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64633-8

NO. 64633-8-I and ~~65132-3-I~~  
(consolidated)

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

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

---

BRIEF OF APPELLANT LAURANCE FOSTER

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2010 MAR 23 PM 1:17  
COURT OF APPEALS  
DIVISION ONE  
SEATTLE, WA

ORIGINAL

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## I. INTRODUCTION

This case involves judgments entered against a beneficiary of his parents' estate. Laurance Foster, one of two sons of his deceased parents, was entitled to thirty-five percent (35%) of his parents' assets. Laurence's brother Alan Foster, who was entitled to twenty-five percent (25%) of the assets, was personal representative of the estate. Twenty percent (20%) of the assets was to go to grandchildren, and twenty percent (20%) was to go to great grandchildren, eight of whom were minors. There is no dispute that while he was personal representative, Alan Foster misappropriated the minor beneficiaries' shares. A judgment was entered against Alan Foster in August 2006 for the amounts due to the minors and for attorney fees for a Special Representative who was appointed to represent the minors' interests. Subsequently, the Special Representative sought to make Laurance Foster jointly and severally liable with Alan for the minors' shares and for her fees.

The deceased parents' estate plan included a revocable family trust and pour-over wills. The trust contained the distribution scheme referred to above. After both parents had passed away, the majority of their assets remained in their estate, rather than the trust. In 2004, Alan Foster, instead of transferring money from the estate to the trust, began

distributing funds directly from the estate. He made distributions to the grandchildren and some of the great grandchildren, and he made a partial distribution of \$129,000 to Laurance Foster. He never made the required distributions to the minor great grandchildren. Laurance did not know, and had no reason to know, that Alan was going to misappropriate the minors' share of funds.

In May 2008, the Special Representative filed a petition seeking judgment against Laurance Foster for the amounts due to the minors. The Special Representative alleged that Laurance was a co-trustee of the family trust at the time Alan made the \$129,000 distribution to him, and that as a co-trustee, Laurance was legally required to hold those funds in trust for the minors. Laurance contested both of those allegations. He filed an answer to the petition and a jury demand.

On November 23, 2009 (over one year later), at a review hearing on an accounting filed by Laurance, a court commissioner entered the judgment requested by the Special Representative without hearing any oral testimony. This case involves Laurance Foster's appeal from that judgment and associated judgments for attorney fees of the Special Representative and a Special Administrator who was involved in the case.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The trial court erred in entering an order and judgment against Laurance Foster on November 23, 2009 without setting the matter for trial or taking oral testimony, because there were factual issues to be determined.

2. The trial court erred in entering an order and judgment against Laurance Foster on November 23, 2009 without ruling on his affirmative defenses.

3. The court erred in entering findings of fact in the November 23, 2009 orders against Laurance Foster that were not supported by substantial evidence.

4. The trial court abused its discretion in entering judgment for attorney fees against Laurance Foster on November 23, 2009 and January 27, 2010.

### **B. Issues Pertaining to Assignment of Error**

1. Were there legal and/or factual issues or issues of credibility that made a trial necessary?

2. Were there legal and/or factual issues or issues of credibility that made oral testimony necessary?

3. Should a person be considered a trustee during the period of his appointment if the order of appointment is later vacated?

4. Is it an abuse of discretion to award attorneys' fees against a party when the basis of the award is a breach of fiduciary duty that has not been proven?

5. Is it an abuse of discretion to award attorneys' fees against a party when the same fees were previously found to be solely the responsibility of another party?

6. Is it an abuse of discretion to award attorneys' fees against a party when a portion of the fees awarded were incurred solely for time spent on matters that did not relate to the party?

### **III. STATEMENT OF THE CASE**

This case concerns the involvement of two brothers, Lloyd Alan Foster and Laurance Foster, in the probate of their parents' estate. Alan and Laurance are the sons and only children of Lloyd W. Foster and Alice H. Foster. Lloyd W. Foster and Alice H. Foster executed the Foster Family Trust (the "Trust"), a revocable living trust, on November 25, 1992. CP 831-844. On that same day, they each executed a will. CP 1-2, 845-46. Both wills are pour-over wills, providing that real and personal property not conveyed to the Trust at the time the Trust was executed

would be conveyed to the Trust at the death of the surviving spouse.  
CP 1, 845.

The Trust provided for distribution of Trust assets following the trustors' deaths as follow:

- Thirty-five percent (35%) to Laurance;
- Twenty-five percent (25%) to Alan;
- Twenty percent (20%) to grandchildren; and
- Twenty percent (20%) to great-grandchildren.

CP 836. Lloyd W. Foster died in September 1998. Alice Foster died December 9, 2002. CP 3.

