 28.

“[RAP 18.1(b)] requires more than a bald request for attorney fees on appeal.” *Stiles v. Kearney*, 168 Wn. App. 250, 267, 277 P.3d 9 (2012). “Argument and citation to authority are required under the rule to advise the court of the appropriate grounds for an award of attorney fees as costs.” *Id.*

Here, the PR cites an appropriate statute and case authority for its position that it is entitled to attorney fees. What is missing is one or perhaps two sentences—a brief argument that ties the authorities to its request for fees.

One can debate whether the PR has complied with RAP 18.1(b). But throughout this opinion, we have reviewed various factual and legal arguments made by Mr. Riste that did not comply with our rules of appellate procedure. We similarly relax the strict requirement that a request for fees contain argument in the brief. This is because we can easily discern, without argument, why the PR is entitled to attorney fees under RCW 11.48.210.

RCW 11.48.210 provides in relevant part: “An attorney performing services for the estate at the instance of the personal representative shall have such compensation therefor out of the estate as the court shall deem just and reasonable.” Subject to the PR’s compliance with RAP 18.1(d), we award it just and reasonable attorney fees.

No. 35054-1-III
Estate of McNally

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, C.J.
Lawrence-Berrey, C.J.

WE CONCUR:

Fearing, J.
Fearing, J.

Siddoway, J.
Siddoway, J.

Renee S. Townsley
Clerk/Administrator

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May 3, 2018

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CASE # 350541
Estate of Dan McAnally
YAKIMA COUNTY SUPERIOR COURT No. 124005148

Counsel:

Enclosed please find a copy of the opinion filed by the Court today. A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:pb
Enc.

c: **E-mail** Hon. Kevin Naught

DO NOT CITE. SEE GR 14.1(a).

Court of Appeals Division III
State of Washington

Opinion Information Sheet

Docket Number: 35054-1
Title of Case: In re Estate of Dan McAnally
File Date: 05/03/2018

SOURCE OF APPEAL

Appeal from Yakima Superior Court
Docket No: 12-4-00514-8
Judgment or order under review
Date filed: 01/26/2017
Judge signing: Honorable Kevin Stephen Naught

JUDGES

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