

Appellant's Brief

NO. 35504-3-II

COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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JAMES JOHANNES, JANE DOE JOHANNES, and the  
marital community composed thereof, Appellant,

v.

ESTATE OF EVELYN C. JOHANNES, Gerald Johannes,  
Personal Representative, Respondents,

and

SHERRY KAY FERRENTE; KATHLEEN D. YORMARK;  
JEFFREY W. JOHANNES; MATTHEW S. JOHANNES; and  
TIM F. JOHANNES, Cross Appellants,

and

ESTATE OF EVELYN C. JOHANNES, GERALD  
JOHANNES, Personal Representative, ~~Cross~~ Respondents.

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BRIEF OF PETITIONER

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Bart Adams, Attorney for James Johannes, Appellant  
2626 N. Pearl  
Tacoma, WA 98407  
(253) 761-0141  
WSBA #11297

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STATE OF WASHINGTON  
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COURT OF APPEALS  
DIVISION II

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## I. ASSIGNMENTS OF ERROR

- No. 1            The trial court erred in entering Finding of Fact #6.
- No. 2            The trial court erred in entering Finding of Fact #16.
- No. 3            The trial court erred in entering Finding of Fact #25.
- No. 4            The trial court erred in entering Finding of Fact #26.
- No. 5            The trial court erred in entering finding of Fact #32.
- No. 6            The trial court erred in failing to find that the estate of Evelyn Johannes should have been closed at the very latest by the end of 1993.
- No. 7            The trial Court erred in entering Finding of Fact # 47.
- No. 8            The trial court erred in entering Finding of Fact # 48.
- No. 9            The trial court erred in entering Finding of Fact # 49.
- No. 10           The trail court erred in entering Finding of Fact #51.
- No. 11           The trial court erred in admitting into evidence the balance sheets prepared by Frank Johnson that were exhibits #16 and #17 and in entering a judgment requiring that those be used to establish the proper estate balances for 2004.
- No. 12           The trial court erred in refusing to grant damages placing the trust beneficiaries in the position they would have been had the estate been closed in 1993.
- No. 13           The trial court erred in failing to grant a judgment awarding the Johannes Trust a judgment for 40% of a \$28,000.00 CD cashed by Gerald Johannes on April 19, 1993 and not accounted for in the estate, together with interest at 12% per annum since April 19, 1993.

No. 14           The trial court erred in failing to award a judgment to the Johannes Estate in the amount of 40% of the sum \$29,857.00 in funds that were missing from the estate account at the end of 1993 plus 12% interest per annum since that time.

No. 15           The trial court erred in failing to grant a judgment to the Johannes Estate for 40% of \$44,403.00 for the overpayments to Puget Sound National Bank made by the trustee for debt that could not have belonged to the estate.

No. 16           The trial court erred in failing to grant a judgment to the Johannes Trust for 40% of \$2,093.00 in funds that came from United Bank, were not accounted for by the Personal Representative, together with 12% interest since May 19, 1989.

No. 17           The trial court erred in failing to find that the debt owed by Gerald Johannes to the estate as of the date of the death of Evelyn Johannes was \$33,769.00 rather than \$13,769.00.

No. 18           The trial court erred in failing to find that \$100,000.00 in bonds were held in the name of Evelyn Johannes at the time of her death belonged to the estate and were not the property of Gerald Johannes.

No. 19           The trial court erred in entering \$7,500.00 against James Johannes on the Promissory Note as set forth in Conclusion of Law #1.

No. 20           The trial court erred in entering Conclusion of Law #4 by failing to rule that the estate should have been closed by the end of 1993 and by failing to award damages for the Personal Representative's failure to timely close the estate.

No. 21           The trial court erred in entering Conclusion of Law #6.

No. 22           The trial court erred in entering Conclusion of Law #7.

No. 23           The trial court erred in entering Conclusion of Law #9.

No. 24           The trial court erred in entering Conclusion of Law #10.