After the filing of the wills in June 2003, Alan Foster began the administration process of his parents' estate (the "Estate") and the Trust. CP 5-7. Alan was appointed both personal representative of the Estate and Co-Trustee of the Trust, to serve with either of two named individuals, both of whom were named as successor trustees in the original trust document. CP 841. Both the named individuals refused to serve as Co-Trustee. On September 16, 2003, pursuant to an order entered in connection with a motion for instructions filed by Alan Foster, Jennifer Gilliam was appointed Special Representative for the eight minor beneficiaries of the Trust. CP 9. Her duties were to represent the interests

of the minor beneficiaries in both the probate and trust matters and ensure that the probate and trust were properly handled. CP 851.

On January 13, 2004, pursuant to an ex parte motion by Lloyd Foster, Laurance Foster was appointed as co-trustee of the Trust. CP 847. That order of appointment was vacated on August 11, 2004, but the motion was kept pending. CP 848-852. An order was subsequently entered pursuant to that motion on January 26, 2005, appointing Laurance as co-trustee. CP 112.

As personal representative of the Estate, Alan Foster was the only person with access to monies in and records concerning the Estate. While there is some question about the valuation of the net Estate, the orders that are being appealed from were based on the determination that there was a net Estate value of \$632,306. CP 861.

Instead of following the proper procedure called for in the wills, of putting Estate money into the Trust before distributing it, Alan Foster made distributions to beneficiaries directly from the Estate. At issue in this case are distributions made (and distributions not made) by Alan on January 23, 2004 from Estate funds directly to all the adult beneficiaries named in the Trust. CP 281. As part of those distributions, Alan made a

partial distribution directly into Laurance Foster's bank account in the amount of \$129,000. CP 281.

Alan failed to distribute at least \$100,000 that should have been used as distributions to the great grandchildren. CP 22. Alan Foster does not deny misappropriating those funds. As a result of this impropriety, on January 18, 2006, Alan was removed as personal representative of the Estate and Sandra Bates Gay was appointed by the Court as Special Administrator for those proceedings. CP 19. Ms. Bates Gay was appointed to conduct discovery into the status of the Estate assets.

In May 2005, the Trust held funds of approximately \$400,000, primarily from the sale of a Hawaiian residence. CP 856. Soon after the sale of the residence, distributions were made from the Trust according to the disposition provisions in the Trust, including dispositions to the minor beneficiaries that were used to establish educational trusts. CP 856. There have not been any allegations made that the distributions from the Trust were improper.

As part of those distributions from the trust, because the \$129,000 Alan distributed to Laurence from Estate funds was less than the thirty-five percent (35%) distribution Laurance was due pursuant to the

disposition provisions of the Trust, Alan agreed to a \$40,900 distribution from his share of the Trust assets to Laurance. CP 281; 756.

On May 11, 2006, the Special Representative brought a petition seeking judgment against Alan Foster for amounts that Alan should have used to complete the funding of the minor's accounts, but that he had instead misappropriated. CP 20-24. The Special Representative's petition also requested an award of fees against Alan Foster. CP 20-24. At that time, the Special Administrator also brought a motion for fees, asking that her fees be awarded against both Alan Foster and Laurance Foster. CP 32-43.

A hearing on the Special Representative's petition and the Special Administrator's motion was held on August 23, 2006 before Commissioner Eric B. Watness. Judgment was entered against Alan Foster for \$83,440 -- \$10,430 for each of eight minor beneficiaries. CP 91-96. Judgment was also entered against Alan Foster for \$12,985.02 for fees in favor of the Special Representative, CP 91-96, and for \$14,117.57 for fees in favor of the Special Administrator. CP 97-99.

Of particular significance, the Special Representative did not request judgment against Laurance Foster for either monies due to the minors or her fees. It was clear that the funds due to the minors had been

stolen by Alan Foster and that the judgment in favor of the minors was the responsibility of Alan Foster. Alan did not even respond to the petition.

As for her attorney fees, the Special Representative stated:

...all of the time incurred was a direct result of Lloyd Alan Foster's failure to provide information concerning his activities as Personal Representative, failure to comply with court orders and lack of candor to the court.

CP 26, ll. 20-23.

It should also be noted that in not entering an award of fees for either the Special Representative or the Special Administrator against Laurance Foster, the court stated:

The benefits that have been provided by [the Special Representative and the Special Administrator] have been both to the trust and the probate and have been caused by Lloyd Alan Foster's intransigence and his failure to fulfill his professional duties.

