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NO. 74201-9-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In Re:

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

BANK OF AMERICA,

Respondent,

adv.

FREDERICK A. GRAHAM,

Appellant.

BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

Frederick Graham[1] is the lifetime beneficiary of a trust established by his deceased mother. He also owns and controls the residuary beneficiary, his estate. The Trust directed the Trustee, Bank of America, N.A., to make discretionary annual distributions at a level sufficient to allow Mr. Graham to continue living at the level to which he was accustomed. When the Trustee decided to reduce distributions below that level, Mr. Graham objected. The Trustee justified its decision, in part, by asserting that Mr. Graham's estate has an independent interest in the corpus of the Trust in conflict with Mr. Graham's interest, which the Trustee had an obligation to protect. Mr. Graham contended that because he owns and controls the interest of his estate, it cannot be in conflict with his interest as a life beneficiary, correctly distinguishing the "interest" of the heirs/devisees of the estate, which is not cognizable at law.

The Trustee, which is statutorily required to remain neutral when there is more than one trust beneficiary, sought and obtained the appointment of a Special Representative to represent the estate. However, instead of allowing the Special Representative to advocate against Mr. Graham's position, the Trustee actively, aggressively and improperly

[1] The Trustee, respondent here, was the petitioner below by virtue of having initiated the trial court action by filing a Petition for Instructions. Mr. Graham, appellant here, was the respondent below. The parties are referenced by name in this Brief.

advocated that Mr. Graham's two interests are separate and distinct, that they conflict, and that the estate's separate interest must be taken into account by the Trustee when deciding the amount of discretionary distributions to be made to Mr. Graham.

On cross-motions for partial summary judgment, the trial court agreed that two separate interests exist, but that, for purposes of the distribution issue, no conflict existed and Mr. Graham could virtually represent the interest of his estate. While dismissing the Special Representative, its order left open the question of whether a conflict could exist as to other issues, including whether a new appointment of a Special Representative or *guardian ad litem* would be required for purposes of settlement negotiations. The trial court's order also authorized the Trustee's attorney's fees to be paid from the trust.

The Trustee subsequently moved for summary judgment dismissal of Mr. Graham's remaining claims, including his claim that because it had breached its fiduciary duties of neutrality and loyalty, the Trustee must be required to reimburse the Trust for the fees it paid itself and the attorney's fees it incurred in advocating against his position. Mr. Graham filed a cross-motion for summary judgment of liability on these claims. The trial court dismissed Mr. Graham's breach of fiduciary duty claims and ordered

that the Trustee's fees and its attorney's fees in bringing its summary judgment motion were to be paid from the Trust.

Mr. Graham timely appealed the trial court's orders.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its February 10, 2015, Order Granting Petitioner's Motion for Summary Judgment, Denying Respondent's Motion for Summary Judgment, and Denying Relief Under CR 56(f).[2]

2. The trial court erred in entering its March 6, 2015, Order Denying Frederick A. Graham's Motion for Reconsideration.

3. The trial court erred in entering its October 9, 2015, Order Granting Trustee's Motion for Summary Judgment on Remaining Claims and Denying Respondent's Cross-Motion for Summary Judgment.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where the heirs/devisees of Mr. Graham's estate have no legally cognizable interest in the Trust, and the only cognizable interests are owned and controlled by Mr. Graham and therefore cannot conflict, did the trial court commit an error of law by recognizing a separate and distinct interest not controlled by Mr. Graham?

2. Where the Trustee advocated against Mr. Graham's

[2] The Order was filed on February 12, 2015. CP 434.

position that he owns and controls the only cognizable interests in the trust, both erroneously and in breach of its fiduciary duty of neutrality between beneficiaries, did the trial court commit an error of law in ordering that the Trustee's attorney's fees for that advocacy be paid from the Trust?

3. Where the Trustee advocated against the interest of its beneficiary in violation of its fiduciary duty, did the trial court commit an error of law by dismissing the beneficiary's claim for breach of fiduciary duty and by failing to grant his motion for summary judgment of liability as to that claim?

4. Where the Trustee violated its fiduciary duty, did the trial court commit an error of law by failing to require the Trustee to reimburse the Trust for its fees and attorney's fees?

IV. STATEMENT OF THE CASE

A. The Trustee's Petition for Instructions, Mr. Graham's Response and the Trustee's Reply.

On January 3, 2001, Felecia A. Graham died a resident of King County. Her will established a trust for the benefit of her husband, Donald Graham, Jr., with the remainder interest bequeathed equally to her two sons ("Marital Trust B"). CP 11 - 23 (§IV.B). In 2013, Donald Graham, Jr., relinquished his lifetime interest in Marital Trust B via a binding non-judicial agreement. This relinquishment resulted in Marital Trust B being

divided into two subtrusts, one for each of his two sons. Mr. Graham became the sole lifetime beneficiary of one of the subtrusts, which is the subject of this action (the "Trust"). Bank of America, N.A., became the trustee. CP 26-27. The Trust directs the Trustee to pay Trust income to Mr. Graham and authorizes discretionary distributions of principal if the income payments are insufficient to provide for his "proper support in his...accustomed manner of living...." CP 13. Upon Mr. Graham's death, his interest "shall be distributed as he shall appoint or provide by his will or, in the absence of such appointment or provision, to his estate." CP 17.

The income from the Trust proved to be insufficient to provide support to Mr. Graham in his accustomed manner of living. Citing "the beneficial interest of the remaindermen of the Trust" among other factors, the Trustee declined to distribute principal sufficient to make up the difference. CP 53. A dispute arose because the Trustee failed to authorize principal distributions sufficient to make up the difference. Mr. Graham disputed the Trustee's assertion that the interest of the "remaindermen" is separate and distinct from and in conflict with his own interest. His position was and is that there can be no conflict because he owns and controls the remainder interest since he has the general power to appoint the remainder to any person (or, if he makes no appointment, the

remainder will pass to his estate and he has the exclusive right of disposition of estate assets). CP 1-2.

The Trustee recognized that "those interested in Mr. Graham's estate" cannot be ascertained until his death. CP 2. The problem was that it proceeded to conflate Mr. Graham's estate with those takers from the estate, assuming and asserting that the estate has an interest "separate and distinct" from and in conflict with Mr. Graham's interest. Mr. Graham contended that recognizing an interest in his estate separate and distinct and possibly in conflict with his own equates with recognizing a present interest in his heirs and devisees, a proposition which has been squarely rejected by the courts. Because Mr. Graham was correct, the Trustee should have considered only his interest in making determinations as to discretionary distributions of principal. In addition, he and the Trustee may enter into a Non-Judicial Agreement pursuant to RCW 11.96A.220 to resolve their dispute without having a guardian ad litem appointed to represent any other party.