- No. 25            The trial court erred in entering Conclusion of Law #11.
- No. 26            The trial court erred in entering Conclusion of Law #12.
- No. 27            The trial court erred in entering Conclusion of Law #16.
- No. 28            The trial court erred in entering Conclusion of Law #17.
- No. 29            The trial court erred in entering Conclusion of Law #20.
- No. 30            The trial court erred in entering Conclusion of Law #22.
- No. 31            The trial court erred in failing to award James Johannes all of his attorneys fees in exposing the breaches of fiduciary duty and obtaining a judgment against Gerald Johannes for his breaches of those fiduciary duties at trial.

#### **ISSUES RELATED TO ASSIGNMENTS OF ERROR**

- No. 1            How long does a Personal Representative have to close an estate under RCW 11.48.010 after the Federal Estate Tax closing letter is received, all property of the estate is sold, and the estate is completely liquid?
- No. 2            Is a Personal Representative who breaches his fiduciary duty to close an estate as rapidly and quickly as possible liable to the estate beneficiaries for damages resulting from that breach?
- No. 3            What is the measure of damages for a Personal Representative's breach of fiduciary duty to timely close an estate?
- No. 4            Is a Personal Representative's breach of fiduciary duty to timely close an estate subject to estoppel?
- No. 5            Is it error to conclude that the doctrine of estoppel applies when no findings support it?
- No. 6            Is hearsay that is objected to at trial admissible in evidence?

- No. 7            Is it error for the court to rely on hearsay evidence as the basis for its decision?
- No. 8            Does the Personal Representative, or do the other beneficiaries of an estate, have the burden of proof regarding the accuracy of the accounting of a Personal Representative?
- No. 9            Are estate beneficiaries entitled to a judgment against a Personal Representative who purchases a Certificate of Deposit with estate funds and cashes that Certificate of Deposit and cannot show that the funds were paid back to the estate?
- No. 10           Are estate beneficiaries entitled to a judgment against the Personal Representative for the amount of estate funds used to pay debts that are not debts of the estate?
- No. 11           When funds are missing from an estate and a judgment is rendered for them, what is the interest rate to be paid by the Personal Representative on the amounts found to be owed?
- No. 12           Is the Personal Representative required to account for assets belonging to a decedent at the time of death that are not included in the Federal Estate 706 Tax Return or the inventory of the estate?
- No. 13           What are the elements of a gift and who has the burden of proof of those elements?
- No. 14           Is a gift of a bearer bond complete when the bond is delivered if it is not endorsed and cannot be cashed by the beneficiary of the gift?
- No. 15           When litigation is commenced against a fiduciary for breach of fiduciary duties and the court finds several breaches of fiduciary duty and awards a judgment for damages resulting from those breaches, are the parties prosecuting the claim for breach of fiduciary duty entitled to attorney's fees?

No. 16            If a Personal Representative is proven to have breached his fiduciary duties is it error for the parties proving that breach to be required to pay part of the Personal Representative's attorney's fees?

## **II. STATEMENT OF THE CASE**

This case involves breaches of fiduciary duty by Gerald Johannes in administering the estate of his mother. Evelyn Johannes died in March 1989. Gerald Johannes was appointed as the Personal Representative of her estate on April 12, 1989. (FF1, see Appendix). The will of the decedent made minor specific bequests. After distributing the specific bequests the will left the estate sixty percent (60%) to Gerald Johannes and forty percent (40%) to a trust of which James Johannes was the lifetime income beneficiary and his children received the remainder. (FF 13, 14).

Gerald Johannes undertook administration of the estate and took control of the estate assets. The estate had two parcels of real property, the first of which was sold on August 4, 1989. (FF 22). The Federal Estate Tax closing letter was received in April 1990. (RP 221, 286). The last parcel of real property was sold in April, 1993. (FF 31). At that point the estate was completely liquid. (RP 452, 453).