VRP1, p. 39, ll. 6-9.<sup>1</sup> The court further stated that:

[Laurance] Foster has complied. I don't know of anything else he could do. I haven't been presented with any evidence that tells me that he's withholding a shred of information or evidence. He's in compliance with the citation and order.

VRP1, p. 36, ll. 9-11.

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<sup>1</sup> There are three verbatim reports of proceedings. The first, referred to herein as VRP1, is from a hearing before Commissioner Eric B. Watness on August 23, 2006; the second, referred to as VRP2, is from a hearing before Commissioner Carlos Velategui on November 23, 2009; and the third, referred to as VRP3, is from a hearing before Commissioner Carlos Velategui on January 27, 2010.

At the time of the August 2006 hearing, there was also an issue regarding real property in the name of Alan Foster located in King County. The Special Administrator alleged that the property was in fact property belonging to the Trust. CP 66. Over the next several years, large amounts of time were spent by both the Special Representative and the Special Administrator getting the property transferred to the name of the Trust and attempting to get that property and adjoining property belonging to Alan Foster sold so as to provide funds for funding the accounts of the minor beneficiaries and to pay the judgments entered for fees. CP 227-230, 577-586 (time records of Special Representative); and CP 117-119, 665-668 (time records of Special Administrator).

As it became clear that collection of the judgments against Alan Foster would be difficult, if not impossible, the Special Representative and the Special Administrator continued efforts to locate potential additional assets of the Trust and/or the Estate. Accountings were requested of both Laurance and Alan Foster. On May 6, 2008, Laurance Foster filed an accounting for both the Estate and the Trust that provided financial details as far as he knew them or had access to them. CP 276-431. No formal accounting of the Estate was ever provided by Alan Foster. It should be kept in mind that Laurance was never the personal representative of the

Estate and that Alan Foster, not Laurance Foster, had control of all Estate financial records.

On May 22, 2008, after the accounting was filed, the Special Representative filed a petition seeking, among other things, to add Laurance Foster as a judgment debtor, jointly and severally with Alan Foster, with regard to the judgment entered against Alan Foster on August 23, 2006 that included the \$83,440 judgment for the minors and the judgment for her attorney fees (and to enter a judgment against both Alan Foster and Laurance Foster for her fees since August 23, 2006). The request for relief against Laurance Foster was based on allegations of breach of fiduciary duty. CP 866-67.

The allegations of breach of fiduciary duty were based on Laurance Foster's receipt of the \$129,000 distribution from the Estate in January 2004. It was the Special Representative's position that Laurance was a co-trustee of the Trust when he received the \$129,000, and he therefore had a fiduciary obligation to use those funds to fund accounts for the minor beneficiaries of the Trust. CP 853-870. On June 2, 2008, Laurance Foster filed an Answer to the petition, denying the allegations of breach of fiduciary duty and setting forth affirmative defenses. CP 503-

510. He also filed a jury demand. CP 502. Action of the petition was not taken until November 23, 2009.

During the last half of 2008, attempts were made to force Alan Foster to sell his residence in order to at least partially pay for the judgments entered against him. CP 651-61. Laurance Foster was involved in those attempts, but as of December 2, 2008, the attempts were unsuccessful. CP 631-634. At a hearing on December 31, 2008, the court entered orders acknowledging that Alan and Laurance Foster agreed to take steps to accomplish a lot line adjustment between Alan's residence and the adjacent property owned by the Trust, in order to facilitate the sale of those properties. CP 651-61. Also on December 31, 2008, the court entered orders discharging the Special Representative and the Special Administrator. CP 648-50, 651-61.

The lot line adjustment and the sale of the real properties never happened. On June 3, 2009, the Special Representative brought a petition seeking to have her fees, previously approved by the court, reduced to judgment against the Trust and against both Alan and Laurance Foster. CP 674-76.

On June 6, 2009, the Special Administrator filed a motion seeking to have her fees, previously approved by the court in the amount of

\$50,408.25, reduced to judgment against the Trust and against both Alan and Laurance Foster. CP 678-683. The Special Representative's petition and the Special Administrator's motion seeking judgment against Laurance Foster were based upon allegations that Laurance Foster failed to comply with the December 31, 2008 order from the court related to the lot line adjustment and proposed re-financing property owned by Alan Foster in order to provide funds for the minor beneficiaries and to pay the fees of the Special Representative and Special Administrator. CP 675, ¶ 3; 679-81, ¶¶ 1.4-1.6. Laurance Foster denied the factual allegations of the Special Representative and the Special Administrator that he failed to comply with the order for the lot line adjustment and proposed planned refinancing, explaining why, through no fault of his own, the lot line adjustment and refinancing could not be accomplished. CP 692-93, 687-88.

