

646-33-8

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NO. 64633-8-1

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

IN RE THE ESTATE OF LLOYD W. FOSTER
AND ALICE H. FOSTER

BRIEF OF RESPONDENT SANDRA BATES GAY,
SPECIAL ADMINISTRATOR (Discharged)

SANDRA BATES GAY, P.S.
Sandra Bates Gay, WSBA No. 4671
Pro Se
Suite 1900 Bank of America Building
10500 N.E. Eighth Street
Bellevue, Washington 98004
(425) 637-3040

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. RESTATEMENT OF ISSUES..... 2

III. RESTATEMENT OF THE CASE..... 3

 A. The Court Should Disregard Laurance Foster’s
 Statement of the Case..... 3

 B. The Parties..... 3

 C. Proceedings Subsequent to Appointment of the
 Special Administrator.....7

 D. Entry of Judgments.....27

 E. Notice of Appeal: Post-Appeal Judgments.....30

IV. ARGUMENT..... 32

 A. Standard of Review..... 32

 1. Standard Applicable to Liability for Damages
 For Failure to Account to Trust, Estate and
 Court-Appointed Special Representative and
 Special Administrator33

 2. Standard of Review for Award of Special
 Administrator’s Compensation.....34

 B. Appellant failed to file a timely notice of appeal
 From the Order Awarding Judgment in Favor of
 Special Representative (November 23, 2009)..... 35

 C. Laurance Foster was Not Entitled to a Jury Trial on
 the Issue of the Failure to Properly Account for
 Trust and Estate Assets.....38

D.	The Findings of Fact Entered in Support of the Judgments in Favor of the Special Administrator were Supported by Substantial Evidence.....	44
1.	There was no Effective Assignment of Error to the Findings.....	44
2.	Referring to Findings Does Not Constitute an Effective Assignment of error.....	44
3.	The Findings Underlying the Removal of Laurance Foster as Trustee and Assessing Fees and Costs of the Special Administrator are Supported by Substantial Evidence....	49
E.	The Court Should Deny Laurance’s Request for Appellate Fees and Costs and Impose Special Administrator’s Fees and Costs on Appeal Pursuant to RAP 18.1.....	55
V.	REQUEST FOR FEES AND COSTS ON APPEAL.....	57
VI.	CONCLUSION.....	57
	ENDNOTES.....	58

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Adkins v. Aluminum Co. of America</i>	37
110 Wn.2d 128, 134, 135, 750 P.2d 1257, 756 P.2d 142 (1988)	
<i>El Cerrito, Inc., v. Ryndak</i>	62
60 Wn.2d 847, 857, 376 P.2d 528 (1962)	
<i>Endicott v. Icicle Seafoods, Inc.</i>	42
167 Wn.2d 873, 244 P.3d 761 (2010)	
<i>Estate of Black</i>	32, 33, 34
16 Wn.App. 476, 66 P.3d 670 (2003)	
<i>Estate of Wegner</i>	44
_____ Wn.2d _____, 237 P.3d 387 (Aug. 10 2010).	
<i>In re Enos' Estate</i>	41
79 Wash. 583, 140 P. 675 (1914)	
<i>In re Estate of Cooper</i>	51
81 Wn. App. 79, 94-95, 913 P.2d 393 (1996)	
<i>In re Estate of Ehlers</i>	50
80 Wn. App. 751, 761, 911 P.2d 1017 (1996)	
<i>In re Estate of Ney</i>	33
183 Wash 503, 48 P.2d 924 (1935)	
<i>In re Estate of Shaughnessy</i>	41
97 Wn.2s 652, 648 P.2d 427 (1982)	
<i>In re Guardianship of Mathews</i>	61
156 Wn.App. 201, 232 P.3d 1140 (2010)	
<i>In re Larson</i>	53
103 Wn.2d 517, 694 P.2d 1051 (1985)	

<i>In re the Marriage of Petrie</i>	51
105 Wn.App. 268, 274-75, 19 P.3d 443 (2001)	
<i>In re Trust of McLean</i>	53
144 Wn.App. 333, 183 P.3d 317 (2008)	
<i>In the Matter of the Contested Election of Schoessler</i>	44
140 Wn.2d 368, 385, 998 P.2d 818 (2000);	
<i>Rich v. Starczewski</i>	57
29 Wn. App. 244, 628 P.2d 831, rev. denied, 96 Wn.2d 1002 (1981o)	
<i>Right-Price Recreation, LLC v. Connells Prairie Community Council</i>	37
105 Wn.App. 83, 21 P.3d 1157 (2001)	
<i>Shoemake v. Ferrer</i>	42
168 Wn.2d 193, 255 P.3d 990 (2010)	
<i>Waits v. Hamlin</i>	51
55 Wn. App. 193, 198, 776 P.2d 1003 (1989)	
<i>Watson v Watson</i>	41
93 Wash 512, 161 P. 375 (1916)	
<i>Wlasiuk v. Whirlpool Corporation</i>	37
76 Wn.App. 250, 884 P.2d 13 (1994)	

STATUTES

RCW 11.32.030.....	51, 62
RCW 11.32.040.....	24
RCW 11.32.050.....	24
RCW 11.96A.....	1, 22

RCW 11.96.020.....	33
RCW 11.96A.020(1).....	41
RCW 11.96A.020(2).....	41
RCW 11.96A.100(2).....	13
RCW 11.96A.100(7).....	42
RCW 11.96A.150.....	34, 51, 53, 62
RCW 11.96A.150(1)(a).....	55, 57
RCW 11.96A.150(2).....	62
RCW 11.96A.170.....	41
RCW 11.98.039(4)(c).....	50

RULES

CR2A.....	22
KCLCR 98.14(a) and (b).....	22
KCLCR 98.20(a).....	22
RAP 2.4(b).....	36, 37
RAP 10.3(a)(5).....	3
RAP 10.3(g).....	45
RAP 18.1	55, 57
RAP 18.9(a).....	56

I. INTRODUCTION

As the probate court correctly ruled, the court had personal jurisdiction over Appellant Laurance E. Foster (Laurance) and further, had the authority under the Washington Trust and Estate Dispute Resolution Act, Chapter 11.96A RCW, to resolve disputes related to the consolidated probates and the Foster Family Living Trust ("Family Trust"). As heir and beneficiary under the terms of the Trust Agreement, and as a party who accepted the appointment as co-Trustee in the existing probate proceeding, Appellant by his actions acknowledged that the issue of accounting for the pour-over Trust and Estate assets was incidental to the probate proceeding. The probate court had the authority to direct and compel accountings, remove Laurance as co-Trustee without discharge, and order him to pay the fees and costs incurred by the Special Representative and Special Administrator as a result of his actions and his inactions.

The issues before the probate court – whether proper accountings and distributions had been made on behalf of the Trust and the Estate - were equitable in nature and accordingly, Laurance had no right to a jury trial. After conducting multiple hearings over a

period of six years on the issues of Laurance's actions - as beneficiary, as co-Trustee of the Family Trust, and as *de facto* trustee of Decedent's estate - the probate court properly exercised its discretion to deny the demand for a jury trial "of all of the issues in this cause," Jury Demand, CP 502, "involving breach of fiduciary duty, negligence or other theories," Answer to Report and Petition of Special Representative, CP 509.

II. RESTATEMENT OF ISSUES

A. Did Appellant give proper and timely notice of appeal of the Judgments for fees and costs awarded to Special Administrator Gay?

B. Did the probate court exercise appropriate discretion in denying a jury trial on the issue of Laurance Foster's failure to properly account for Trust and Estate assets?

C. Did the probate court err in entering Findings that support its award of fees and costs of Special Administrator Gay?

D. Was this appeal brought frivolously such that the Court should award Respondents' fees and costs on appeal?

E. Is the Special Administrator entitled to an award of fees and costs on appeal as authorized by statute and Court Rule?

III. RESTATEMENT OF THE CASE

A. The Court Should Disregard Laurance Foster's Statement of the Case. Laurance fails to provide a "fair statement of the facts," often reciting only his version of events and omitting portions of the record and testimony that are plainly relevant to the findings that he challenges. RAP 10.3(a)(5). Appellant refers to Laurance's position as beneficiary of his parents' Estate (BA, Intro. p. 1) and points out that he was not appointed as personal representative of the Decedents' Estates (*Id.* at pp. 10-11), but ignores his request to be appointed as personal representative (CP 19; RP 01/18/2006, p. 16 l. 25, p. 17 ll. 1-16)¹ and the fact that he petitioned and was appointed as Trustee of the Foster Family Trust, and thereby accepted the responsibility to marshal, receive and account for the assets distributed from the Decedents' Estates.

For these reasons, Gay provides the following statement of facts to remedy these omissions.

B. The Parties. This appeal relates to the consolidated Estates of Alan W. Foster and Alice H. Foster, husband and wife. Mr. and Mrs. Foster were survived by their sons, Lloyd Alan Foster ("Alan") and Laurance E. Foster ("Laurance"). During their lifetime, Lloyd and

Alice were domiciled in Washington but resided in Hawaii. Mr. and Mrs. Foster created a Living Trust in November 1992,² CP 831-844. Under the terms of the Trust, upon the death of one spouse, Alan, a Washington resident, was named as successor Trustee (to the exclusion of Laurance), to be followed in order of appointment by the couple's former attorney and accountant, who subsequently declined to serve, CP 944-945; 947.