The Trustee agreed that appointees under a testamentary general power of appointment have no interest in the Trust. CP 153, n.3. And although Mr. Graham indisputably has no heirs during his lifetime, the Trustee nevertheless disputed Mr. Graham's contention that his interest is

the only interest it may consider in administering the Trust, apparently conflating the estate with the non-existent heirs.

In September 2014, Mr. Graham and the Trust attempted to resolve the dispute by negotiation. Alleging that the interest of Mr. Graham's estate "is separate and distinct from that of Mr. Graham," CP 2, the Trustee petitioned the King County Superior Court for appointment of a Special Representative to represent that interest in the negotiations. CP 1–23. An *ex parte* order was granted on September 23, 2014, appointing William L. Fleming as Special Representative. CP 24–25. The negotiations were unsuccessful, and, pursuant to TEDRA, on October 1, 2014, the Trustee filed a Petition for Instructions. CP 26–51. Alleging again that the estate has a beneficial interest in the Trust which conflicts with Mr. Graham's interest, the Trust sought appointment of Mr. Fleming as guardian ad litem to represent the estate's interest in the dispute. CP 29–33. Mr. Fleming agreed to serve in that capacity and to continue to serve as Special Representative for purposes of any future Non-Judicial Agreement regarding the Trust. CP 57–58.

The Petition alleged that Mr. Graham's interest in maximizing discretionary distributions of principal conflicted with the interest of his estate in preserving principal until his death. CP 29–33. The Petition referred to the estate's remainder interest as an "unascertained yet vested

remainder interest" and the owners of that interest as "unascertained vested remainder beneficiaries." CP 28–29. The use of this terminology reflects the Trustee's erroneous understanding as to the owner of the interest it purportedly seeks to protect: The estate is both singular and ascertainable; the takers from the estate are neither.[3]

Mr. Graham's Response to the Petition denied the existence of a beneficial interest in the Trust separate, distinct and in conflict with his own and asked for a hearing on that issue. CP 59–100 at 63–64. In addition, Mr. Graham alleged that by advocating against him and in favor of the remainder beneficiary, and by refusing to allow his attorney's fees to be paid by the Trust, the Trustee violated its statutory fiduciary duties of loyalty and of neutrality between beneficiaries. He alleged that these violations precluded the Trustee from using Trust funds to pay its fees and its attorney's fees, exposed it to liability for damages, and required it to pay Mr. Graham's attorney's fees. CP 74-78.

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[3] The Trustee also requested an order approving the stochastic method it utilized in calculating discretionary principal distributions. CP 36. Upon his father's death, Mr. Graham stands to inherit a substantial amount, which should be sufficient to provide for his support at that time. CP 54. Because the Trustee's methodology for discretionary distributions during Mr. Graham's father's lifetime assumed his father would live for an additional nine years, to age 101, as to which there was only a five percent probability, CP 55, Mr. Graham disputed it. CP 68-73. The trial court granted the Trustee's motion for summary judgment on that issue. CP 342. Because Mr. Graham does not challenge that ruling on appeal, he does not discuss the methodology issue further in this Brief.

In its Reply, the Trustee agreed that the nature and extent of the remainder interest "is a threshold issue that determines the proper parties to this matter." CP 101–107 at 102. One obvious reason that the question is a threshold issue is that any Non-Judicial Agreement respecting the Trust, including one resolving a dispute between the Trustee and any beneficiary, must be signed by all parties. RCW 11.96A.220. Also in its Reply, the Trustee denied that it had violated its duty of loyalty. CP 105.

After a hearing on December 5, 2014, Commissioner Nancy Bradburn-Johnson referred the threshold issue of "the nature, extent, and representation of the remainder interest" to the trial court. CP 108–10.

B. The Initial Cross-Motions for Partial Summary Judgment.

On January 9, 2015, Mr. Graham and the Trustee filed cross-motions for summary judgment. CP 111–43; 144-81. Mr. Graham's motion asked the trial court to determine that there is no Trust interest separate from and in conflict with his own. CP 112. In its motion, the Trustee assumed there are unascertained remaindermen beneficiaries of the Trust with an interest independent from and in conflict with Mr. Graham's interest. CP 152-55. It identified the unascertained interest holder as Mr. Graham's "Estate," while simultaneously acknowledging that his estate does not exist until Mr. Graham's death. CP 153. The Trustee also acknowledged that Mr. Graham's heirs and devisees

(remaindermen of the estate, not of the Trust) have no interest in the Trust and no present interest in the estate. CP 153, n.3. Nevertheless, the Trustee asserted a conflict of interest exists between the interests which disqualifies Mr. Graham from representing both. CP 154. It asked the trial court to order that a vested remainder interest exists and requires continuing independent representation by Mr. Fleming as Guardian ad Litem. CP 155.

Mr. Fleming as GAL filed a brief memorandum in support of the Trustee's position, noting the absence of legal authority in Washington or elsewhere bearing directly on the question at issue, but also conflating the purported interest of the estate urged by the Trustee with the interests of the takers (the heirs or devisees, i.e., appointees under Mr. Graham's general testamentary power of appointment or the ultimate beneficiaries of his estate). CP 227-30 at 228. The GAL also confused the vested remainder interest in the Trust urged by the Trustee with "a vested remainder interest in Mr. Graham's estate...." CP 228. Finally, he agreed with the Trustee that if the court found a second beneficial interest, such interest would conflict with Mr. Graham's interest with regard to discretionary principal distributions because, to the extent that such distributions are made to him during his lifetime, "there will be less remaining in the Trust ...after his death." CP 228-29.

An inconsistency in the Trustee's argument arose from its Reply in support of partial summary judgment. In his Reply Declaration, James K. Gallagher, the trust officer at Bank of America with responsibility for the Trust, averred that "in developing the discretionary distribution plan, preservation of the Trust's principal for remainder beneficiaries has not been the goal." CP 335-36. This averment apparently sought to minimize or dismiss the dispute between the parties and thereby disarm Mr. Graham's challenge to the Trustee's decision not to make distributions which would allow him to maintain his standard of living as contemplated by the trustor. However, the averment plainly contradicted the Trustee's acknowledged duty to adhere to its fiduciary duties to all classes of beneficiaries, CP 232, since, if a separate, distinct and conflicting remainder interest exists, the Trustee would have a fiduciary duty to preserve principal for that interest. Thus, unless Mr. Gallagher was admitting to a violation of that duty, his declaration cannot be reconciled with the Trustee's contention that a separate remainder interest exists in conflict with Mr. Graham's interest.