On June 16, 2009, at a hearing on the petition and the motion, the court entered judgment for fees against the Trust but declined to enter judgment against Laurance Foster. CP 731-33, 734-43. At that hearing, the court appointed Thomas Keller as Interim Trustee of the Foster Family Trust to:

perform a forensic accounting of the Trust and Estates to determine whether the former Trustees and Personal

Representatives breached their fiduciary duties to the Trust and Estates.

CP 918-19. The court also set status hearings for “September 22, 2009, and each 60 days thereafter”. CP 919. As acknowledged by the Special Administrator on September 18, 2009, in a submission related for the first scheduled status hearing, the court was reserving the issue of a judgment against Laurance Foster pending the Interim Trustee’s report. (CP 747, ll. 7-11). Thomas Keller, however, declined to act as Interim Trustee. CP 920.

In September 2009, at a status/review hearing, Laurance Foster’s attorney told the court that Laurance had obtained a forensic accounting of the trust. VRP2, p. 6, ll. 24. The court set a review hearing on the accounting. CP 921-924. The accounting was filed November 4, 2009. CP 754-758. Then, on November 17, 2009, the Special Representative filed a “Response . . . to Accounting” in which she renewed her request that the August 23, 2006 judgment against Alan Foster be amended to add Laurance Foster as a joint and several judgment debtor. Laurance Foster filed a Reply on November 19, 2009, again denying the Special Representative’s claims and asserting his right to a jury trial. CP 782-784.

The review hearing was held November 23, 2009 before Commissioner Carlos Velategui. After hearing oral argument, but no oral

testimony, and over the objections from counsel for Laurance Foster, the court entered orders that (1) amended the August 23, 2006 judgment against Alan Foster to add Laurance as a joint and several debtor with Alan Foster for the \$83,440 that is the total of individual judgments of \$10,430 in favor of each of eight minor beneficiaries of the Foster Family Trust and the \$12,985.02 for attorney fees incurred by the Special Representative through August 23, 2006; and (2) entered a judgment against Alan Foster and Laurance Foster for \$23,822.88 for attorney fees incurred by the Special Representative from August 23, 2006 through December 31, 2008. CP 801-810.

The court also entered an order prepared by the Special Administrator (that was presented without notice) that, also based on alleged breaches of fiduciary duty, declared Laurance Foster jointly and severally liable for fees to the Special Administrator previously approved by the court in the amount of \$50,408.25. CP 788-795; 798-800.

The court entered the following findings of fact with regard to its order and judgment presented by the Special Representative:

4. Lloyd Alan Foster, as former Personal Representative, and as former co-trustee, has breached his fiduciary duties to the minor beneficiaries by failing to properly administer the probate estate, by making direct distributions to himself and to Laurance Foster rather than to the Foster Family Trust, by deliberately failing to report

these distributions to the court and to the Special Administrator, by failing to account for a hold back for the minors' share and by failing to protect the financial interests of the minors.

5. Laurance Foster, as co-trustee from January 13, 2004 through August 11, 2004, as co-trustee from January 26, 2005 through August 23, 2006 and as sole trustee from August 23, 2006 through June 16, 2009, has breached his fiduciary duties to the minor beneficiaries by personally accepting substantial distributions from the probate estate that should have been distributed to the Foster Family Trust, by agreeing that the Personal Representative could withhold the share of the minors for no known legitimate reason, for deliberately failing to disclose his knowledge of the administration of the probate estate and the distributions to himself and to Lloyd Alan Foster to the court and to the Special Administrator, and by failing to protect the financial interests of the minors.

6. The lack of candor, lack of cooperation, and outright hostility towards the Special Administrator, Special Representative and the court throughout these proceedings have resulted in astronomical fees in this matter that otherwise would not have been incurred but for the actions and inactions of Lloyd Alan Foster and Laurance Foster.

CP 807. Similar Findings were entered in the order granting fees to the Special Administrator. CP 789-791.

On January 27, 2010, additional judgments were entered against Alan Foster and Laurance Foster, jointly and severally, for fees incurred by the Special Representative in the amount of \$12,775.26, CP 929-931, and by the Special Administrator in the amount of \$13,902.73, CP 926-928, for time spent on this matter in 2009.

It is from the November 23, 2009 and January 27, 2010 orders entering judgments against him that Laurance Foster appeals.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

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. Estate of Black, 116 Wn. App. 476, 483, 66 P.3d 670 (2003); aff'd on other grounds, 153 Wn.2d 152, 102 P.3d 796 (2004).