Although James Johannes argued at trial and argues in this appeal that the estate should have been closed by the end of 1993, the trial court found that the estate should have been closed by the end of 1994. (FF 32, CL 4). Gerald Johannes never closed the estate or distributed the estate funds. Although the trial court found that Gerald Johannes breached his fiduciary duty in not timely closing the estate, it awarded no damages for that breach. (CL 4). The evidence at trial showed that the trust of which James Johannes was the lifetime beneficiary should have had \$616,110.00 by the end of 2005 if it had been invested as it would have by Puget Sound National Bank had the estate been closed and the trust been funded in 1993. (RP 261). Instead, 40% of the amount found by the court to be in the estate (Ex. 16) together with the judgment against the Personal Representative for his breaches of fiduciary duty of \$124,512.34 (Appendix 2) leaves the trust with \$366,766.93, a loss of \$249,313.07.

In 1998 James Johannes borrowed \$188,000.00 from the estate pursuant to a promissory note. He did not make any payments on the note. (FF 37-39). Had Gerald Johannes not breached his fiduciary duty to close the estate timely, the estate would have been closed four years before that loan and it could not have been made.

The trust beneficiaries hired CPA Frank Ault to determine whether Gerald Johannes could account for the funds he claimed were in the estate at the beginning of the probate. The trial court specifically found that Gerald Johannes did not keep adequate records of the transactions he managed and that it was impossible to produce an accounting from his records because they were inadequate. (FF 50). Although the records were inadequate, Frank Ault established that in 1990 and in 1993 there was a total of \$29,857.00 missing from the estate accounts. The trial court refused to grant a judgment for that missing money because it found in Finding of Fact #50 that although funds were missing Mr. Ault did not testify that the funds went to Gerald Johannes and therefore the trust beneficiaries were not entitled to any judgment for them. (FF 50).

Since there was no accounting available from the Gerald Johannes, the court adopted as the accounting at trial a hearsay document produced by a CPA for Gerald Johannes. (Ex. 16, 17). Counsel for Gerald Johannes admitted that the accounting was hearsay, but claimed it was not being offered for the truth of the document. (RP 497, 769). Despite the fact that the document was hearsay, was objected to as hearsay, and was admitted to be hearsay by counsel for Gerald Johannes, the trial court admitted it into evidence and adopted the accounting in Finding of Fact #51 and in its

judgment ordered that it be used for determining what was available to the estate at the time of the accounting.

James Johannes also proved and the trial court found that Gerald Johannes had purchased a Certificate of Deposit from Key Bank during 1993. (FF 33). Despite the fact that the court found that Gerald Johannes could not establish that the funds were paid back to the estate, (FF 33) and despite the fact that the account had a balance of a value of \$21,000.00 to \$28,000.00 (RP 139, 140), the trial court denied a judgment for the missing funds. (CL 7).

At trial Gerald Johannes admitted that he failed to include in the estate assets from which the accounting began \$2,093.00 from United Bank. Despite that admission the court refused to grant a judgment for it.

Gerald Johannes made payments to Puget Sound National Bank during his administration of the estate. He admitted at trial and the trial court found that he made five payments of \$328.59 to Puget Sound National Bank after the estate's debt to the bank was paid off. (FF 30). The evidence at trial also established that while Gerald Johannes was paying \$1,631.89 per month to Puget Sound National Bank from December 1989 through November 1993 that the debt of the estate to the bank could not have been that much because the mortgage payment was

interest only (RP 62-63) and the balance at the time of the decedent's death was only \$138,347.00. (FF 15). Gerald Johannes was unable to produce any promissory notes, but he admitted that the loans were not at 14% as would have been necessary to justify his monthly payment. (RP 535). Despite those facts the court refused to grant the trust any judgment against Gerald Johannes for his inability to explain either excessive mortgage payments, or the mortgage payments after the estate's debt to the bank was paid off.

Gerald Johannes owed Evelyn Johannes \$33,769.00 as of January 1, 1989. (Ex. 125). The records produced by Gerald Johannes claimed that he was entitled to a gift of \$20,000.00 from his mother as a credit against his debt. (Ex. 125). Gerald Johannes had no proof of that gift at trial and admitted at trial that he had no idea why Exhibit 125 showed a credit on the note of \$20,000.00 in 1989. (RP 97, 98). Despite that admission the trial court allowed Gerald Johannes a credit against the debt he owed his mother at the time of her death for a gift that took place in 1989. (FF 25, CL 9).