Lloyd Alan Foster died on September 3, 1988. His wife Alice died on December 9, 2002. The consolidated Estate was filed for probate on February 11, 2003 (CP 932-934) by the firm of Curran Mendoza, P.S., retained by Alan, who was nominated as sole Personal Representative in his parents' Wills (to the exclusion of Laurance), CP 1-2; 845-846. Alan was appointed as Personal Representative by Order entered March 23, 2003 (CP 941-943) and was re-appointed after more recently executed Wills (dated June 11, 2003) were located and filed,³ CP 5-7.

For several months, the adult beneficiaries discussed a possible settlement to resolve issues related to the Estate and Trust administration, pursuant to which the adult heirs agreed to divide the assets of the Trust. During the period that this

discussion took place, tension arose between the family members and the Curran Mendoza firm. By letter dated May 17, 2003, Laurance insisted that he and Alan should both serve as "co-Trustees of the Estate" and demanded an accounting, CP 959. He repeated his request to serve as co-Trustee by letter dated June 2, 2003, CP 961.

On December 16, 2003, the court appointed Jennifer Gilliam as Special Representative on behalf of the minor beneficiaries (grandchildren and great-grandchildren) of the Foster Family Trust, CP 9. Thereafter, on January 13, 2004, without noticed to Gilliam, Alan filed a motion *ex parte* which was granted, appointing Laurance as co-Trustee of the Foster Family Trust,⁴ CP 847; 949.

The disagreement between Laurance and the Curran Mendoza law firm mounted. Because the settlement under consideration affected the rights of the minor beneficiaries, counsel advised the family members that the appointment of a guardian ad litem or Special Representative would be required, CP 970. On July 28, 2004, Laurance filed a Declaration attaching correspondence sent to counsel in which he informed the attorneys that they were not authorized to perform services for the Trust

“without the approval of both trustees” and directed the firm to withdraw as counsel, CP 950-987.

In October 2004, having received no cooperation in response to a request for an accounting of assets available for distribution to the minor beneficiaries, Gilliam petitioned the court for an order removing Alan as personal representative and for appointment of a Special Administrator, CP 1023-1024. No action was taken at that time. Her petition was reconsidered on January 18, 2006 and Respondent Gay was appointed as the Special Administrator, CP 19. The Order provided, in pertinent part:

(a) Alan was removed but not discharged as Personal Representative, reserving whether Laurance should be appointed at a future date when the status of the Estates were known, *Id.*

(b) Gay was appointed as Special Administrator without non-intervention powers and directed to perform discovery to determine the status of the Estate and report back to the court, *Id.*

(c) Both Alan and Laurance were directed to cooperate in regard to the Special Administrator’s responsibilities,

Id.

(d) The court ordered that Alan personally pay the fees and costs of Special Representative Jennifer Gilliam for the previous hearing when the matter of appointment of a Special Administrator was requested, and reserved for future determination the amount of personal liability for causing delay in the administration of the Estate, *Id.*

C. Proceedings Subsequent to Appointment of the Special Administrator. Following appointment as Special Administrator, Gay filed two Interim Reports (CP 1141-1174 and CP 1216-1278) in a period of two months, describing her attempts to ascertain the status of the Estate and Trust assets; determine whether all tax returns and tax liabilities had been filed; and determine whether the Trust assets had been properly managed and distributed.

The first Interim Report was presented at a status conference held March 29, 2006, before Commissioner Eric Watness. Neither Alan nor Laurance attended the hearing, CP 1185. In her Interim Report, Special Administrator Gay requested that the Court enter an Order directing the Clerk of the Court to issue Citations to Laurance and Alan, directing that they appear

before the Court to provide reasons why they should not be held in contempt of court and further directing; and that they turn over any and all records they may have pertaining to the consolidated Estates of Lloyd and Alice Foster and the Family Trust, CP 1151. The Court entered an Order continuing the hearing until April 21, 2006, indicating that the request for Citations would be considered at that time, CP 1123.

On March 29, 2006, Gay sent Alan and Laurance a letter forwarding a certified copy of the Order entered March 29th, directing them to appear in court on April 21, 2006, as well as copies of the Orders directing third party banks and accountants to produce records that would assist in preparing an accounting of the probate estate and trust assets, income and disbursements, CP 1189-1190. The letter also advised that the court would issue Citations if they did not comply with the request for information, *Id.*

Following the March 29, 2006 hearing, Gay did not receive any communication from either of the co-Trustees or former PR indicating that they would cooperate with an accounting, CP 1186. Instead, Gay and Special Representative Gilliam received a faxed memorandum stating, in part, that the Estate and Trust funds had

been distributed, that there was no money remaining in the Estate (for payment of fees or otherwise), and that "if we go to court again, Erik [sic] Watness won't be on the bench,"⁵ CP 1186. The correspondence also asserted that there was a conspiracy between the Court, the Special Representative and the Special Administrator, as well as former counsel for the Estate, to "bleed the Estate for over \$75,000.00," CP 1187.

In order to ascertain the status of the Estate assets and whether Alan and Laurance had carried out their duties as co-Trustees, the court entered an Order directing that Citations issue to Alan and Laurance and directing Alan to provide a full accounting of both the Decedents' Estates and the Family Trust, CP 1176-1177. Gay met with Alan and his counsel to determine what assets had been transferred from the Estate to the Trust, what assets were currently held by the Trust, and whether the Trust / Estate had prepared all necessary tax returns and completed all actions required before the estate administration could be closed, CP 127. Based on information provided at the meeting and a review of bank records that were produced pursuant to Orders and subpoenas directed to Alan and Laurance, and to banks where

accounts had been established,⁶ Gay concluded that there were no assets in the name of Lloyd or Alice Foster remaining in their consolidated Estate, CP 127-128. However, neither Laurance nor Alan provided an accurate accounting of the funds and assets to be distributed from the Estate to the Trustees, *Id.*

At the meeting in June 2006, Alan revealed that while Alice Foster was still living, he had acquired property in his own name with Trust assets, CP 66; 128. After reviewing real property records and investigating the status of the property, Gay filed a motion (CP 1287-1298) that resulted in the issuance of a citation and a hearing on the matter of the use of Trust assets to buy the property, CP 1299-1306. Alan also revealed that approximately \$80,000.00 had been distributed from the Trust to Gregory Foster, a grandchild (not a minor) for college education expenses, an amount that was disproportionate and not authorized by the terms of the Trust, CP 129.

Laurance did not provide formal accountings other than hand-written estimates of distributions to the beneficiaries' individual trusts in response to the court's Order. In addition, no action had been taken by either Trustee to equalize this distribution

in relation to any of the other Trust beneficiaries, CP 129.

In the course of reviewing records produced by accountants and financial institutions, Gay also discovered that a check in the sum of \$47,000.00 for payment of income taxes had not cleared the bank. Upon further inquiry, Gay confirmed with the IRS that the Estate Form 1041 for tax year ending December 31, 2004, as presented by Alan, had never been filed, nor had the check representing payment of taxes for that year been tendered to the IRS. Laurance subsequently represented that he would arrange for the return to be completed and the taxes paid. The tax return was never filed with the Service nor were the taxes paid; CP 66; 129-130.

By Order entered August 23, 2006 (CP 1299-1306), the Court entered a finding that on or about July 15, 1998, co-Trustee Alan and his wife, Joyce C. Foster, had utilized \$80,000.00 of Estate / Trust funds to acquire the ten-acre parcel adjacent to their personal residence in their own names. The Court held that the funds were improperly used and entered a Judgment against Alan and Joyce Foster in the sum of \$80,000.00, subject to adjustment to properly reflect the true fair market value of the property, or to

reflect the extent of the damage to the Trust as a result of the use of Trust funds to personally acquire property; and further ruled that the subject property was an asset of the Trust.⁷ The court ordered Alan and Joyce Foster to convey the subject property to the Trust, CP 1299-1306. The court also entered an Order ordering recovery against Alan personally, in favor of the minor beneficiaries of the Family Trust in the sum of \$10,430.00 for each minor, for their estimated share of the Estate assets, CP 91-96. Finally, the court removed Alan as Trustee but did not discharge him from liability for his actions related to the Trust, CP 1299-1306. The court concluded that neither Alan nor Laurance had any intention of complying with the Court's orders and sited on the record an excerpt from Laurance's presentation to the court in which he stated, "[M]ake all the threats you want. We will not appear in court again if [Commissioner] Watness is on the bench," RP 08/23/2006, p. 35, ll. 13-15. The court awarded the Special Administrator's fees and costs as reasonable against the Trust and the Estate and against Alan individually, and reserved the request to award the fees and costs against Laurance for future hearing, CP 97-99; RP 08/23/2006, pp. 35, l. 7 – p. 39, l. 17, noting that both Alan and

Laurance had "done everything they can to frustrate the administration of [the] Estate, *Id*, p. 41, ll. 8-11.