With regard to the orders related to attorneys' fees, the standard of review is abuse of discretion. In Re Guardianship of Matthews, 38105-2-II (Wn. App. 5-18-10).

##### **B. The Court Erred By Entering the November 23, 2009 Order and Judgment.**

###### **1. The Court Erred When it Refused to Grant Laurance Foster a Trial and Entered Judgment on Inadequate Notice.**

Under LCR 40.1(b)(2)(E), all proceedings brought under Title 11, RCW are set on the Guardianship/Probate calendar in the Ex Parte and Probate Department. For contested matters, the Commissioner can refer the case to the clerk to issue a trial date. Id. That is the procedure that should have been followed here because of the number and complexity of factual issues involved, and especially because a jury demand had been

filed. CP 502. RCW 11.96A.170 supports the right to a jury trial in Trust and Estate matters. The right to jury trial is guaranteed by article I, section 21 of the Washington Constitution. There is a right to a jury trial in a tort action. Endicott v. Icicle Seafoods, 167 Wn.2d 873, 884-85, 224 P.3d 761 (2010). Breach of fiduciary duty is a tort action, and Laurance Foster therefore had a right to a jury trial. Andrea v. Ferrer, 168 Wn.2d 193, 198, 225 P.3d 990 (2010). Court Commissioners may not hear jury trials. State ex rel. Lockhart v. Claypool, 132 Wash. 374, 375, 232 P. 351 (1925). The Special Representative addressed Laurance Foster's request for a trial at the hearing by saying that "...there's no money to take this to trial." VRP2, p. 11, ll. 21-22. In a factually complex matter that requires discovery and oral testimony, a decision not to set a trial because of the cost involved is reversible error. Laurance Foster has a right to a jury trial in this matter and the court erred by entering judgment without referring the matter to the Superior Court for a jury trial. Instead, the Commissioner entered a judgment at a review hearing for an accounting, after oral argument, but with no oral testimony. CP 801-810.

Even if the court did not err by not referring this matter to the trial calendar, entering the order and judgment at a review hearing related to an accounting was error. The Special Representative did not even note up a

motion, but instead, five (5) days before the review hearing, she filed a Reply to the accounting that renewed her request that Laurance Foster be added to the August 23, 2006 judgment against Alan Foster. The court should not have entered a judgment against Laurance Foster at the November 23, 2009 hearing for a multitude of reasons, including the Special Representative's failure to properly note a motion and to provide adequate time for Laurance Foster to prepare a response to the Special Representative's claims before the hearing.

**2. The Court Erred In Holding a Hearing Without Oral Testimony When There Were Factual Issues Related to the Claims for Breach of Fiduciary Duty.**

When a petitioner makes an application by motion to the court for an order, the court has discretion to determine whether there are factual and credibility issues that require a testimonial hearing. Blaine v. Feldstein, 129 Wn.App. 73, 76, 117 P.3d 1169 (1005).

If there are no relevant factual disputes or credibility issues and the record is sufficient to fully inform that court, the case may be properly resolved without a testimonial hearing.

Id. Here, aside from the fact that the orders were entered at a review hearing with inadequate notice, there were factual disputes that required oral testimony.

In her petition, the Special Representative asserts that Laurance Foster breached fiduciary duties to the minor beneficiaries by personally accepting distribution from the Estate that should have gone to the Trust, by agreeing that the Estate could withhold the minors' share "for no known legitimate reason," for deliberately failing to disclose his knowledge of the administration of the Estate to the court and by a "general failure to protect the financial interests of the minors." CP 866-67.

Laurance Foster acknowledges that he received a \$129,000 distribution from the Estate, but he denies that he was a co-trustee at the time the \$129,000 distribution was made. This is one of the affirmative defenses to the petition raised by Laurance Foster. The argument related to that affirmative defense is set forth below at § 3.2. Even if it is determined that he was a co-trustee, Laurance denies any knowledge that the distribution should not have been made or that his receipt of funds was inappropriate.

Alan Foster had full control of the Estate assets. He was making partial distribution from the Estate to the beneficiaries named in the Trust. While this was not the proper procedure, Laurance believed Alan was making full distribution of the monies in the Estate to the beneficiaries

named in the Trust. He had no reason to believe Alan intended to misappropriate the funds that belonged to the minors. Laurance was therefore within his rights to accept the funds in his capacity as a beneficiary rather than a trustee (even if he should be treated as having been a trustee at that point).