Significantly, however, Mr. Gallagher's Reply Declaration did not retract the Trustee's contention that a Special Representative/GAL must be appointed to sign any Non-Judicial Agreement. CP 2. That contention is consistent with the Trustee's continuing assertion that Mr. Graham's

estate has a separate and independent interest different from and in conflict with Mr. Graham's interest, an assertion which cannot be reconciled with Mr. Gallagher's statement that it is not the goal of the Trustee to preserve principal for the remainder beneficiaries.

By order dated February 10, 2015, the trial court denied Mr. Graham's motion and granted the Trustee's motion, making the express determination that "there is a separate remainder interest," which it referred to as the "unascertained remaindermen." CP 340-44 at 342. However, in denying the Trustee's request for appointment of a GAL and in obvious reliance upon Mr. Gallagher's unlikely averment, the court found that "both the objective of the Trustor and the plan of distribution encompass the possibility that little or nothing will remain for the unascertained remaindermen when the life interest terminates." CP 342. For that reason, the court found no conflict between the remainder interest and Mr. Graham's interest as the lifetime beneficiary, holding that, "under such circumstances," Mr. Graham "may virtually represent the remainder interest." *Id.* Critically, however, it added, "If circumstances arise where there is a conflict between the parties, either party may seek further relief from the Court, including appointment of a GAL." CP 342-43.

The order sought to give something to each side: It recognized a separate remainder interest but found that that interest is not in conflict

with Mr. Graham's interest as to the issue of discretionary principal distributions, *id.*, despite the fact that principal distributions to him will result in "less remaining in the Trust for whoever will receive the remaining Trust assets after his death...." CP 228. Moreover, the order dodged the question of whether Mr. Graham could virtually represent the "other" interest for other issues, including and perhaps of paramount importance, the issue of whether Mr. Graham and the Trustee may enter into a Non-Judicial Agreement without securing the appointment, approval and signature of a GAL.

In denying Mr. Graham's subsequently filed Motion for Reconsideration, the trial court elaborated on its earlier order, stating that it "agrees [with the Trustee's position that] there is a separate remainder interest," and that the Trust "creates unascertainable remainder beneficiaries as posited by the Trustee." CP 357-58.

C. The Subsequent Cross-Motions Summary Judgment.

On September 4, 2015, the Trustee moved for summary judgment as to all remaining claims, asserting, *inter alia*, that Mr. Graham's claims for breach of fiduciary duty should be dismissed as a matter of law. CP 359-74. More specifically, it asserted that the trial court's earlier ruling agreeing with the Trustee that a separate remainder interest exists "resolved" Mr. Graham's breach of fiduciary duty claim insofar as it

related to the duty of impartiality. CP 364. The Trustee also argued that the earlier ruling approving the distribution methodology implicitly resolved the claim for breach of loyalty. *Id.* Finally, it argued that because it was statutorily authorized to petition the court for instructions, doing so had not violated its fiduciary duty to its beneficiary. CP 367-70.

Mr. Graham opposed the motion and filed a cross-motion asking the court to determine the Trustee's liability for breach of fiduciary duty as a matter of law, to require the Trustee to reimburse the Trust for its fees and attorney's fees which had been paid from the Trust, and to require it to pay Mr. Graham's attorney's fees. CP 375-409.

Based on oral findings and conclusions made at the October 9, 2015, hearing on the cross-motions, VRP 24-25, the trial court entered an order dismissing the remaining claims.[4] The court's determinative finding was that the Trustee had merely petitioned for a judicial determination as to the existence of a present remainder interest and what the Trustee's obligation to it was, distinguishing case law holding that where there are two competing beneficiaries, a trustee may not take a position in conflict with one of them. *Id.*

This appeal followed.

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[4] It did, however, subsequently enter two orders directing that Mr. Graham's attorney's fees should be paid from the Trust. Those orders were not appealed by the Trustee.

V. ARGUMENT

A. Standard of Review.

The standard of review of the summary judgment orders which are the subject of this appeal is *de novo,* and the appellate court performs the same inquiry as the trial court. *Smith v. Safeco Insurance Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003).

B. The Threshold Issue of the Parties in Interest Was Erroneously Determined Because Only Mr. Graham Has an Interest in Mr. Graham's Property.

As succinctly stated by the Trustee in its Reply to Mr. Graham's Response to the Petition:

> ...the nature and extent of the unascertainable remaindermen of the Trust...is a threshold legal issue that determines the proper parties to this matter, whether those parties are represented before the Court and what factors the Trustee should consider when exercising its discretion [to make distributions of principal]. Without addressing the nature, extent and representation of the remainder interest the Court cannot address any other substantive issues.

CP 102. The "other" substantive issues raised by the pleadings included whether a GAL appointment is required for purposes of a Non-Judicial Agreement, whether the Trustee has a fiduciary duty to anyone other than Mr. Graham, whether Mr. Graham may demand that the Trustee pay his attorney's fees incurred in this dispute from the principal of the Trust, and whether the Trustee breached its fiduciary duty and caused damages to

Mr. Graham. CP 59-79. Not only did the trial court err in finding the existence of a separate interest it described as "unascertained remaindermen" when the sole "remainderman" is actually Mr. Graham's estate, over which Mr. Graham has unrestricted ownership and control,[5] but its erroneous determination that no GAL is required because that separate interest is not in conflict with Mr. Graham's interest was inherently inconsistent with its finding that a trust remainder exists that is separate from Mr. Graham. If the estate is an interest separate from Mr. Graham, the Trustee's assumed goal of preserving principal to the time of Mr. Graham's death clearly conflicts with Mr. Graham's goal of maximizing distributions prior to his father's death. Further, the trial court's orders on the threshold issue appeared to require the parties to relitigate the "nature, extent, and representation of the remainder in trust" as to other issues raised by the pleadings and to arise in the future.

For example, it is unclear whether the trial court's order extends to the circumstance of Mr. Graham's father's death, when the Trustee intends to cease discretionary distributions of principal. CP 159, 187-188. If, as averred by Mr. Gallagher, the Trustee's plan of discretionary distributions approved by the trial court does not include a goal of preserving principal

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[5] *Estate of Barnes*, ___ Wn. 2d ___, ___ P.3d ___ (No. 91488-5, January 28, 2016, at p. 6); *Dean v. Jordan*, 194 Wash. 661, 668, 74 P.2d 331 (1938).

for the remainder beneficiary, CP 335-36, then a decision by the Trustee to cease distributions of principal to Mr. Graham upon his father's death is inconsistent with that plan. And if, as the trial court determined, Mr. Graham may virtually represent the remainder beneficiary for purposes of discretionary distributions, CP 342, then the Trustee must consider only Mr. Graham's interests in distribution decisions. Yet it is far from clear that the Trustee agrees. Moreover, the trial court's erroneous order may preclude execution of an effective Non-Judicial Agreement between the Trustee and Mr. Graham pursuant to RCW 11.96A.220, which requires all parties to sign. Thus, unless this Court reverses the finding that a remainder interest in the Trust exists that is separate from Mr. Graham (in other words, that Mr. Graham and his estate are not one and the same), a Non-Judicial Agreement executed only by Mr. Graham and the Trustee could be subject to attack by the "remainder beneficiaries" recognized by the trial court on the basis of the conflict the trial court did not recognize.