Finally, the court expressly referenced the provisions of TEDRA, RCW 11.96A.100(2) otherwise requiring a summons to be issued but noting that if the proceeding is commenced as an action incidental to an existing juridical proceeding relating to the same trust or estate or non-probate asset, notice must be provided only to those parties who are not already parties to the existing judicial proceedings. The court concluded that Alan and Laurance Foster had both been subject to the jurisdiction of the court, both as to subject matter and personal jurisdiction, and no summons was required, CP 96. In response to this explanation, counsel for Laurance Foster responded, "Okay, that's fair." RP 8/23/2006, p. 42, l. 13 – p. 43, l. 3

Pursuant to a stipulated Order entered January 24, 2007 and agreed to by Laurance (CP 1314-1320) , the ten-acre parcel was conveyed to Laurance Foster as Trustee, who was to market the parcel and the proceeds of a sale were to be disbursed to the Trust. Laurance failed to cooperate to market the property or complete the steps required to close the Estate. Following entry of

the agreed Order, Laurance informed Gay that he had not agreed to the Order entered on January 24, 2007 (CP 167-168), despite the fact that he personally signed it, CP 1319. Gay sent additional written communications addressing issues that had been the subject of a number of prior court hearings (CP 177-180), including:

(a) Laurance's request for copies of Gay's billing statements that had previously been provided as attachments to Declarations in support of requests for approval of fees and costs, CP 177; and

(b) His objection to the court's jurisdiction over the Trust and denying that he had seen a court order signed by Commissioner Watness claiming jurisdiction over a Hawaii Trust, specifically, the inclusion of the Hawaii property and/or proceeds in the court's directives regarding distributions from Trust assets, CP 178; 179. (This issue had been addressed at prior hearings as early as 2004.)

In a letter sent to Gay in February 2007, Laurance stated that he could "fix the situation" and estimated that it would take "six months to fund the Trust with cash," CP 1350. In March 2007, Gay was advised by Special Representative Gilliam that she had

received a call from Windermere Real Estate Agent Linda Letney, Laurance's daughter, who inquired about the status of the ten-acre parcel and indicated that the property was being listed for sale, CP 131.

On April 17, 2007, Gay advised Laurance by memo that she was preparing a status report to the court and asked for a copy of any listing agreement for sale of the property that he may have executed in furtherance of liquidating the property. She also asked him to confirm that all property taxes had been paid and reminded him that the estate income tax return needed to be addressed, CP 185-186.

Laurance, as sole Trustee of the Family Trust, presented no evidence that he made any attempt to market the property or collect the monies owed to the Trust by his brother, Alan, CP 134. After a number of months without contact, Laurance sent a letter to the Special Representative dated October 8, 2007 (CP 196), again claiming that he had no notice of the hearing during which the property was conveyed to the Trust and questioned the Court's Order regarding the ten acres purchased by his brother with Estate funds, in spite of the fact that he had signed the agreed Order,⁸

and indicated that he did not want the Trust to become embroiled in a lawsuit. By letter dated October 8, 2007, addressed to Gay (CP 192-194), Laurance again questioned the purchase of the subject property by his brother stating that the Trust did not have funds to purchase the property back in 1998, although the Trust was created November 25, 1992, and was to receive net distributions from the Estates of Lloyd and Alice Foster, CP 134. Laurance also stated that the first time the Trust had cash was when he [Laurance] sold his parents' Hawaii home in April 2005, CP 192.

In February 2008, Gay filed a Third Interim Report (CP 124-202); a request for award of fees (CP 221-230); a Petition for Approval of the Third Report and for entry of an Order directing Laurance to provide a complete accounting of the assets or be held in contempt (CP 203-220); and a Motion for Issuance of Citation directing Laurance to appear and show cause why he had not taken appropriate steps to market the real property conveyed to the Trust, CP 109-123; 1321-1322. Laurance was served with the Order to Appear, retained new counsel, and requested a continuance of the hearing on show cause which was agreed to by

Gay and Gilliam, CP 264-265; 1326-1327. Unknown to Gay or the Special Representative, Laurance had filed two Declarations prior to the agreement to continue the hearing, CP 231-263; 264-266. The Declarations represented, in part, that Gay and Gilliam already had a report for trust assets. An itemization of assets produced in January 2004 reflected a beginning balance of January 2003, with deductions, expenses and distributions to beneficiaries. However, Laurance's counsel advised that all of the disbursements reflected in that accounting had not, in fact, been made, CP 1328.

In February 2008, Special Representative Gilliam filed a Final Report and Petition for Discharge, CP 203-220. Her petition summarized the accounting information available as of that date, noting that a discrepancy existed in the rudimentary accountings provided by Laurance and Alan, emphasizing that \$514,000.00 had been distributed to the heirs (and not the Trust as directed by the terms of the Decedents' Wills) in January 2004, a fact that had not been previously disclosed to the court, the Special Administrator or the Special Representative until January 2006 (CP 205); and, concluding that nothing further could be accomplished "given the ongoing hostility and lack of cooperation from the current Trustee

[Laurance],” requested to be discharged, CP 208. The Special Representative joined in the Petition of the Special Administrator to remove but not discharge Laurance as Trustee, appoint an independent Successor Trustee, CP 208. The Petition also requested that Gay be discharged; and that Gay’s fees and costs be approved and “allocated against Lloyd Alan Foster and Laurance Foster for the amount approved,” *Id.*

In March 2008, Laurance retained new counsel (CP 1323-1327) in response to Gay’s Third Interim Report, in which Gay requested that he be removed as Trustee, that the court direct him to complete the accounting of Trust assets, and that fees and costs of the Special Administrator be approved. CP 124-202. By Order entered April 7, 2008 (CP 267-270), the petition to remove Laurance as Trustee was reserved for further hearing, and he was directed to produce to Gay and Gilliam, within 30 days of the date of the Order, a full and complete accounting of all assets of the Foster Family Trust and the Estate as distributed to the Trust or individual beneficiaries of the Trust; copies of each and every bank record, check, and statements or other accounting documents confirming receipt of Trust assets, distributions to beneficiaries,

creditors, the Trustees, or the Personal Representative or tax authorities, including cancelled checks or record of electronic payment. Failure to comply would result in entry of an Order of Contempt and sanctions on the part of Laurance, *Id.* In fact, Laurance's counsel Jim Johanson sent a letter to his client dated April 10, 2008, informing him:

Lastly, the Court ordered that you, as Trustee, are to produce a complete and detailed accounting *of both the Estate and Trust assets*, starting with the date of Alice Foster's death in December 2002 and going through the present. You have thirty (30) days to compile and provide that accounting to the Court. The accounting must be completed and filed with the court absolutely no later than May 7, 2008. If you do not provide this accounting to the Court in the requisite time period, it is very likely that the Court will find you in Contempt of Court and order you to spend time in jail. It is also likely that if you are found in Contempt of Court you will be fined and there is the *possibility that the Court would decide to make you personally liable for the entirety of the fees and costs of the Special Representative and the Special Administrator as a result of your non-compliance.* There is also a likelihood that *the Court may see fit to re-evaluate the judgments that have been previously assigned personally against Alan and allocate some of the debt against you*

. . . .
As we have previously discussed, an accounting is not just merely producing bank records, but is instead a record of the assets and money involved in Trust. *It is also a record of any distributions made and to whom they were made. In other words, it is an extremely detailed means of tracking Trust assets and distributions. . . . [I]n order to complete the accounting in the requisite degree of detail, we will need documentation to show the value of the estate/trust assets*

at the time of Alice H. Foster's death in December 2002, documentation of the distributions made from those assets, and copies of the most recent statements showing the amount or value of the shares that have been set aside for the minor great-grandchildren [Emphasis added], CP 1617-1619.

In May 2008, Laurance's counsel filed a Declaration "Regarding Accounting of the Foster Family Trust" attaching instead a document entitled "Estate Cash Accounting," based on the bank records produced pursuant to subpoenas issued by Gay related to various accounts, CP 278. The second recap entitled "Foster Family Trust Assets" reflected the proceeds of the sale of the Hawaii residence including distributions to adult children, and a net amount distributable to the great grandchildren, CP 279. The "Cash Accounting" concluded that over-payment by Alan while serving as personal representative required a return of \$135,171.00 for distribution to those beneficiaries, including the minors represented by Special Representative Gilliam, CP 278.

The accounting was reviewed by Cynthia Foster, Alan Foster's daughter, who submitted a Declaration, objecting to the accounting on the basis of information and documentation she obtained from her father, CP 1586-1653. For example: In her Declaration, Cynthia testified that, contrary to Laurance's assertion

that Alan had failed to submit the tax return and check for \$47,000.00 payable to the IRS, Laurance had informed Alan that the accountant concluded no tax was due and that he (Laurance) would be taking care of the taxes, CP 1589. This is consistent with the testimony of the accountant Michael Bayless, who prepared the estate fiduciary tax return, who confirmed that all of his dealings on behalf of the Estate were with Laurance and that based on the financial information provided by Laurance, there was in fact a tax liability due from the Estate, CP 1223-1224.