There is also a factual dispute regarding the damages incurred by the minor beneficiaries if a breach of fiduciary duty were to be found. Even if it was improper for Laurance Foster to keep the \$129,000 he received in a distribution from Alan, and the Trust was the proper repository for those funds, the minor beneficiaries were only entitled to a portion of those funds. Under the Trust, the great grandchildren were entitled to a 20% distribution. CP 836. There were twelve great grandchildren, and eight of those were minors. CP 856. That means that the great grandchildren's share of the \$129,000 would have been \$25,800 (or \$2,150 each), and the eight minors would therefore have been entitled to a total of \$17,200. The entry of judgment in the amount of \$83,440 for the minors was not supported by the facts.

A further factual dispute relates to Laurance Foster's affirmative defense of statute of limitations. CP 508. Pursuant to RCW 11.96A.070, the Special Representative's petition must have been filed within three

years from the time the alleged breach was discovered or reasonably should have been discovered. Here, the petition was filed May 22, 2008. The distribution to Laurance was made January 23, 2004, more than three years prior to the petition.

The Special Representative alleges that she did not discover that a distribution was made by Alan Foster to Laurance Foster until January 20, 2006, less than three years from the date of filing her petition on May 22, 2008. CP 855. It is Laurance Foster's position that regardless of when the Special Representative learned of the distribution, she reasonably should have learned about it prior to May 22, 2005, in which case the statute of limitations would have run. For example, the Special Representative had authority to, and should have, subpoenaed bank records of Alan Foster.

When the statute of limitations issue was raised at the hearing, the Commissioner's only response, "[a]pparently it's still open," was based upon the Special Representative's assertion that there was no statute of limitations problem. VRP2, p 19, ll. 2-5. The court basically ignored Laurance Foster's affirmative defense when entering judgment.

In addition, Laurance denies agreeing that the Estate could withhold the minors' share, deliberately failing to disclose his knowledge of the administration of the Estate to the court, and generally failing to

protect the financial interests of the minors. All of the above are factual issues that require oral testimony, and because of the scope of the factual issues, the matter should have been set for trial (or at least the court should have taken oral testimony).

In fact, the court's prior rulings make clear that the court did not have all the facts necessary to make a determination in this matter. In its June 16, 2009 order, the court appointed an interim trustee to undertake an investigation of whether the former personal representative or trustees breached any fiduciary duties. CP 918-19. The court clearly saw a need to develop the facts related to the claims of breach of fiduciary duty. However, no such investigation was ever done as the interim trustee declined to act. CP 920. The Special Administrator acknowledged in September 2009 that because there was no investigation being conducted, "it is unclear what action would be appropriate at this time regarding the outstanding issues in this proceeding." CP 747, ll. 18-19. Without an independent investigation and without the discovery and briefing that would be involved if the matter was set for trial, there could be no full and fair determination of all the issues.

The court did not take any oral testimony in order to ascertain Laurance Foster's knowledge of the facts, the details of his response to the

allegations in the petition, or the credibility of any of the parties or other potential witnesses. Given the large number and complexity of factual and credibility issues raised by the petition and by Laurance Foster's Answer, even if the court did not err by not transferring the matter for a full hearing before a superior court judge, it erred by not requiring oral testimony.

**3. The Court Erred By Not Addressing Laurance Foster's Affirmative Defenses.**

In his Answer to the Petition, Laurance Foster raised several affirmative defenses. CP 508-509. None were substantively addressed by the court.

**3.1. Statute of Limitations.** As set forth above, Laurance Foster raised a statute of limitations defense in his Answer to the Petition. There are factual issues that need to be resolved with regard to this affirmative defense. The court erred by not providing an opportunity for this issue to be determined.

**3.2. Estoppel.** When an order is vacated, the rights of the parties are left as through the order had not been entered. Sutton v. Hirvonen, 113 Wn.2d 1, 9, 775 P.2d 448 (1989). The Special Representative's claims against Laurance Foster for which judgment was entered in favor of the minor beneficiaries is based on the allegation that Laurance Foster received a distribution from Alan Foster at a time when

Laurance was a co-trustee of the Trust, and that he therefore had a fiduciary duty to the minor beneficiaries to deposit the funds in the Trust rather than allow them to remain in his own account. Because the order appointing Laurance Foster as co-trustee in January 2004 was vacated by the court on August 11, 2004, CP 851, Laurance must be treated as not having been a co-trustee at the time he received the funds. If he was not a co-trustee when the distribution was made, he could not have breached a fiduciary duty. This affirmative defense was simply not addressed by the court and the court erred by not providing an opportunity for this issue to be determined.