Finally, the trial court's order did not expressly identify the remainder interest it found. If the interest is that of Mr. Graham's estate, as urged by the Trustee, then the order failed to address how or why the "interest" of his estate is different from his own interest. On the other hand, if it was the interest of the appointees under Mr. Graham's general testamentary power of appointment or his heirs or devisees, as urged by

the GAL, CP 228, then the order contravenes Washington law that those persons have only a mere expectancy, which is not a legally cognizable interest, *i.e.*, they have no interest in the Trust and therefore they are not beneficiaries of the Trust. *See In re Estate of Becker*, 177 Wn.2d 242, 246–47, 298 P.3d 720 (2013).

Longstanding authority holds that an estate is not a legal entity and means the property owned by the decedent at his death, *Hansen v. Stanton*, 177 Wash. 257, 260, 31 P.2d 903 (1934), or payable to the estate of the decedent at death. Restatement (Third) of Prop.: Wills and Other Donative Transfers §1.1; illus. 15 (1999). The interest of the estate is not and cannot be separate and independent from and in conflict with the decedent who owns the property and rights that constitute his estate. Who owns the estate if the decedent does not? Because the decedent has the right to dispose of it, he must own that regarding which he has the right of disposition. Insofar as the Trust is concerned, its only duty to the estate is to deliver any Trust assets remaining on Mr. Graham's death to the personal representative for administration.

"Property owners have the nearly unrestricted right to dispose of their property as they please, either during life or at death." Restatement (Third) of Prop., *supra*, Introduction at 3 (1999). Given this expansive right to dispose of his property at death, Mr. Graham has no lesser right

during his life, subject to the restrictions of the Trust, but not subject to the interest of any other person. The Trustee's and GAL's misunderstanding of the remainder interest, as adopted by the trial court, appears to be based upon a conflation of the estate with the potential takers of the estate rather than with the estate itself, *i.e.,* with the decedent who owns and controls it. The Trustee argued that, "Even if Mr. Graham's estate is simply a bundle of property rights, *someone* other than him is entitled to those property rights...." CP 235 (emphasis in original). However, because only Mr. Graham has an interest in the property in his estate and the sole right to dispose of it, no one besides Mr. Graham has an interest in the Trust remainder interest. When the Trustee argued that someone other than Mr. Graham is entitled to his property rights, it implied that his donative transferees are so entitled. Who else could benefit? But the law is clear that donative transferees do not have a right to any particular property, only transferee rights after probate administration, Restatement (Third) of Prop., *supra,* §1.1; *Hansen v. Stanton*, *supra*, 177 Wash. 257. Takers from an estate have no rights in property in, or distributable to, the estate. The takers have only the right to succeed to ownership of property transferred to them from the estate, consistent with the directions of the decedent in his will or by intestate succession in the absence of a will. The mistake implicit in the Trustee's argument is the unsupported assumption and

advocacy that takers from an estate have an ownership interest in what the estate owner owns at death (and over which the estate owner has the unrestricted right of disposition) or owns during his lifetime. However, the estate's owner owes no obligation to them, and, thus, the takers can have no rights in the owner's property. The court's order, consistent with that mistaken argument, was erroneous. The rights of takers relate to their transferor, *i.e.*, to the decedent (and to his/her estate; not to the trust that is distributable to the estate). The transferor has the unrestricted right of disposition as to owned assets (including assets distributable to the transferor's estate), so that the right of the transferees is to receive what the transferor elects to give them. Neither the Trust nor the Trustee has any role in that process.

The necessary implication of the Trustee's position and the trial court's order adopting it is that if a remainder interest separate from Mr. Graham's interest does exist, the Trustee must have a fiduciary duty to that interest to preserve Trust assets beyond Mr. Graham's lifetime. Yet the Trustee's objective and its plan of distribution, as articulated by Mr. Gallagher and adopted by the court, encompass "the possibility that little or nothing will remain for the unascertained remaindermen when the life interest terminates." CP 342. A plan which encompasses such a possibility is inconsistent with a fiduciary duty to the "remaindermen."

The Trustee, and the court which adopted its position, cannot have it both ways: either the plan must consider only the interest of Mr. Graham or it also must consider the interest of "remaindermen," who can only be the donative transferees of Mr. Graham. But they indisputably have no interest in the Trust. The inconsistency inherent in the order demonstrates its error.

Further evidence of the Trustee's erroneous position is its continued reference to the remainder interest as "unascertainable," CP 2, 30, 102, 153, an error which the trial court adopted in its orders. CP 341-42, 358. While the potential donative takers from the estate are certainly unascertainable, the estate is not. The remainder interest is unequivocally the estate of Mr. Graham. However, by using this term, the Trustee and the court impliedly acknowledge that the remainder interest to which they refer is the non-existent interest of the unascertained donative transferees of the estate assets rather than the estate itself.

In support of its position that the estate is a separate interest, the Trustee argued that it could be sued by "a remainder beneficiary" or the Personal Representative of Mr. Graham's estate ("PR") for granting Mr. Graham's request for distributions of principal to which he consented. CP 237-38. However, the PR would be estopped to complain about "an act or omission of the trustee [that was] a breach of trust if the beneficiary prior

to or at the time of the act or omission consented to it." Restatement (Second) of Trusts §216 (1959). Thus, Mr. Graham's act of accepting discretionary distributions of principal waives any claim against the Trustee for making those distributions. His consent and lifetime agreements bind his executor or PR as well as himself. *See In re Murphy's Estate*, 191 Wash. 180, 192, 71 P.2d 6 (1937).[6] Further, the donative transferees of Mr. Graham are not remainder beneficiaries of the Trust. They have no trust rights that the Trustee can violate.