On May 20, 2008, the court entered an order imposing monetary sanctions against Laurance and directed him to file a full accounting that included an explanation of all issues raised by Gay and Gilliam, stating that failure to comply would result in entry of an Order of contempt, monetary judgments and potential jail time, CP 1386-1390.

In June 2008, Laurance had once again retained new counsel, Craig McReary, who filed a Jury Demand, requesting a jury trial "of all of the issues in this case" (CP 502) and an Answer to Special Representative Gilliam's Petition "for issues involving breach of fiduciary duty, negligence or other theories, which entitle

[Laurance] to a jury,” CP 509. At no time did Laurance formally file a request to certify the matter for trial. Accordingly, all matters were referred to the Ex Parte and Probate Department. KCLCR 98.14(a) and (b); KCLCR 98.20(a).

On June 9, 2008, as a result of Laurance Foster’s failure to refute the issues raised by Cynthia Foster’s Declaration, the parties executed and presented a CR2A Agreement on the record, CP 1442-1443. The parties were directed to formalize the CR2A Agreement in the form of a TEDRA under RCW 11.96A but were unable to agree to the language of the TEDRA.

On October 24, 2008, Gay and Gilliam received Notices of Trustee’s Sale of Alan Foster’s residence that was to serve as collateral to fund the disbursements under the CR2A Agreement. In November 2008, Gay became aware that real property located in Edgewood, Washington was owned by Decedent Alice Foster but was not listed in the Estate Inventory, CP 528. Gay also became aware of a recorded transaction in which a Quit Claim Deed (CP 535-536) in which Alice conveyed a partial interest in property located in Washington to her granddaughter, Karen Pyle, Laurance’s adult daughter. At the time, Alice, then age 90, was

residing in Hawaii: The Deed was attested to by a Washington notary, although the signature is witnessed by two individuals by the name of Kahakelii. It would appear that the property was used as collateral for loans by those holding undivided interests, all of which indicate that there were additional assets, and perhaps liabilities, that were not reported or included in the estate, CP 527-569. Gay filed a Petition for Clarification of the CR2A Agreement, for Instructions, and for an award of additional fees and costs, CP 1444-1454. Special Representative Gilliam filed a Joinder, CP 570-573.

On December 31, 2008 the Court discharged the Special Administrator (CP 651-661) and Special Representative (CP 648-650) by separate Orders which provided, among other things, that reimbursement to the Trust to fund the minor beneficiaries' bequests would be made from the proceeds of a reverse mortgage against Alan Foster's residence; and that the fees of the Special Administrator and Special Representative would be paid, in part, by contributions by both Laurance Foster and Lloyd Alan Foster in the sum of \$33,000.00 each. The Agreement also provided that Gay and Gilliam would forego an order reducing the awards of their fees

and costs to judgment in order to assist the parties with financing the settlement, CP 651-661. Gay was discharged as Special Administrator, with the findings that Gay had investigated, undertaken discovery and submitted interim reports as directed by the Court; that the duties and actions of Special Administrator Gay had been undertaken and performed as directed and in good faith; and that pursuant to RCW 11.32.050, the Special Administrator shall not, following discharge, be liable to an action by any creditor of the Decedents; and pursuant to RCW 11.32.040, the Decedents' Estate shall be liable for obligations incurred by the Special Administrator pursuant to her Order of Appointment and as approved by the court by this Order,⁹ CP 653-654. Gilliam was also discharged as Special Representative, subject to limited authority to execute documents on behalf of the minor beneficiaries to carry out the court's directives, CP 649; 657. As the sole Trustee, Laurance was ordered – and agreed – to take specific actions needed to carry out the terms of the CR2A Agreement, including the sale of the ten-acre parcel conveyed to the Trust,¹⁰ CP 659.

In June 2009, Gilliam filed a Petition to reduce the award of her fees and costs to judgment, advising the court that Alan and

Laurance Foster had failed to carry out the terms of the stipulated Order clarifying the CR2A Agreement entered the prior December and advising the court that the residence that would serve as collateral for producing the settlement funds had been sold at Trustee's Sale, CP 674-677. Evidence was presented that Laurance and his counsel failed to respond to numerous requests for information as to the status of complying with the Agreement,¹¹ CP 695-697; 698-719. On June 16, 2009, the court removed but did not discharge Laurance Foster as Trustee of the Family Trust; and appointed Seattle attorney Thomas Keller as Interim Trustee to perform a forensic accounting to determine whether the former Trustees had breached their fiduciary duties to the Trust and Estates, and to evaluate what should be done with the ten-acre parcel, CP 918-919. The court also entered Orders reducing the previously awarded fees and costs of Gay and Gilliam to Judgment, CP 731-733; 734-743. By noticed filed on July 29, 2009, Mr. Keller declined to serve as Interim Trustee, CP 920.

On September 22, 2009, Laurance, through his counsel, presented, but did not file a "forensic accounting" to the court at a Status Hearing, CP 756-768. The court ordered that Gay and

Gilliam be provided with a copy of the report and continued the matter for further hearing, CP 1528. A month passed before copies of the accounting, dated September 21, 2009, were forwarded to Gay and Gilliam on October 19, 2009, CP 754-755. The accounting (CP 756-768), prepared by a Snohomish County CPA firm, was based on a review of the Wills and Family Trust; a letter from Gilliam to one of Laurance's former counsel; and documents that made it "clear" that Laurance "has attempted to provide some idea of what happened to the assets of the probate estate." The CPA observed that Laurance "was not the personal representative" and would not "be in any position to force any financial institution" to provide records, CP 757. Regarding specific figures, the author referred to Alan and Laurance's recaps but does not verify that actual financial records were reviewed and, in fact, recites an error in the arithmetic. The remainder of the "forensic accounting" consists of the conclusion that it is "difficult to understand how he could be held personally responsible for funds he had no control over," *Id.* The reconciliations attached to the "forensic accounting" were the same inadequate recaps that had been presented previously by Laurance, with no verification of

accuracy,¹² CP 759-760.

D. Entry of Judgments. On November 23, 2009, the Commissioner who had retained jurisdiction of this proceeding reviewed the record and the Declarations and entered specific Findings to support an Order providing that Laurance should be jointly and severally liable with Alan for the fees and costs of the Special Administrator and Special Representative. CP 788-797. Each of the findings is supported by the record and, in many cases, was and remains uncontested, CP 789-791. The findings include:

1. Laurance's Declaration of Proposed Trustee filed in 2005 (CP 1433-1435) stated that he had not been convicted of a crime involving moral turpitude (CP 1434), when in fact he had been convicted of theft, CP 1440. When this was brought to the court's attention in a Report filed in June 2008 (CP 1394-1441), Laurance did not deny the allegation.

2. Laurance's Declaration also stated, under penalty of perjury, that he had a business degree, CP 1434. Alan informed his daughter Cynthia that his brother Laurance did not complete a degree at either of the state universities that he attended and therefore, would be surprised if he held a "business degree," CP

1399. This issue was also brought to the court's and the parties' attention as a responsive pleading filed in June 2008 (CP 1394-1441), and has never been denied or refuted by Laurance.

3. Laurance personally accepted substantial distributions from the probate Estate that should have been distributed to the Foster Family Trust and made available for distribution according to the terms of the Trust. As Trustee, he cannot say that he was "unaware" of the financial status of the probate Estate as an excuse for not making proper distributions to the beneficiaries of the Trust.

4. Laurance deliberately failed to disclose to the court, the Special Administrator or the Special Representative his knowledge that the assets of the probate Estate had been fully distributed to himself and to Alan

5. Laurance distributed a minor's trust assets directly to the parent rather than preserving the assets for education purposes as required by the Trust document.

6. Laurance provided financial data to a tax preparer without sufficient basis and, having assumed the responsibility for preparing the return, failed to confirm that the tax liability was paid:

All assets available to pay the liability were subsequently distributed to the beneficiaries.

7. Laurance failed to cooperate with the court and the parties to produce an accounting or take reasonable steps to carry out a CR2A Agreement that would avoid loss to the probate and trust estates.

The court also reiterated that prior interim Orders expressly recited that entry of judgment in favor of the minors, the Special Administrator and the Special Representative were reserved for further consideration (CP 790), and at no time did Laurance seek revision of those orders by the Superior Court.

The court also noted Laurance's failure to cooperate with presenting an accounting; that when an accounting was provided in September 2009, a copy was not presented to the discharged Special Administrator and Special Representative; and that the accountings that were provided were the same incomplete accountings previously presented (CP 791), and determined that over the six-year duration of the proceeding, Laurance, by his actions and failure to cooperate, harmed the minor beneficiaries and caused substantial losses to various parties' beneficial

interests, resulting in substantial fees and costs, *Id.*

On the basis of the court's Findings, Judgment in favor of Special Administrator Gay was entered against Laurance, jointly and severally with Alan Foster and the Foster Family Trust for fees and costs as Special Administrator in the sum of \$50,408.25, the amount of prior awards and judgments entered against Alan Foster, CP 798-800. The Order authorized the Special Administrator to petition the court for entry of judgment, joint and several against the same parties, for professional fees and costs incurred subsequent to January 1, 2009 (CP 792-793). The court also entered an Amended Judgment for fees and costs against Laurance Foster, jointly and severally with Alan Foster and the Family Trust, in favor of Special Representative Gilliam and the minor beneficiaries, CP 801-810.