**C. The Findings of Fact Are Not Supported By Substantial Evidence.**

The following Findings of Fact were entered by the court in the November 23, 2009 Order presented by the Special Representative related to the allegations of breach of fiduciary duty and her request for attorney fees:

4. Lloyd Alan Foster, as former Personal Representative, and as former co-trustee, has breached his fiduciary duties to the minor beneficiaries by failing to properly administer the probate estate, by making direct distributions to himself and to Laurance Foster rather than to the Foster Family Trust, by deliberately failing to report these distributions to the court and to the Special Administrator, by failing to account for a hold back for the minors' share and by failing to protect the financial interests of the minors.

5. Laurance Foster, as co-trustee from January 13, 2004 through August 11, 2004, as co-trustee from January 26, 2005 through August 23, 2006 and as sole trustee from August 23, 2006 through June 16, 2009, has breached his fiduciary duties to the minor beneficiaries by personally accepting substantial distributions from the probate estate that should have been distributed to the Foster Family Trust, by agreeing that the Personal Representative could withhold the share of the minors for no known legitimate reason, for deliberately failing to disclose his knowledge of the administration of the probate estate and the distributions to himself and to Lloyd Alan Foster to the court and to the Special Administrator, and by failing to protect the financial interests of the minors.

6. The lack of candor, lack of cooperation, and outright hostility towards the Special Administrator, Special Representative and the court throughout these proceedings have resulted in astronomical fees in this matter that otherwise would not have been incurred but for the actions and inactions of Lloyd Alan Foster and Laurance Foster.

CP 807-808.

Basically the same Findings were entered in the order presented by the Special Administrator. CP 789-790 (Finding 1.1). In addition, the Special Administrator proposed, and the court signed, Findings that the accounting filed by Laurance Foster in November 2009 was insufficient, CP 791 (Finding 1.5), that Laurance Foster's failure to cooperate resulted in harm to the minor beneficiaries and in "substantial professional fees and costs", CP 791 (Finding 1.6), and that Laurance Foster breached his fiduciary duty as Trustee and was liable to the Trust in the amount of

\$169,000. CP 795 (Finding 1.7). (There were no specific Findings in the January 27, 2010 orders and judgments for fees). All those Findings are unsupported by substantial evidence. It is unclear from the record what evidence, if any, the court reviewed in making its ruling. Given the procedural status of the hearing -- a review hearing on an accounting -- Laurance had not submitted declarations to controvert the allegations in the petition and was generally unprepared to address the issues in the Special Representative's petition and the Special Administrator's motion at the hearing. No oral testimony was taken by the court at the hearing. Given that there was no oral testimony, substantial evidence does not exist to support the findings.

**D. The Court Abused its Discretion by Entering Judgments Against Laurance Foster for Attorneys' Fees.**

In probate and trust matters, the court has discretion to award fees to any party. RCW 11.96A.150. The trial court's award of fees is reviewed for an abuse of discretion. In Re Guardianship of Matthews, 38105-2-II (Wn. App. 5-18-2010) at p. 11. A trial court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or when untenable reasons support the decision. State ex rel. Carrol v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Said another way, a court abuses its discretion if its decision is unacceptable

given the facts and applicable legal standard. In Re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). In Guardianship of Matthews, the Court of Appeals (Div. II) found an abuse of discretion when the trial court awarded fees after it required a guardianship petitioner to post a bond, a requirement that is not recognized in Washington law. Id. at 47. Here, 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 the Special Representative's fees and all of the Special Administrator's fees against Laurance Foster.

It is manifestly unreasonable to enter a fee award against Laurance Foster based upon findings that he breached his fiduciary duties, when those findings are not supported by substantial evidence and a trial on the merits is necessary to make a determination on those allegations.

In granting the fees requested by the Special Representative and the Special Administrator, the court expressed frustration with Laurance Foster. VRP2, p. 25, ll. 9-21. The Special Representative and the Special Administrator can no doubt point to pleadings filed by Laurance Foster in which he strongly (and perhaps inappropriately) expressed his frustrations with the Special Representative, the Special Administrator, and the court, as well as the legal process in general. However, by asking that judgments

be entered against Laurance Foster for all their fees, the Special Representative and Special Administrator were asking that Laurance be responsible for more than his fair share of fees. Similarly, in granting those fee requests, the court was basing its decision on untenable reasons, perhaps out of a sense of frustration with the case.

There is no dispute that Alan Foster had control of and then misappropriated funds belonging to the minors. There is also no dispute that Alan failed to cooperate with the Special Representative and the Special Administrator and that they spent a large amount of time trying to secure assets from Alan Foster to fund the minors' accounts and pay their fees, all activities for which Alan was responsible, not Laurance. It does not make sense that Laurance Foster should now be made responsible for every minute of time billed by the Special Representative and the Special Administrator.