Prior to death Evelyn Johannes also held \$100,000.00 in Phoenix bonds. In Finding of Facts #26 the trial court found that those bonds had been a gift to Gerald Johannes in 1988 by delivery of possession of the

bonds with a document titled Statement of Gift. It is undisputed that the bonds were never endorsed over to Gerald Johannes and remained in the name of Evelyn Johannes. (RP 282, 283). When Evelyn Johannes died Gerald Johannes could not cash the bonds because they had not been placed in his name. (RP 282, 283). The only way that he could cash the bonds was to place them in the account for the estate of Evelyn Johannes, which he did, and then remove the funds claiming they were his. (RP 283). The trial court ruled that there was an effective gift that had taken place prior to the death of Evelyn Johannes and did not include those bonds in the estate assets. (FF 6, 16).

The trial court found that Gerald Johannes had committed four major breaches of fiduciary duty. They are (1) failing to keep records of the transactions he managed for the estate (FF 50, CL 2); (2) purchasing KMart bonds with 50% of the estate assets that were junk bonds and declined rapidly in value, costing the estate \$84,000.00 plus lost interest on the money expended (FF 46, CL 3); (3) not closing the estate before 1995 (CL 4); and (4) loaning himself money to buy a home and paying back less than the full principle balance without interest (CL 5). Despite proving those breaches of fiduciary duty, the trial court refused to grant James Johannes attorney's fees for proving those breaches and ordered

James Johannes to pay one-half Gerald Johannes' attorney's fees at trial. (CL 16). It also ordered James Johannes to pay one half of the attorney's fee for the other trust beneficiaries who also sued Gerald Johannes for breaching his fiduciary duty even though they did not request fees against James Johannes. (CL 17). The trial court also refused James Johannes' request for attorney's fees for proving the breaches of fiduciary duty of Gerald Johannes.

### **III. ARGUMENT**

#### **TRIAL COURT MISAPPLIED LAW REGARDING THE PERSONAL REPRESENTATIVE'S DUTY TO CLOSE THE ESTATE**

Gerald Johannes was appointed as Personal Representative of the estate of Evelyn Johannes in April, 1989. (FF 4). The trial court ruled that Gerald Johannes breached his duty as Personal representative by not closing the estate prior to 1995. (FF 32, CL 4) Based upon the evidence presented at trial the court erred factually in not finding that the state could have closed the estate by the end of 1993 and erred legally by not concluding that it was a breach of his fiduciary duty to fail to close the estate by the end of 1993. The difference between using the end of 1993 and the end of 1994 as the date by which the estate should have been closed is significant because, due to the

Personal Representative's breaches of fiduciary duty by failing to keep adequate records, the records are less deficient at the end of 1993 than they were at the end of 1994. Counsel for James Johannes and counsel for the Johannes children both argued that the court should adopt year end 1993 as the time the estate should have been closed. There is no evidence in the record that would support holding the estate open beyond that time. The estate closing letter from the Internal Revenue Service approving the Federal Estate tax Return was received in April 1990 and the estate was ready to be closed at that time. (RP 221, 286). The only expert who testified on that subject at trial, Robin Balsam, testified that the estate could and should have been closed by the summer of 1990. (RP 201). On March 12, 1992 counsel for Gerald Johannes wrote him a letter indicating that the estate was ready to be closed at that time and that he could close the estate by awarding himself the equity in the fourplex, which, by that time, was the only real property owned by the estate. (RP 525, Ex 20). That fourplex was sold in April, 1993. By that time the estate was completely liquid and there was nothing left to do but close the estate. (RP 452, 453). The record is devoid of any claim by Gerald Johannes that there was any administration left to be done after the last real estate was sold. The court should have found that the estate could have been closed by

the end of 1993 as argued by counsel for James Johannes and the Johannes children.