E. Notice of Appeal: Post-Appeal Judgments. Laurance did not file a motion for revision, timely or otherwise, from any order or Judgment entered in the proceeding. On December 17, 2009, Laurance Foster filed a Notice of Appeal from "an order entered November 23, 2009 by Commissioner Carlos Velategui, *and all prior rulings in this case,*" CP 1531-1542. However, the only

pleading attached by way of reference to the "November 23, 2009 Order" was the Judgment entered on that date in favor of Special Representative Gilliam and in favor of the minor beneficiaries, CP 801-810; 1533-1542. No reference was made or attachment included regarding the Judgment entered in favor of Special Administrator Gay, CP 798-800.

On January 27, 2010, the court entered Judgment in favor of Special Administrator Gay for fees and costs incurred subsequent to the period covered by the prior judgments (commencing January 1, 2009 through and including November 23, 2009) in the sum of \$13,902.73, CP 926-928. Judgment was also entered in favor of Gilliam, CP 929-931. Both Judgments were against all parties, jointly and severally.

No Motion for Revision was filed for review of the orders and judgments entered November 23, 2009 and January 27, 2010. On February 26, Laurance filed a Notice of Appeal from "two orders entered January 27, 2010, by Commissioner Carlos Velategui, *and all prior rulings entered in this matter.* The Judgments attached to the Notice are the Order Reducing Award of Fees and Costs of Former Special Administrator Against Laurance and Alan Foster,

Individually; the Foster Family Trust; and the Decedents' Estate, jointly and severally, CP 926-928; and the Order Approving Fees, Entering Judgment, and Granting other Relief in favor of Former Special Administrator Gilliam and against Laurance and Alan Foster, Individually, Jointly and Severally, CP 929-931.

IV. ARGUMENT

A. **Standard of Review.** Laurance argues that the standard of review from a Commissioner's ruling is the *de novo* standard, with the court engaging in the same inquiry as the trial court, citing *Estate of Black*, 16 Wn.App. 476, 66 P.3d 670 (2003). Accepting the *de novo* standard as applicable to this case, the Restatement of the Case above sets forth, in detail, the evidence and proceedings presented during the seven-year probate and trust administration in the court below. In applying the *de novo* standard to the issues related to Laurance Foster's liability to the minor beneficiaries and the court-appointed administrator and representative, however, the court and parties must be careful to differentiate between standard of review and standard of proof in addressing probate issues.

1. **Standard Applicable to Liability for Damages for Failure to Account to Trust, Estate and Court-Appointed Special Representative and Special Administrator.** The *Black* case involved a dispute over competing wills, requiring the proponent of an opposing will to prove, by a preponderance of the evidence and clear and distinct testimony, that the will was in existence at the time of the testator's death and that the will was properly executed. *Estate of Black*, 116 Wn.App. 476. The standard for proving the execution of a lost will, however, differs from the standard of review. The court in *Black* recognized that RCW 11.96A.020 confers plenary power on the probate court and grants the court "full power and authority" to proceed "in any manner and way that the court deems right and proper." The court in *Black* affirmed that review is *de novo* on the entire record and that on appeal, the court may affirm the trial court's ruling on any grounds supported by the record, citing *In re Estate of Ney*, 183 Wash 503, 48 P.2d 924 (1935), holding that the trial court's ruling may be affirmed on any ground supported by the record. *Id.*¹³

2. Standard of Review for Award of Special Administrator's Compensation. The standard of review for the second element addressed in Laurance's appeal – awards of fees and costs – is correctly noted to be an abuse of discretion standard.¹⁴ The *Black* court sets out a more lenient standard of review for the award of attorneys' fees in probate matters, citing the discretionary language of the statute authorizing compensation:

RCW 11.96A.150 gives the court discretionary authority to award attorney fees from estate assets. And we will not interfere with the decision to allow attorney fees in a probate matter, absent a manifest abuse of discretion. Discretion is abused when it is exercised in a manner that is manifestly unreasonable, on untenable grounds, or for untenable reasons. Because of the "almost limitless sets of factual circumstances that might arise in a probate proceeding." The legislature "wisely" left the matter of fees to the trial court, directing only that the award be made "as justice may require." *Estate of Black*, 116 Wn.App at 489 (citations omitted).

A *de novo* review of the history of the probate court proceedings culminating in an award of fees and costs in favor of the Special Administrator and Special Representative establishes that there was sufficient evidence to support the award of fees and costs pursuant to the statute. There was no abuse of discretion and the awards of the Special Administrator's fees and costs were

based on reasonable and tenable grounds.

B. Appellant Failed to Timely File a Notice of Appeal from the Order Awarding Judgment in Favor of the Special Administrator on November 23, 2009.

Laurance Foster filed a Notice of Appeal on December 17, 2009, referencing and attaching the Order Amending Judgments in favor of the Special Representative and the minor beneficiaries to include the joint liability of Laurance. CP 801-810. The Notice did not reference or attach the Order Awarding Fees or the Judgment for \$50,408.25 entered in favor of the Special Administrator, creating joint and several liability of Laurance, CP 788-797; 798-800.

On February 26, 2009, Laurance filed a second post-judgment Notice of Appeal, referencing and attaching two Judgments entered on January 27, 2010 establishing Laurance's joint and several liability for fees and costs incurred during the period following, one in favor of the Special Administrator and one in favor of the Special Representative, CP 926-928; 929-931. Both notices recite that Laurance "seeks review" by the Appellate Court of "all prior rulings in this matter."

Laurance has not filed the requisite Notice to seek review of

the November 23, 2009 Judgment in favor of Special Administrator Gay. RAP 5.3(a), which governs the content of a notice of appeal, requires that the appellant "designate the decision or part of decision which the party wants reviewed." Additionally, "[t]he party filing the notice of appeal should attach to the notice of appeal a copy of the signed order or judgment from which the appeal is made," RAP 5.3(a). Laurance failed to do so when he filed the Notice of Appeal. The time for filing notice of appeal begins to run from the entry of the required findings, RAP 2.2(d).

In regard to whether an order or ruling not designated in a notice of appeal should be considered on appeal, RAP 2.4(b) provides:

Order or Ruling Not Designated in Notice. The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.

Neither condition was made here. The November 23rd Judgment in favor of Gay had no effect on the Judgment in favor of Special Representative Gilliam cited in the initial Notice of Appeal filed on December 17, 2009. Clearly, the Judgment entered in favor of Gilliam could be decided without considering the merits of

the Judgment in favor of Gay. *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 105 Wn.App. 83, 21 P.3d 1157 (2001).¹⁵

The purpose of RAP 2.4(b) is to eliminate “a trap for the unwary [that existed under the prior rules]” and “avoid the problem of precluding review of an order which is not readily identifiable as appealable.” *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 134, 135, 750 P.2d 1257, 756 P.2d 142 (1988). Prior to amendment of RAP 2.4(b), an appeal from a post-judgment order awarding attorneys’ fees could bring up for review a final judgment previously entered in the same action (cf. *Wlasiuk v. Whirlpool Corporation*, 76 Wn.App. 250, 884 P.2d 13 (1994)). Under the current Rule, unlike the *Adkins* orders, the Judgment in favor of Gay had no effect on the Judgment in favor of Gilliam and the minor beneficiaries, which would have occurred regardless of Laurance’s liability to Gay. In addition, the November 23rd Judgment was entered prior to the filing of the initial Notice of Appeal and does not fall within the appealable orders described in RAP 2.4(b), authorizing review of an award of attorneys fees entered after the appellate court accepts review of the decision on

the merits.

Under the applicable rules, the court should not consider the merits of the November 23, 2009 Judgment in favor of Gay, an order that should have been appealed within 30 days of the entry of the order.

C. Laurance Foster was Not Entitled to a Jury Trial on the Issue of the Failure to Properly Account for Trust and Estate Assets. Laurance assigns error to the Commissioners' refusal to refer the case to the court Clerk to issue a trial date, BA p. 17. The court exercised proper discretion to rule on the submissions of the parties and declined to refer any request for relief for trial.