That the Special Representative's and the Special Administrator's requests that Laurance be responsible for all their fees were unreasonable is apparent from the Special Representative's request for an order amending the August 23, 2006 judgment related to fees to make Laurance Foster a joint and several judgment debtor with Alan, and the Special Administrator's motion to have all her fees reduced to judgment against

Laurance. In her petition that resulted in the August 23, 2006 judgment for fees against Alan Foster, the Special Representative stated that:

...all of the time incurred was a direct result of Lloyd Alan Foster's failure to provide information concerning his activities as Personal Representative, failure to comply with court orders and lack of candor to the court,

CP 26, ll. 20-23 (emphasis added). At the hearing on that petition and the Special Administrator's fee request, the court stated:

The benefits that have been provided by [the Special Representative and the Special Administrator] have been both to the trust and the probate and have been caused by Lloyd Alan Foster's intransigence and his failure to fulfill his professional duties.

VRP2, p. 39, ll. 6-9. The court also stated that:

[Laurance] Foster has complied. I don't know of anything else he could do. I haven't been presented with any evidence that tells me that he's withholding a shred of information or evidence. He's in compliance with the citation and order.

VRP1, p. 36, ll. 9-11.

Given that it was clear that the fees incurred were entirely the fault of Alan, the August 2006 judgment should not have been amended to add Laurance as a judgment debtor for the fees of the Special Representative, and a judgment against Laurance for fees incurred by the Special Administrator through August 2006 should not have been entered. Those orders were manifestly unreasonable, and they appear to be in the nature

of a penalty rather than a thoughtful allocation of what fees, if any, are actually attributable to Laurance.

With regard to the fees incurred by the Special Representative and the Special Administrator after August 23, 2006, including the judgments entered on January 27, 2010 for fees incurred in 2009, it was unreasonable for the Special Representative and the Special Administrator to ask for an award of all their fees against Laurance, rather than to make an allocation of such fees. A portion of those fees had nothing to do with Laurance. There are extensive time entries for both the Special Representative and the Special Administrator that clearly do not involve Laurance in any way. CP 227-230, 577-586, 117-119, 665-668. The court's granting of judgments for the entire amount of fees, without requiring an allocation between Alan and Laurance was therefore based on untenable grounds.

Laurance Foster requests that the court vacate the November 23, 2009 and January 17, 2010 orders and remand this case with instructions to set the matter for trial on the civil calendar. The issue of attorneys' fees can then be decided based upon the results of that trial.

**E. Laurance Foster Requests Attorneys' Fees For This Appeal.**

Laurance Foster is entitled to fees on appeal. RCW 11.96A.150(1)(a); RAP 18.1. The court erred in granting the

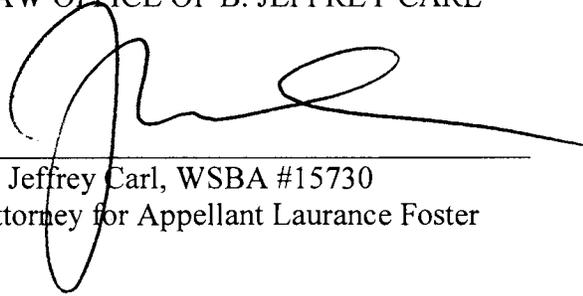
November 23, 2009 and the January 17, 2010 orders, and Mr. Foster should be awarded fees for bringing this appeal.

**V. CONCLUSION**

For the reasons set forth above, the court should vacate the November 23, 2009 and the January 17, 2010 orders and remand this matter to the trial court with instructions to have the matter set on the civil trial schedule.

DATED this 20<sup>th</sup> day of August, 2010.

LAW OFFICE OF B. JEFFREY CARL

A handwritten signature in black ink, appearing to read 'B. Jeffrey Carl', is written over a horizontal line. The signature is stylized with a large loop at the beginning and a long tail.

B. Jeffrey Carl, WSBA #15730  
Attorney for Appellant Laurance Foster

**CERTIFICATE OF SERVICE**

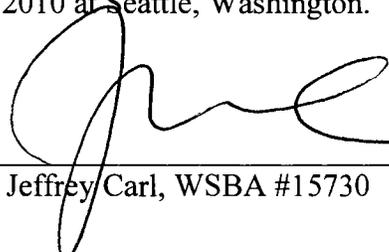
I certify that on the 20<sup>th</sup> day of August, 2010, I caused a true and correct copy of this Brief of Appellant Laurance Foster to be served on the following via First Class U.S. Mail, postage prepaid:

Sandra Bates Gay  
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**I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.**

DATED this 20<sup>th</sup> day of August 2010 at Seattle, Washington.

  
B. Jeffrey Carl, WSBA #15730

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