As a matter of law it was a breach of his fiduciary duty for Gerald Johannes to fail to close the estate by the end of 1993. RCW 11.48.010 contains a clear duty for a Personal Representative to close an estate as soon as practically possible. It states, in the relevant portion:

It shall be the duty of every Personal Representative to settle the estate, including the administration of any nonprobate assets within the control of the Personal Representative under RCW 11.18.200, in his hands as rapidly and quickly as possible, without sacrifice to the probate or nonprobate assets.

That a Personal Representative is responsible to estate beneficiaries for damages for failing to close the estate as rapidly and quickly as possible is clear from In Re Estate of Wilson, 8 Wn.App. 519, 507 P.2d 902 (1973). There the court reiterated the statutory duty to close an estate as rapidly and quickly as possible. The trial court erred in ruling that the estate should have been closed by the end of 1994 when under the undisputed facts of this case, there is no basis to argue that the estate could not be closed within 8 months after all the real property was sold and the estate was completely liquid, which occurred by April 1993.

**THE COURT ERRED IN FAILING TO GRANT DAMAGES FOR  
PERSONAL REPRESENTATIVE'S BREACH**

Regardless of whether the court accepts the end of 1993 or the end of 1994 as the date by which Gerald Johannes had to have the estate closed, the trial court committed legal error by entering Conclusion of Law #4 and refusing to award damages for the breach in failing to timely close the estate. As a result of that failure, the estate assets remained under the horrible investment strategies of Gerald Johannes and were not invested as they would have been had the trust been funded with Puget Sound National Bank as called for the decedent's will. Leaving aside the funds not accounted for by the Personal Representative for periods prior to the end of 1993, which are addressed later in this brief, the Johannes Estate had for available for distribution at the end of 1993, according to Gerald Johannes, \$885,374.00. (Ex. 1, 59, 115). Under the court's ruling, to determine what will be in the estate at closing, the new Personal Representative is to start by using the 2004 balance shown on Exhibit 16 of \$792,430.00. Under the court's ruling the estate also received a judgment against Gerald Johannes in the total amount of \$124,512.34, consisting of losses in a Kmart bond investment resulting from his breach of fiduciary duty, \$13,769.00 Gerald Johannes owed his mother at death and never repaid to the estate, funds that Gerald Johannes borrowed

from the estate and paid back with less than the full amount borrowed and without interest, and for forfeiture of his Personal Representative's fee. (Appendix 2). The amount in the estate in 2004 plus the judgment against Gerald Johannes with interest to 2006 total \$916,942.34. That means that the estate of \$885,374.00 at the end of 1993 grew by \$31,568.00 in eleven years. Since Gerald Johannes made distributions to himself and James Johannes in 1995 totaling \$170,000.00, (FF 34) the total gains in the estate in eleven years were \$201,568.00. Of that gain, \$87,730.00 was the interest on a 1998 note from James Johannes to the estate. (Ex 16). That means that in eleven years an \$885,000.00 estate invested by Gerald Johannes returned \$113,838.00, equivalent to about what would have, or a rate of about 1.25% per annum compounded annually.

The duty of the court when a fiduciary breaches his fiduciary duty is to place the beneficiary in the position he would have been in had the breach of fiduciary duty not occurred. Boyer Bank v. Garver, 43 Wn.App. 673, 719 P.2d 583 (1986). The duty of the court at trial was, therefore, to determine how much the trust assets would have been worth had the estate been closed timely, whether that be at the end of 1993 as asserted by James Johannes, or at the end of 1994 as found by the court. Where, as here it is undisputed that the bank would have invested in stock and bond investments, the measure of

damages is to determine how much the stock index rose between the date of the breach of fiduciary duty by failing to close and the time of trial. Garver, *supra*. In Garver, the Washington court adopted Restatement of Trusts 2<sup>nd</sup> § 205. That section states:

If the trustee commits a breach of trust, he is chargeable with:

(c) any profit that would have accrued to the trust estate if there had been no breach of trust.

The Restatement of Trusts 2<sup>nd</sup> § 205 (c) has been replaced with the Restatement of Trusts 3<sup>rd</sup> § 205 (b) which states:

A trustee who commits a breach of trust is  
(b) chargeable with the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered.