First, there is no evidence, and the Appellant's Brief does not identify, any instance in which Laurance filed a request for certification of the case for trial prior to filing a Jury Demand and Answer in June 2008 (CP 502; 503-510), in response to a Report filed by Specific Representative Gilliam objecting to Laurance's accounting, CP 853-902. In August 2006, the court entered a judgment in favor of Gay and against Alan Foster and the Trust for \$14,117.57, CP 97-99. Gay requested that the fees be assessed against Laurance as well because of his obligations to the trust and

his children (RP 08/23/2006, p. 12, ll. 6-11), and Gilliam informed the court that Laurance had not objected to her calculations regarding the amount of the minor's distributive share that had not been distributed, *Id.*, p. 15, l. 22 – p. 16, l. 1. The court observed that there had been no motion for revision or appeal from the court's determination that the court had jurisdiction under TEDRA over the trust and the estate and the parties before the court, *Id.*, p. 33, ll. 9-23. The court concluded that Alan and Laurance had together and independently obstructed the process of administration of the case, citing Laurance's presentation and the entry of an ex parte order appointing them as co-Trustees without prior notice to the Special Representative, *Id.*, p. 33, l. 19 – p. 34, l. 5; and concluded that the "two Fosters have done everything they can to frustrate the administration of this estate. And it's their fault, quite frankly," *Id.*, p. 41, ll. 8-11. The court noted that Laurance had expressed that he had no intention of complying with the court's orders, *Id.*, p. 35, ll. 7-15. He concluded that he would not enter judgment against Laurance *at that time* (*Id.*, p. 39, ll. 12-17), but reserved consideration for a future date.¹⁶ No appeal or motion for revision was taken from the Judgment.

On April 7, 2008, the court approved Gay's Third Interim Report and also approved supplemental fees and costs of \$18,933.56 as reasonable for the period through the date of the Order (CP 267-270), reserving for further consideration the source of payment of the award, *Id.* No appeal or motion for revision was taken from that Order.

On June 16, 2009, the court approved as reasonable additional fees and costs of the Special Administrator in the sum of \$17,357.12 and entered Judgment consolidating the two prior Orders into a single Judgment for \$36,290.68 against Alan and the Trust, expressly reserving for further consideration whether the judgments should be entered against Laurance Foster, CP 731-733. On September 18, 2008, Laurance filed a Memorandum of Law referencing the prior demand for a jury trial, stating that the case "is entirely based upon a claim of breach of fiduciary duty . . . which imposes liability in tort which makes it a question of law," and concluding that a judgment should not be entered before a jury trial is held, CP 749-751.

Thereafter, the court entered the two Orders providing that Laurance was jointly and severally liable for the \$50,408.25

judgment entered November 23, 2009 (CP 788-797; 798-800) and the \$13,902.73 judgment entered January 27, 2010 (CP 926-928 / 929-931).

As a court of equity, the probate court has full power and authority to settle all matters concerning estates and assets of deceased persons, and all trust matters. RCW 11.96A.020(1). The probate court is given full power and authority in the exercise of the jurisdiction or powers given by the probate statute. RCW 11.96A.020(2). The authority of the probate court is equitable in nature, triable by the court and not before a jury. *In re Enos' Estate*, 79 Wash. 583, 140 P. 675 (1914); *Watson v Watson*, 93 Wash 512, 161 P. 375 (1916); *In Re Estate of Shaughnessy*, 97 Wn.2s 652, 648 P.2d 427 (1982) (noting that a jury to sit in advisory capacity in a will contest is within the discretion of the trial court).

The right to a jury trial in probate matters is expressly addressed – and limited - in RCW 11.96A.170:

If a party is entitled to a trial by jury and a jury is demanded, and the issues are not sufficiently made up by the written pleadings on file, the court on due notice shall settle and frame the issues to be tried.

RCW 11.96A.100(7) expressly provides that testimony by

witnesses may be presented by affidavit.

None of the authorities cited by Laurance support his challenge to the probate court's refusal to refer his objections to the court's orders to a jury for trial. *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 244 P.3d 761 (2010) is a maritime case that interpreted federal maritime law and not equitable principles of probate proceedings. Similarly, *Shoemake v. Ferrer*, 168 Wn.2d 193, 255 P.3d 990 (2010) involved the determination of damages in a legal malpractice claim and presented no equitable issues.

There has been no showing on the record below that certification for trial or a jury was required under the probate statutes or was necessary to ascertain specific facts in order for the probate court to assess and determine the proper outcome of the claims in this case. In fact, the estate and trust accounting issues had proceeded for over five years before Laurance filed a jury demand and requested a trial "of all of the issues in this case" in June 2008, CP 502. A year and a half passed, during which the parties attempted but were unable to agree to the terms of a CR2A Agreement. Following discharge of the Special Representative and Special Administrator, the Commissioner entered specific Findings

proposed by the Special Administrator upon which the award of fees and costs against Laurance were based, CP 788-797. These Findings recited detailed grounds for concluding that Laurance should be liable for expenses incurred during the probate proceeding, only one of which was a breach his fiduciary duties owed to the minor beneficiaries. The court referenced Laurance's failure to present an accounting and concluded that he had breached his duty of good faith and diligence as Trustee in dealing with the Trust and its beneficiaries. In his oral ruling, the Commissioner also observed that it was not necessary to find that Laurance had breached his fiduciary duties owed to the trust and minor beneficiaries:

Laurance just got money out of the estate he wasn't entitled to. That's not a tort. It's just a misdirection of the money. He has to give it back. It's as simple as that, RP 11/23/2009, p. 20, ll. 7-11.

The provisions of TEDRA clearly support the court's determination that there were no contested issues that required a trial or a jury. Unlike cases related to proof of lost wills and claims of incapacity, the issues before the court related strictly to equitable principles that do not entitle the parties to a jury trial.

D. The Findings of Fact Entered in Support of the Judgments in Favor of the Special Administrator were Supported by Substantial Evidence.

1. **No Effective Assignment of Error.** Although Laurance now assigns error to entry of specific Findings incorporated into the Order Awarding Judgment in favor of the Special Administrator, BA p. 3, 26-27; CP 789-792, Laurance did not appeal the Orders incorporating the Findings in either of the Notices of Appeal and, accordingly, the unchallenged Findings of Fact are verities on appeal. *In the Matter of the Contested Election of Schoessler*, 140 Wn.2d 368, 385, 998 P.2d 818 (2000); *Estate of Wegner*, ___ Wn.2d ___, 237 P.3d 387 (Aug. 10 2010).

2. **Referring to Findings Does Not Constitute Effective Assignment of Error.** Respondent's Assignment of Error A.3 states that "[t]he court erred in entering findings of fact in the November 23, 2009 *orders* against Laurance Foster that were not supported by substantial evidence." The Notice of Appeal references "*an order* entered on November 23, 2009 by Court Commissioner Carlos Velategui and *all prior rulings* in this matter," [emphasis added], CP 1531. The only Findings attached to the

Notice are those incorporated into the Order Amending and Entering Judgments in favor of Special Representative Gilliam. The reference to "*all prior rulings*" is insufficient to assign error to the Findings enumerated in the Judgment in favor of Gay, RAP 10.3(g).

If the Appellate Court determines that Laurance's one-paragraph discussion in Appellant's Brief is sufficient to constitute a challenge to the Special Administrator's Findings entered November 23, 2009 (CP 788-797), the challenges relate only to those specific Findings referenced in his Brief, BA pp. 26-27.

Laurance references Finding 1.1 (setting forth 10 specific actions / omissions supporting the claim of breach of fiduciary duty), 1.5, 1.6 and 1.7 but only to state that these Findings were "basically the same Findings" entered in the Order supporting the award of the Special Representative's award of fees. No further argument is presented in regard to the following specific Findings:

1.1(a) The fact that he filed a Declaration of Proposed Trustee, under penalty of perjury, attesting that he has not been convicted of a crime and had attained a degree, to establish his competency to serve as a fiduciary, when, in fact, evidence had

been presented that these statement under oath were untrue, *Id.*;

1.1(b) The fact that he received and accepted substantial distributions from the probate estate that he knew or should have known, as Trustee of the Family Trust, should have been distributed to the Family Trust for apportionment and distribution to the beneficiaries, including the minors represented by Gilliam, *Id.*;

1.1(c) The fact that he agreed that Alan as personal representative could withhold the share of the minors though shares were distributed to the adult beneficiaries, *Id.*;

1.1(d) That, for a period of three years, he deliberately failed to disclose his knowledge of the administration of the probate estate and the distribution to himself and to Alan to the court, the Special Administrator and the Special Representative, *Id.*;

1.1(e) The fact that he created a GET account for a minor beneficiary who would not benefit from the arrangement and subjected the beneficiary to penalty for withdrawal, *Id.*;

1.1(f) The fact that he directly distributed a minor's trust assets to the parent rather than as directed under the terms of the Trust, *Id.*;

1.1(g) The fact that he failed to account for funds in the

Trust established for the benefit of a minor beneficiary whose identity could not be confirmed, *Id.*;

1.1(h) That he failed to protect the interests of the minor beneficiaries, *Id.*;

1.1(i) The fact that he provided financial information to a tax preparer without sufficient basis and, having assumed the responsibility for preparation of the return, failed to confirm that the return was properly filed or that the liability was paid, *Id.*;

1.1(j) The fact that he refused to cooperate with the parties in an effort to carry out the terms of the CR2A Agreement intended to resolve discrepancies between the partial accountings made available to the Special Administrator and Special Representative, *Id.*;

1.5 The fact that the accounting produced by Laurance was the same accounting that had been initiated by Alan Foster and reflected in a summary accounting by Laurance in April 2008, *Id.*;

1.6 The fact that Laurance had failed to cooperate in the course of the six-year proceeding, resulting in substantial professional fees and costs incurred in the proceeding and harming

the minor beneficiaries, *Id.*;