The trial court's erroneous determination that a remainder interest exists impedes the expeditious administration of the Trust because all issues that are litigated in reliance on the erroneous order will have to be retried after entry of final judgment and appeal of right. Absent reversal, the erroneous order limits the discretion of the Trustee to make principal distributions satisfying the Trustor's objective that Mr. Graham is provided support at the level to which he is accustomed. The Trustee has asserted that if a separate remainder interest exists, it has a fiduciary duty

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[6] The Trustee argued to the contrary, CP 237-38, citing *State ex. rel. Beardsley v. London & Lancashire Indem. Co. of America*, 124 Conn. 416, 200 A. 567 (1938), in which the defendant, for "an adequate premium charged," had issued a statutory trustee's bond for the benefit of beneficiaries/appointees. The appointees sued on the bond. *See id.* The Connecticut court applied the Connecticut bond statute against the insurer, concluding that the lifetime beneficiary, who was also the trustee of the trust, never owned the property, and so the losses she caused by making inappropriate investments gave rise to a forfeiture of the bond. *See id* at 430-31. The Trustee's suggestion that this authority supports the conclusion that it stands exposed to liability on a claim by an appointee here lacks merit.

to the holder of that interest. CP 232. Accordingly, because the trial court's order recognizes such an interest, unless it is reversed, the Trustee will erroneously consider a remainder interest separate from Mr. Graham in exercising its discretion. The trial court's odd and erroneous conclusion that there is no conflict between Mr. Graham's interest and the remainder interest because of the "possibility" that little or nothing will remain for the unascertained remaindermen when the life interest terminates under the Trustee's current plan of distribution does not relieve the Trustee of the fiduciary duty arising from the determination that a remainder interest separate from Mr. Graham exists. If it does exist, the Trustee must consider it, but doing so limits the Trustee's freedom to satisfy the Trustor's objective of permitting Mr. Graham to continue living at the level of support to which he is accustomed. In addition, the order may limit Mr. Graham's ability to effectively waive claims against the Trustee in order to facilitate additional distributions of principal to him.

The trial court's order finding that the interests of Mr. Graham and his future estate are separate interests contravenes governing law respecting the nature of an estate. Further, the order's provision that there is no conflict between Mr. Graham's interest and the remainder interest only because of the possibility that little or nothing will remain at the termination of the life estate departs from governing law holding that a

trustee has a fiduciary duty to each party with an interest in the trust. The only proper basis for an order providing that there is no conflict between Mr. Graham's interest and the estate's remainder interest is that they are one and the same, *i.e.*, that the decedent (Mr. Graham) controls his estate. The trial court should have determined that Mr. Graham is the only party with an interest in the Trust. Its failure to do so was error. Unless reversed, the trial court's order granting the Trustee's motion for partial summary judgment and agreeing with its contention that a remainder interest separate from and in conflict with Mr. Graham's interest will mean that in every instance when a decision must be made regarding management of the Trust, a court determination will be required as to whether a GAL is required. Absent the approval of a GAL, Mr. Graham will not be able to enter into a nonjudicial agreement with the Trustee regarding any Trust issue. For instance, if Mr. Graham wishes to pass Trust assets to his family members prior to his death (thereby avoiding significant estate taxes), the Trust may be required to consider the remainder interest and/or seek appointment of a GAL before approving the request. Given the previous disagreements between the Trustee and Mr. Graham regarding the administration of the Trust, resolving this question will almost certainly require court intervention and significant additional time and expense for both parties.

C. The Trustee Violated Its Fiduciary Duties by Advocating Against Mr. Graham's Position.

1. The Trial Court Erred in Finding the Trustee Did Not Advocate Against Mr. Graham's Position.

The trial court dismissed Mr. Graham's claims for breach of fiduciary duty after finding that the Trustee's petition merely sought a judicial determination of whether a present beneficial remainder interest separate from Mr. Graham existed and how the Trustee's proposed distribution plan was affected by that interest. VRP 24-25. The undisputed evidence contradicts this finding. At no time did the Trustee petition the court to determine whether a separate beneficial remainder interest existed. Instead, the Petition asserted as established facts both the existence of the interest and its conflict with Mr. Graham's interest, and asked only that the court determine if the conflict required appointment of a GAL. CP 26-51. For example, the Petition's banner headings herald,

- "A Guardian Ad Litem is Needed to Represent the Trust's Unascertainable, Vested Remainder Interest Because Frederick Graham's Conflict of Interest Prevents Him from Virtually Representing that Remainder Interest." CP 29.

- "The Trustee's Method for Determining the Amount of Discretionary Distributions Properly Applies the Trust's Terms and Balances the Competing Interests." CP 33.

Similarly pejorative declarations permeate the Petition, e.g., "Currently, there are two vested interests in the Trust," CP 30; "Here, there is a direct

conflict of interest between Frederick Graham and his Estate," CP 31; "Because the Estate has a vested interest in the Trust that is in conflict with Frederick Graham's interest in the Trust...." CP 32. Moreover, the Petition states the issue for the court as

> Whether the yet-unascertained vested, remainder beneficiary of the Trust must be represented separately in this matter in order to properly resolve issues regarding the Trustee's discretionary distributions; if so, whether such interest can be virtually represented by Frederick Graham under RCW 11.96A.120 or whether, due to the conflict of interest between the interests, a Guardian ad Litem needs to be appointed under RCW 11.96A.190.

CP 29. Finally, the Trustee's authorized representative admitted under oath that it took the position that there was a remainder interest. CP 407. Thus, the trial court's finding that the Trustee did not take a position adverse to Mr. Graham is not only unsupported, the evidence shows the opposite to be true. In sum, the trial court failed to acknowledge the Trustee's obvious advocacy against Mr. Graham's interest in the Trust. As a result, it erred in dismissing Mr. Graham's claim for breach of fiduciary duty.

Ironically, the Trustee had previously obtained the appointment of a Special Representative ("William M. Fleming is appointed as the Guardian ad Litem to represent the putative unascertained remainder interest of the Trust for all judicial matters related to the Trust"). CP 108-

09. The GAL's advocacy for the existence of the separate interest was appropriate.[7] The trial court appeared to acknowledge the appropriate respective roles of the (neutral) Trustee and the (advocate) GAL when it inquired of Trustee's counsel at oral argument as follows:

> THE COURT: Well, Mr. Harrington, let me ask you, how do you respond then to Mr. Henrie's -- or the respondent's argument that all the trustee should have done in this instance was appoint or seek permission to appoint the guardian ad litem and then the guardian ad litem could take the argument and run with it?

VRP (October 9. 2015) 9-10. Nevertheless, setting aside any doubts it might have had, the trial court found as a matter of law that the Trustee did not advocate against Mr. Graham's position and dismissed his claim.