1.7 The fact that Laurance received personal distributions from the probate estate rather than assuring that distribution was made to the Family Trust and, accordingly, as Trustee, he would be jointly liable for an amount that would make the minor beneficiaries whole, *Id.*

Laurance does not challenge Finding 1.2, stating that the court had entered prior interim Orders upon Petitions related to awards and Judgments for fees and costs, which reserved for further consideration whether Laurance should be jointly and severally liable for those awards. This Finding is also a verity on appeal, in direct contradiction to Laurance's claim that he was not given an opportunity to submit declarations to controvert the allegations or address the issues in the Petitions, though numerous petitions had been filed and hearings held in which the court was requested to assess cost and fee awards against Laurance, *Id.*

Nor did Laurance challenge Finding 1.3, asserting that the court made reasonable attempts to appoint a successor Trustee (after Laurance was removed but not discharged) to conduct a forensic accounting, but the nominee refused to serve due to the

that fact the Trust and probate estate had been fully distributed before the administration of the estates had been completed, *Id.*

Nor did Laurance challenge Finding 1.4, asserting that he had been directed to provide a copy of the forensic accounting he had obtained to Gay and Gilliam to provide an opportunity for them to review them prior to a special hearing scheduled for the purpose of reviewing the account, *Id.*

Finally, Laurance acknowledged, but did not otherwise challenge, Finding 1.8 that Commissioner Velategui did not participate as settlement judge or otherwise in the parties' negotiations to settle disputes or negotiate a CR2A or Settlement Agreement, *Id.*

Accordingly, each of these Findings are verities on appeal.

3. The Findings Underlying Removal of Laurance as Trustee and Assessing Fees and Costs of the Special Administrators are Supported by Substantial Evidence. If the Appellate Court concludes that merely referencing each Finding and concluding that they were "unsupported by substantial evidence," BA p. 27, is sufficient to challenge them, it is submitted that Respondent's failure to offer declarations to controvert those

allegations or give oral testimony does not require the conclusion that "substantial evidence does not exist to support the findings," *Id.* In addition to motions, pleadings and Declarations of counsel, Laurance did, in fact, submitted numerous Declarations related to the accounting, the agreement to petition for a lot line adjustment, his failure to carry out the terms of the CR2A Agreement, and other issues raised by the Petitions: CP 83-87; 88-90; 231-263; 264-266; 450-501; 631-634; 684-689; 692-694; 720-725; 726-728; 950-987; 1212-1213.

The complete record makes it clear, even without a bench or jury trial, that there was sufficient evidence to justify the court's rulings regarding Laurance's removal and award of fees and costs. First, removal of Laurance as Trustee was justified on several grounds: upon petition of a trustor, trustee, or beneficiary, the superior court may remove a trustee for reasonable cause, RCW 11.98.039(4)(c); breach of the trustee's fiduciary duty, a conflict of interest between the trustee and the trust beneficiaries, or bad will generated by litigation, among other things, may provide a superior court with reasonable cause to remove a trustee, *In re Estate of Ehlers*, 80 Wn. App. 751, 761, 911 P.2d 1017 (1996) (citing *Waits*

v. Hamlin, 55 Wn. App. 193, 198, 776 P.2d 1003 (1989)); and the superior court has wide latitude in exercising its discretion to remove a trustee "when there is sufficient reason to do so to protect the best interests of the trust and its beneficiaries." *In re Marriage of Petrie*, 105 Wn. App. 268, 274-75, 19 P.3d 443 (2001) (quoting *In re Estate of Cooper*, 81 Wn. App. 79, 94-95, 913 P.2d 393 (1996)).

Similarly, under RCW 11.32.030, the superior court has been granted authority to appoint a special administrator of a decedent's estate, with the authority to:

. . . collect all the goods, chattels, money, effects, and debts of the deceased, and preserve the same . . . ; and for that purpose may commence and maintain suits as an administrator, . . . The appointment may be for a specified time, to perform duties respecting specific property, or to perform particular acts, as stated in the order of appointment. Such special administrator shall be allowed such compensation for his or her services as the said court shall deem reasonable, together with seasonable fees for his or her attorney.

In addition to the general authority under the statute authorizing appointment of special representatives, TEDRA (RCW 11.96A.150) provides:

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) from any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters....

The Order appointing the Special Administrator directed Gay to perform discovery, determine the status of the Estate, and report to the court and that her appointment was made "at her customary fee," CP 19.

Laurance complains that the court abused its discretion (1) by awarding fees without providing for a full hearing on the merits of the case, and (2) by granting judgment of all of the Special Administrator's fees against him, BA p. 28. He also asserts that the fees incurred by Gay and Gilliam "were entirely the fault of Alan," BA p. 30. This is clearly not the case and is not supported by the evidence.

On the basis of Laurance's activities involving both trust and estate assets, clearly he had assumed the position of *de facto* Trustee, having assumed the duties and asserted authority to direct the operation of the estates. *In Re Trust of McLean*, 144 Wn.App. 333, 183 P.3d 317 (2008). The record reflects that Gay's notice of intent to request that the court assess pre-removal fees and costs against both Alan and Laurance was provided as early as May 2006. There is no basis for asserting that fees and costs should not be assessed against Laurance for the period prior to the time Alan was removed as Trustee.

On this basis, the court's award of the full amount of fees and costs was justified. First, as cited earlier, matters involving probate, trusts and estates, including awards of fees and costs, are equitable proceedings within the discretion of the court (RCW 11.96A.150) and do not require "full hearing[s] on the merits of the case" to make a determination as to the appropriateness of the award of fees and costs, and such awards are reviewed for an abuse of discretion. *In re Larson*, 103 Wn.2d 517, 694 P.2d 1051 (1985). In view of Laurance's fiduciary position in regard to the assets of both the Family Trust, as co-Trustee, and as *de facto*

trustee of the probate estate; and in view of the fact that he received assets from the estate which should have been distributed to the Trust, clearly the probate court had equitable authority to assess the fees and costs against Laurance, particularly in light of the fact that his receipt and acceptance of distributions depleted the Trust and probate estate funds from which no administrative costs could be paid.

Secondly, Laurance differentiates between the fees and costs incurred up to the date of Alan's removal as Personal Representative (August 2006) and the fees and costs entered after that date. It is untrue that Gay's fees up to that date "had nothing to do Laurance" or "did not involve Laurance in any way," BA p. 31. By that date, Gay has already filed two Interim Reports, CP 1141-1174; 1216-127i. The reports set forth in detail the attempts to communicate with both Alan and Laurance; attempts to obtain the status of estate and trust assets and the distribution of those assets; dealing with correspondence from Laurance refuting the authority and jurisdiction of the court (and Gay) to demand an accounting; declaring that the estate had been closed; and indicating that the matter had been referred to the Bar Association

for disciplinary action, CP 1217-1218. Pursuant to Gay's Second Interim Report filed in May 2006, *Id.*, citations had been issued to both individuals, Gay had had conversations with accountants regarding Laurance's participation in preparation of a fiduciary income tax return, and so forth, and disclosure was made that Laurance had participated in improper distributions and was aware that the assets of the estate had already been distributed to individual beneficiaries rather than to the Family Trust.

Finally, there is no indication in the record that Laurance asserted that the fees and costs should be allocated until the issue was presented in his Appellate Brief. Accordingly, the orders and judgments against Laurance for the Special Administrator's fees and costs should be affirmed.

E. The Court Should Deny Laurance's Request for Appellate Fees and Impose the Special Administrator's Fees and Costs on Appeal Pursuant to RAP 18.1. Laurance requests an award of attorneys' fees and costs on appeal, citing RCW 11.96A.150(1)(a) and RAP 18.1 as authorities for an award. The TEDRA statute states that in exercising its discretion whether to award fees to any party, the court may consider any and all factors

that it deems to be relevant and appropriate; and further states that such factors may but need not include whether the litigation benefits the estate or trust involved. In this case, it is respectfully submitted that the Court should take into consideration the myriad of actions and omissions on Laurance's part that did not benefit but, in fact, harmed the estate and/or the trust and were clearly intended to benefit himself, CP 1321-1322; 1386-1390 (Orders issuing citation to Laurance; and awarding sanctions against Laurance and directing that failure to comply with order to produce a full accounting "shall result in findings of contempt as to Laurance Foster with sanctions to include but is not limited to monetary judgments and jail time").

It is further submitted that the citations issued and sanctions imposed by the trial court against Laurance illustrate the frivolous nature of this appeal. RAP 18.9(a) allows an appellate court to impose sanctions against a party who uses the appellate rules for the purpose of delay or who fails to comply with these rules. The Court of Appeals has also invoked this section of the rule to impose sanctions on a party whose appeal was not frivolous, but who had repeatedly used the appellate rules and procedures for delay and

harassment. *Rich v. Starczewski*, 29 Wn. App. 244, 628 P.2d 831, rev. denied, 96 Wn.2d 1002 (1981).

Based on the foregoing authority, it is respectfully submitted that Laurance's petition for award of attorneys' fees and costs on appeal should be denied.

V. REQUEST FOR FEES AND COSTS ON APPEAL

The Special Administrator respectfully requests an award of her fees and costs incurred on appeal against Laurance E. Foster pursuant to RCW 11.96A.150(1)(a) and RAP 18.1. The Orders and Judgments entered by the Superior Court were authorized by Court Rule and statute, and Laurance was not deprived of any right to trial or jury. The actions of the trial court were based on substantial evidence and the court did not abuse its discretion in the award of the Special Administrator's fees and costs.

VI. CONCLUSION

The Special Administrator respectfully requests that the trial court orders and judgments be affirmed in all respects and Judgment be entered for fees on appeal.

RESPECTFULLY SUBMITTED this 22nd day of December,
2010.



Sandra Bates Gay, WSBA 13491, *Pro Se*
Respondent / Former Special Administrator of
Foster Estates (Discharged)

¹ RP 01/18/2006, p. 8, ll. 14-21:

MR. STODDARD: "And I've previously stated to this Court, there is no question when I became involved that Alan Foster did not understand certain things he was supposed to do. Subsequently, I have made sure he did know and I know he did. And [Laurance] Foster can confirm. I've CC'd him copies of our correspondence. He's received everything from me, so he knows that his brother has been fully advised what to do."

Id., p. 9, l. 21 – p. 10, l. 3:

MR. STODDARD: "[Laurance] Foster has been working with his brother and does know most of, probably 90 percent of, the transactions and can, if we have those bank records, reconstruct what was done. Therefore, I recommend he be appointed as the replacement executor because that's going to save a great deal of money to the estate, and all we need is that order to get the records."

Id., p. 15, ll. 7-13:

THE COURT: "And I appreciate the offer that is made by [Laurance] Foster to step in here. He does have the closest relationship with his brother now. There was some difficulty with that in the past. And he has good knowledge about the administration of this estate. But I think a professional who's outside this family needs to step in here and take care of business."

Id., p. 21, ll. 16-22:

[LAURANCE] FOSTER: "Commissioner Watness, the only person that knows how to reconcile (inaudible) so what has been paid is me. I'm the only one who knows. You can get the bank records –"

THE COURT: "I'm going to ask you to cooperate with whoever the special representative is – all of you – in order to assist in getting this wrapped up."

Id., p. 25, ll. 7-13:

[LAURANCE] FOSTER: "But when you said that nobody's – are taking care of the minors in the trust, that's not true. I've taken care of – I've done

including Laurance E. Foster, the Court vacated its Order of September 26, 2006 (in which the Clerk of the Superior Court had been directed to execute a Deed and convey the subject property to Laurance E. Laurance as trustee of the Trust) and entered a Judgment judicially divesting the interest of Lloyd A. Foster and Joyce C. Foster, and their marital community in the subject real property, CP 1314-1320. The property was conveyed pursuant to the Court's Order, and a Notice of Judgment of Conveyance was recorded on February 6, 2007, CP 130; 145-156.

⁸ Laurance in fact had notice of the hearing through his attorney of record at that time, Raymond Gessel. In addition, Laurance sent Gay a memorandum dated January 11, 2007, stating "I have no objection to the order you have concerning the ten acres. Mr. Watness just needs to sign it," CP 158.

⁹ Over a period of four years, the court entered a number of Orders expressly reserving a determination of Laurance Foster's liability for fees and costs of the Special Representative and/or Special Administrator, subject to compliance with various orders directing cooperation with discovery and accounting issues, CP 1671-1680.

¹⁰ The court also directed that interim awards be reduced to judgment (CP 653), and that the fees and costs be paid, in part, from the proceeds of sale of the ten-acre parcel and from contributions from Alan and Laurance Foster, CP 656-657 and, for this reason, Gay and Gilliam remained involved in the case in the months following.

¹¹ Laurance denies that he failed to comply with the Order for the lot line adjustment and proposed planned refinancing and that these actions failed "through no fault of his own." BA p. 13. This is not true: For example, he was directed, together with Alan, to take steps to accomplish the lot line adjustment and was specifically directed to provide funds to pay the fees associated with the lot line adjustment. Further, he was directed to market the ten-acre parcel. The Special Administrator and Special Representative were authorized, upon notice, to request that the awards for their fees and costs be reduced to judgment. The order further provided that Alan as both Personal Representative and co-Trustee and Laurance as Trustee would remain liable for any other claims not otherwise addressed by the Order or any future order related to fiduciary duties and responsibilities.

Gay and Gilliam served and filed Requests for Special Notice of Proceedings following their discharge. At no time did the parties receive a status report of information about the lot line adjustment, refinance applications or sale of property – or lack of any such activity – from either Laurance, Alan or their counsel. The court ordered the parties to submit status reports prior to review hearings to be held every 60 days. Prior to the hearing scheduled for March 31, 2009, Gay requested that Laurance's counsel provide a status report and

received no response. After Gay and Gilliam filed their motions for awards of fees, Laurance, for the first time, complained that Alan did not make a request for funds needed for the lot-line adjustment or was otherwise not cooperating with the lot line adjustment; that inadequate efforts were taken to market Lloyd Alan Foster's residence and/or the 10-acre parcel owned by the Trust, though the task of marketing had been placed on Laurance; and that Alan did not take reasonable steps to secured the reverse mortgage or re-finance of his home to fund the actions directed by the court's Order. Cynthia Foster, Alan Foster's daughter, indicated that messages had been left and that Laurance had received messages from her brother Russell regarding the re-finance but that the calls were never returned. Gay discovered the status of the re-finance only after reviewing the auditor's records and noting that the Trustee's Sale was continued on two occasions.

On May 1, 2009, Gay wrote a letter to all parties concerned, including both Mr. McCreary and his client Laurance Foster, apprising them of the status of the Trustee's Sale and requesting a written report of what steps were being taken to comply with the court's Order of December 31, 2009. Neither Alan nor his counsel responded. Only through a review of the auditor's records did Gay learn that Alan Foster's residence was sold at auction to a third party on May 22, 2009, CP 674-677.

¹² In contrast, Cynthia Foster attested that she completed a detailed review of Alan Foster's records, that she reviewed all checks sequentially numbered (CP 1602-1606); that she did not see a check for \$139,000.00 or \$129,000.00, nor were there any numbered checks missing; and that the only check written to Laurance (with an image of the check produced by Cynthia) was in the sum of \$180,000.00, cashed and deposited to Laurance's personal account, CP 1604. Laurance did not produce evidence to refute this fact.

¹³ As discussed in this brief, the numerous findings and orders entered in connection with Laurance's failure to respond to discovery and directives to produce accountings were based on multiple grounds. The probate court pointed out that proof of breach of fiduciary duties was not necessary, since there was no dispute that Laurance accepted distributions that should have been made to the Family Trust for apportionment to the minor beneficiaries, even in absence of *scienter* as to the appropriateness of the distribution. RP 11/23/2009; p. 17, l. 18 – p. 18, l. 13. See November 16, 2009 Declaration of Gilliam attaching accounting provided by Laurance, establishing that distributions were made to beneficiaries to the exclusion of the minor beneficiaries, CP 777-781.

¹⁴ Appellant's brief consistently references and analyzes whether the probate court abused its discretion in awarding "attorneys' fees," citing *In re Guardianship of Mathews*, 156 Wn.App. 201, 232 P.3d 1140 (2010), BA p. 17. TEDRA, the

controlling statute, RCW 11.96A.150, authorizes the trial and appellate courts, in the courts' discretion, to order "costs, including reasonable attorneys' fees," to be awarded to any party from any party to proceedings involving trusts, decedents' estates and guardianships. The reference to "costs" properly includes the expenses of court-appointed administrators, RCW 11.32.030. The TEDRA statute expressly provides that in exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved, RCW 11.96A.150(2).

¹⁵ There is no basis for distinguishing between awards of post-appeal attorneys' fees and fees of a personal representative. RCW 11.32.030 allows a special administrator such compensation for his or her services as the court shall deem reasonable, together with reasonable fees for his or her attorney.

¹⁶ Although a party may not assign error to the oral findings of the trial court, oral findings may be used to interpret written findings. *El Cerrito, Inc., v. Ryndak*, 60 Wn.2d 847, 857, 376 P.2d 528 (1962).

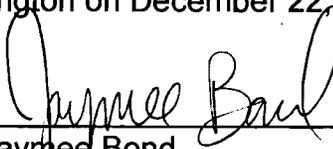
CERTIFICATE OF SERVICE

I CERTIFY that I delivered for service a copy of the foregoing
**BRIEF OF RESPONDENT SANDRA BATES GAY, SPECIAL
ADMINISTRATOR (DISCHARGED)**, via Messenger on the 22nd day
of December, 2010, to the following counsel / parties of record at the
following addresses:

B. Jeffrey Carl
705 Second Avenue, Suite 910
Seattle, WA 98104

Jennifer J. Gilliam
Attorney at Law
5605A Keystone Place North
Seattle, WA 98103

SIGNED at Bellevue, Washington on December 22, 2010.



Jaymee Bond