2. <u>The Trial Court Erred in Failing to Enter Summary Judgment of Liability on Mr. Graham's Claim for Breach of Fiduciary Duty Based on the Trustee's Advocacy Against Mr. Graham's Interest.</u>

Because the evidence of the Trustee's advocacy against Mr. Graham's position was undisputed, the proper result below would have been a summary judgment determination of the Trustee's liability for breach of the fiduciary duties of loyalty and impartiality as requested by Mr. Graham. CP 391. This Court should right the trial court's wrong.

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[7] Although the GAL did not file his own motion for summary judgment, he responded to the cross-motions by supporting the arguments advanced by the Trustee. *See, e.g.*, CP 228-29. Clearly, however, the Trustee took the lead in advocating against Mr. Graham's interest: It filed an 18 page motion, with attachments and two supporting declarations, with exhibits. CP 144-226. The GAL's filing was four pages. CP 227-30.

"[A] trustee is a fiduciary who owes the highest degree of good faith, diligence and undivided loyalty to the beneficiaries." *Estate of Ehlers*, 80 Wn. App. 751, 757, 911 P.2d 1017 (1996). The duty of loyalty requires a trustee to "administer the trust solely in the interests of the beneficiaries." RCW 11.98.078(1). The duty of impartiality requires the trustee to "act impartially in administering the trust and distributing the trust property, giving due regard to the beneficiaries' respective interests." RCW 11.98.078(8). Trustees who litigate the conflicting claims of beneficiaries violate their duties of loyalty and impartiality. *In re Estate of Bernard*, 182 Wn. App. 692, 729, 332 P.3d 480 (2014). *See also Northern Trust Co. v. Heuer*, 202 Ill. App. 3d 1066, 1070 (Ill. App. Ct. 1st Dist. 1990) ("A trustee has a duty to deal impartially with all beneficiaries and to protect their interests"). Because the fiduciary duty a trustee owes to each beneficiary precludes it from favoring one over another, a trustee "should file an interpleader action to avoid acting at its own peril." *Id.,* at 1070-71.[8] *Accord Matter of Duke,* 305 N.J. Super. 408, 440 (Ch.Div. 1995) ("in a dispute between two parties claiming to be beneficiaries, a trustee may not advocate for either side or assume the validity of either side's position. Unless the trust instrument itself provides otherwise, a

[8] The Trustee's Petition is in no way an interpleader; it does not ask the Court to determine whether a separate interest exists and, if so, whether it conflicts with Mr. Graham's interest. Its allegations assume the existence of a separate and conflicting interest. CP 26-51.

trustee's duty to each beneficiary precludes it from favoring one party over another") (internal citation omitted); *Barnett v. Barnett*, 340 So. 2d 548, 550 (Fla. Dist. Ct. App. 1st Dist. 1976) ("All of the claimants being in court, it was not the duty nor prerogative of the trustee to favor one claimant over the other").[9]

The facts and the holding in the leading case of *Northern Trust Co. v. Heuer, supra,* 202 Ill. App. 3d 1066, are instructive. Northern Trust administered a trust for two beneficiaries, Harry Heuer and Diana Winterbauer. *See id.* It filed a complaint asking the court for instructions regarding the application and interpretation of an equalization clause in the trust which set limits on the distributions that could be made to Heuer, arguing that the trustor intended for the equalization clause to apply, thereby limiting those distributions. *See id.*, at 1069. Winterbauer, the other beneficiary, agreed. *Id.* Heuer contended that the equalization clause did not apply. *Id.* Northern Trust moved for partial summary judgment on the equalization clause issue; Heuer moved for summary judgment on all issues. *Id.* Northern Trust advocated against Heuer's position in its pleadings on both motions. *Id.* Winterbauer also opposed

[9] The *Barnett* court posed the crucial question as, "[W]hether, after filing a suit to determine which of the conflicting claims should prevail, the trustee should have actively continued to participate in the preparation of the pending litigation. While the trustee in his fiduciary capacity was required to do something more than stand on the sidelines and watch, it was not his duty to take a partisan stance and argue the side of one or more of the claimants." 340 So. 2d at 550.

Heuer's position. *Id.* Northern Trust prevailed, and the lower court directed its attorney's fees be paid from the Trust. *Id.* at 1069-70.

The appellate court reversed, holding that Northern Trust's advocacy in favor of one beneficiary (Winterbauer) against the other (Heuer) was a breach of its duty of impartiality. *See id.* For that reason, it also concluded that an award of fees and costs to Northern Trust from the trust was improper, holding that where a trustee favors one beneficiary over another, "the trustee is not entitled to attorney fees and costs...." *Id.*, at 1071. Since Winterbauer appeared in the action and advocated her position regarding the proper interpretation of the equalization clause, the Heuer court found that Northern Trust's advocacy in support of her position was entirely unnecessary. *See id.* Moreover, it characterized the trustee's proper role as limited to supplying the court with the underlying facts and the different interpretations which could be drawn:

> In this case, Northern Trust acted properly in seeking the circuit court's construction of the trust agreement concerning the appropriate distribution of the trust. <u>However, when it argued that the trust should be interpreted in a manner beneficial to Winterbauer and detrimental to Heuer, it exceeded its role as trustee and breached its duty of impartiality</u>. The circuit court's award of Northern Trust's attorney fees and costs, in excess of those incurred in preparing and filing the complaint for construction of the trust and in gathering and presenting the information necessary to interpret the equalization clause, constituted an abuse of discretion and is reversed.

Id. at 1072 (emphasis added).

Very similarly, the Trustee here advocated aggressively as to the existence of a conflict between the interests of the Trust beneficiaries, refusing to acknowledge that the Trust remainder interest is controlled by Mr. Graham even though it is indisputably owned by his estate and he indisputably owns his estate. It did so despite its recognition that there was nothing inadequate about the GAL's representation of the remainder interest.[10] While the position the Trustee advocated in opposition to Mr. Graham's position lacked merit, *see* pp. 15-24, *supra*, the Trustee's breach of duty arose from its assertion of the contrary position, regardless of the position's merit. Paraphrasing *Heuer*, *supra*, "[W]hen [the Trustee] argued that the trust should be interpreted in a manner beneficial to [the remainder interest] and detrimental to [Mr. Graham], it exceeded its role as trustee and breached its duty of impartiality. " *See* 202 Ill. App. 3d at 1072.

In the trial court, the Trustee attempted to distinguish *Heuer* by arguing that "[u]nlike the Trustee here, Northern Trust clearly took sides with one beneficiary over another over how much each should receive

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[10] Q: So was there something inadequate in Mr. Flemming [sic] to express that position on behalf of the remainder interest that he represented?

A: Not that I know of.

CR 30(b)(6) Deposition of Bank of America, N.A., at 22:25-23:3, August 27, 2015. CP 407-08.

from the Trust." CP 414. This argument is inconsistent with the undisputed fact that the plan devised by the Trustee to distribute Trust assets sought to "protect[] the remainder interest" by limiting distributions to Mr. Graham. CP 55. The Trustee defended its plan by advocating for a separate remainder interest's share of Trust assets in conflict with Mr. Graham's interest in those assets. The Trustee argued below that advocacy for the existence of a conflicting remainder beneficiary interest is not the same as advocacy against the interests of one beneficiary over the other, citing *In re Estate of Bernard*, *supra,* 182 Wn. App. 692, for the proposition that a trustee may advocate a position adverse to one of the trust beneficiaries. CP 416. *Bernard* is factually distinguishable because it involved a request to determine the legitimacy of the trust instrument itself, not to resolve a dispute between the interests of beneficiaries.[11] The *Bernard* court cited with approval "the general rule that trustees acting in their representative capacities cannot ... litigate the conflicting claims of beneficiaries." *Id.*, at 729. Here, because the pool of Trust assets is limited, the Trustee's advocacy promoting the interest of the remainder beneficiary to those assets necessarily sought to prejudice Mr. Graham's interest by limiting distributions of Trust assets to him.

[11] "[T]he motion for summary judgment was not litigation involving conflicting claims of beneficiaries. Rather, the motion for summary judgment sought to invalidate the first amendment to trust as a matter of law." 182 Wn. App. at 730.

The Trustee's Petition not only advocated in favor of a separate interest that conflicted with Mr. Graham's interest, it *assumed* those predicates as if they were established facts. There was no reason for the Trustee to affirmatively state that a separate conflicting interest existed; instead, its Petition could have, and should have supplied the facts and stated the issues. The Trustee, by strenuously advocating directly and at great length against Mr. Graham's interest and in favor of another interest in its Petition, in its motion for partial summary judgment and in its opposition to Mr. Graham's cross-motion for summary judgment, violated its duties of loyalty and impartiality.

3. The Trustee's Additional Arguments Supporting its Summary Judgment Motion Also Lacked Merit.

The Trustee also supported its motion for summary dismissal of Mr. Graham's claims for breach of fiduciary duty by arguing: (i) the Court *implicitly* decided these claims in its earlier rulings on the cross-motions for partial summary judgment regarding the remainder interest; and (ii) TEDRA and/or Ch. 11.98 RCW and/or case law abrogated the Trustee's fiduciary duties of loyalty and impartiality.[12] CP 364-65. Neither argument was persuasive.

[12] Ironically, the duties of loyalty and impartiality are expressly recognized in RCW 11.98.078(8).

The argument that the Court "implicitly" resolved the breach of fiduciary duty claims in its earlier orders was frivolous for several reasons:

- The trial court expressly stated that its order "resolves only those issues presented to it in the cross-motions for partial summary judgment." CP 358.
- After entry of the order on the cross-motions for summary judgment, the Trustee itself observed, "[T]he remaining issues in this litigation do not involve the remainder interest. These remaining claims include a breach of fiduciary duty claim and a request for attorney fees." CP 402.

The Trustee argued to the trial court that the earlier order that a separate remainder interest exists as urged by the Trustee meant that it could not have breached its fiduciary duties of loyalty and impartiality by advocating against Mr. Graham's position. CP 364. However, the first issue has nothing to do with the second, let alone is it dispositive. The duty of impartiality is breached when a trustee advocates for the interests of one beneficiary over another, regardless of whether the trustee prevails. *Heuer*, 202 Ill. App. 3d at 1070-71 (trustee's litigation against one beneficiary in

favor of another was a breach of its duty of impartiality, even though trustee prevailed on its argument at trial court); *see also* RCW 11.98.078(8) (duty of impartiality requires the trustee to "act impartially in administering the trust and distributing the trust property, giving due regard to the beneficiaries' respective interests"). It is the Trustee's *advocacy*, not the result, which constitutes a breach of fiduciary duties.[13] As to the Trustee's argument that TEDRA (Ch. 11.96A RCW) permits a party to initiate a judicial proceeding regarding disputes over the interpretation of trust provisions or the administration of a trust, nothing in TEDRA revokes the provisions of RCW 11.98.078(8) imposing fiduciary duties of loyalty and impartiality on trustees or otherwise permits a trustee to take sides among two or more beneficiaries. Indeed, this is the very point of the TEDRA provisions authorizing the appointment of the GAL.[14]

Without citation to precedent or other legal authority, and in contravention of authority holding to the contrary, the Trustee argued to the trial court that, "the Trustee need not be disinterested when seeking ...

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[13] In arguing that it prevailed, the Trustee overstated the result of the initial motion hearing. While the trial court agreed that a separate remainder interest exists, it rejected the Trustee's principal argument that the separate interest conflicts with Mr. Graham's interest and therefore that a GAL must be appointed. CP 342.

[14] As explained in *Heuer*, the proper role of the trustee is to "set forth ... the relevant information which require[s] construction of the trust" in a petition and to "supply the underlying facts and the different interpretations that could be drawn." However, when the trustee goes beyond that impartial role to argue in a manner beneficial to one beneficiary and detrimental to another, "it exceed[s] its role as trustee and breach[es] its duty of impartiality." 202 Ill. App. 3d at 1071-72.

instruction," and "the Trustee is permitted to articulate its view, in its discretion, to the Court when asking the Court to resolve a dispute between it and a beneficiary." CP 368. In dismissing Mr. Graham's breach of fiduciary duty claim, the trial court apparently accepted these legally unsupportable arguments. This Court should right that wrong.

The Trustee next contended that because Ch. 11.98 RCW allowed it to file a petition, it was authorized to favor one beneficiary against another. CP 368. RCW 11.98.070 enumerates certain powers of a trustee, including the power to initiate actions to defend trust property. RCW 11.98.070(37). However, a trustee's powers must be exercised in accordance with its fiduciary duties. *See* Restatement (Third) of Trusts, § 86 ("A trustee, in deciding whether and how to exercise the powers of the trusteeship, is subject to and must act in accordance with the fiduciary duties stated in Chapter 15 and elsewhere in this Restatement"); *id.*, § 70 ("In administering a trust, a trustee: ... (b) in the exercise or nonexercise of [its] powers, is subject to the fiduciary duties stated and explained hereafter in Chapter 15 and elsewhere in this Restatement"); *id.*, § 86, cmt. b ("*All powers are subject to the trustee's fiduciary duties.* All powers of trusteeship are held in the trustee's fiduciary capacity and must be exercised in good faith and to serve the interests of the beneficiaries") (italics in original). *Id.* Thus, while the Trustee had the power to initiate a

proceeding respecting Trust property, it was required to do so in a way that did not breach its fiduciary duties—which it could have accomplished by remaining neutral and allowing the Guardian ad Litem to advocate on behalf of the remainder interest.

D. The Remedies for the Trustee's Violation of Its Fiduciary Duties Include an Order Requiring the Trustee to Reimburse the Trust for Its Fees and Its Attorney's Fees Incurred in Advocating Against Mr. Graham's Position, and an Order Requiring It to Reimburse the Trust for Mr. Graham's Attorney's Fees.

In *Allard v. Pac. Nat'l Bank*, 99 Wn.2d 394, 663 P.2d 104 (1983), the Washington Supreme Court held that when a trustee breaches its fiduciary duties, it must pay its own and its beneficiary's attorney's fees:

> A trial court may allow and properly charge attorney fees to a trust estate for litigation that is necessary to the administration of the trust. A trial court's discretion to award attorney fees, however, is not absolute ....
>
> The court's underlying consideration must be whether the litigation and the participation of the party seeking attorney fees caused a benefit to the trust. A trustee who unsuccessfully defends against charges of breach of fiduciary duties obviously has not caused a benefit to the trust. Therefore, a trial court abuses its discretion when it awards attorney fees to a trustee for litigation caused by the trustee's misconduct.
>
> ...
>
> We also hold that since [the trustee] breached its fiduciary duty [the beneficiaries] should be granted their request to recover all attorney fees expended at both the trial and on appeal.... Ordinarily, the trust estate must bear the general costs of administration of the trust, including the expenses of necessary

> litigation. Where litigation is necessitated by the inexcusable conduct of the trustee, however, the trustee individually must pay those expenses.

99 Wn.2d at 406-08 (internal citations omitted).

Here, the Trustee breached the fiduciary duties it owes to Mr. Graham. Understandably, the law provides that the trustee must bear the costs of its misconduct, not the trust estate. The issue of the methodology and amount of distributions was resolved on summary judgment. The Trust should not otherwise be forced to pay for the fees the Trustee has incurred litigating against Mr. Graham. The fees incurred in this action are attributable to the Trustee's decision to advocate against Mr. Graham's interest and to defending against the claims arising from that decision. Accordingly, the Trustee should be ordered to reimburse the Trust for the fees it paid to itself and its attorneys from the Trust. In addition, the Trustee should be ordered to reimburse the Trust for the attorney's fees incurred by Mr. Graham in defending against the Trustee's contentions and in establishing the Trustee's breaches of fiduciary duty. *See Allard,* 99 Wn.2d at 408 ("Where litigation is necessitated by the inexcusable conduct of the trustee...the trustee individually must pay those expenses").

E. Mr. Graham's Attorney's Fees Incurred in Connection With This Appeal Should Be Paid by the Trustee or From the Trust if Not Ordered to be Paid by the Trustee.

For the same reason, the Trustee should be required to pay Mr. Graham's attorney's fees and costs on appeal. However, if this Court does not so order, then it should order that his fees be paid from the Trust.

Generally, where all beneficiaries are before the court on the issue of their respective rights in a fund, an award of all fees from the fund is appropriate. *In re Estate of Black*, 116 Wn. App. 476, 491, 66 P.3d 670 (2003) ("When all the beneficiaries of both wills are involved, the court may award fees from the estate to both sides because the litigation resolves the rights of all."); *accord Estate of Watlack*, 88 Wn. App. 603, 612, 945 P.2d 1154 (1997). Further, "[t]he touchstone of an award of attorney fees from the estate is whether the litigation resulted in a substantial benefit to the estate." *Black*, 116 Wn. App. 476, 490 (citing *In re Estate of Niehenke*, 117 Wn.2d 631, 645, 818 P.2d 1324 (1991)). "The estate benefits when all competing interests of all potential beneficiaries are resolved, *regardless of the outcome*." *Id.* at 491 (emphasis added).

At the very least, an award of Mr. Graham's attorney's fees and costs on appeal from the Trust is appropriate because the present litigation involved the respective rights of the Trust's beneficiaries. If

reimbursement is not to be compelled from the Trustee, Mr. Graham is still entitled to be reimbursed from the Trust.

VI. CONCLUSION

The trial court's summary judgment orders should be reversed. This Court should determine as a matter of law that because Mr. Graham owns and controls his estate, the remainder trust interest that is distributable to his estate is not separate and distinct from him or his estate and that there is no conflict between the remainder interest of his estate in the Trust and him because he owns and controls that interest. The Court should further determine as a matter of law that by advocating against Mr. Graham's position, the trustee breached its fiduciary duty. The case should be remanded for entry of an order requiring the Trustee to reimburse the Trust for its fees and the attorney's fees it incurred in connection with the summary judgment motions, for reimbursement of Mr. Graham's attorney's fees which were paid from the Trust, and for trial as to damages on Mr. Graham's claim for breach of fiduciary duty.

In addition, the Court should require the Trustee to bear its fees and attorney's fees and costs for this appeal and award Mr. Graham his reasonable attorney's fees and costs from the Trustee (or, if not, then from the Trust).

RESPECTFULLY SUBMITTED this 1st day of February, 2016.

WILLIAMS, KASTNER & GIBBS PLLC

By _____
Mark S. Davidson, WSBA #06430
Stanbery Foster, Jr., WSBA #01996
Attorneys for Appellant Frederick A. Graham

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 1st day of February, 2016, I caused a true and correct copy of the foregoing document, "BRIEF OF APPELLANT," to be delivered to the following counsel of record as indicated:

Counsel for Respondents:

RoseMary Reed Mathew L. Harrington Chris R. Graving Stokes Lawrence, P.S. 1420 Fifth Avenue, Suite 3000 Seattle, WA 98101 T: (206) 626-6000 F: (206) 464-1496 E: rmr@stockeslaw.com KSG@stokeslaw.com MLH@stokeslaw.com	☑ Via Legal Messenger ☐ Via Facsimile ☑ Via Electronic Mail ☐ Via United States Mail

DATED this 1st day of February, 2016, at Seattle, Washington.

Susan Allan
Legal Assistant to Mark S. Davidson

RESPECTFULLY SUBMITTED this 1st day of February, 2016.

WILLIAMS, KASTNER & GIBBS PLLC

By

Mark S. Davidson, WSBA #06430
Stanbery Foster, Jr., WSBA #01996
Attorneys for Appellant Frederick A. Graham

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DATED this 1st day of February, 2016, at Seattle, Washington.

Susan Allan
Legal Assistant to Mark S. Davidson

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