At trial James Johannes established through the unrebutted testimony of Rick Wyman that had the trust been turned over to Puget Sound National Bank at the end of 1993 as it should have been, that the bank would have, based upon the age of the life-income beneficiary, James Johannes, had a long-term investment strategy and used an approximately sixty (60) percent stock to forty (40) percent bond mix in investing the trust assets. (RP 259-262). Using that equities to bond mix and selecting the S & P 500 Index for the stock portion of the portfolio, and using the average performing bond fund each

year from the end of 1993 through the end of 2005, the trust should have had in it, after the \$170,000.00 in distributions that were made in 1995, \$616,110.00. (RP 261). Instead, based on the trial court's ruling, the trust is entitled to 40% of the assets from the 2004 accounting which claimed the estate has \$792,430.00 (Ex. 16) added to the judgment against the Personal Representative of \$124,512.34, for a total of \$916,000.00, or \$366,766.93, at loss of \$249,313.07.

Gerald Johannes did not contest that if the estate had been closed and the trust funded and invested by Puget Sound National Bank in 1993 that the trust would have been invested as testified to by Rick Wyman and received the returns that Mr. Wyman presented. He produced no witnesses at trial to discuss how the trust would have been invested had the estate been closed timely and the funds been turned over to Puget Sound National Bank trust department for investment. On cross-examination the expert for Gerald Johannes admitted that the investment strategy testified to by Rick Wyman as being what the bank would have done is the type of strategy that would have been pursued. When asked that question at trial, the expert for Gerald Johannes agreed that a 60% stock to 40% bond ratio for the investments as was testified to by Rick Wyman would have been the investment strategy for the trust, stating:

Q: So in 1993 with, a 25 year life expectancy, something like a 60/40 return with an S & P and bonds is what would have happened.

A: Yes. I don't have a problem with that.

(RP 618).

The undisputed evidence at trial was that had Gerald Johannes closed the estate as he should have by the end of 1993, by the end of 2005 there should have been \$616,110.00 in the trust, rather than \$366,766.93 that was available to be distributed under the court's analysis. Using the proper measure of damages, this court should reverse the trial court and award the Johannes Trust an additional judgment against Gerald Johannes for \$249,313.07.

Instead of trying to refute the proof presented by James Johannes as to what the Puget Sound National Bank investments would have been had the estate been closed and the trust funded, Gerald Johannes defended his breach of fiduciary duty and the investment return he received by alleging that he estate had to be kept invested in short term investments producing very low returns because it needed to be ready to be closed at any time. The court adopted Findings #47, #48 and #49, indicating that once the 1998 Promissory Note was loaned, the estate needed to be kept in short-term assets so that it

was ready to be closed. That argument has no merit. The loan referred to in Findings #47 and #48 was made in 1998. The court found that the estate should have been closed by the end of 1994 and the trial court should have found that the estate should have been closed by the end of 1993 had the Personal Representative closed timely the 1998 loan would not have been made and would not have delayed closing. The argument that the loan delayed the closing is frivolous.

Gerald Johannes argued at trial that it was not a breach of his fiduciary duty to fail to close the estate timely because James Johannes, one of the beneficiaries of the trust to be funded on the closing of the estate, encouraged him to leave the estate open. The court entered Conclusion of Law 12, stating that the doctrine of estoppel applies. That position is legal error for several reasons.

First and most important is that the statutory duty to close an estate as rapidly and quickly as possible is not subject to the defense that one of the estate beneficiaries did not desire to have the estate closed. In re Peterson's Estate, 12 Wn.2d 686, 123 P.2d 733 (1942).

Under Peterson, *supra*, p. 732, 733, the duty to close an estate as rapidly and quickly as possible is a duty of the personal representative to court. It is not subject to waiver or estoppel based on actions of the beneficiaries.

Second, James Johannes was bequeathed nothing directly under the decedent's will. He was but one of several beneficiaries of a trust that was created by that will. No authority has been cited by Gerald Johannes and none exists that establishes that a request by one of several trust beneficiaries under a trust will to defer funding of a testamentary trust protects the personal representative from complying with the terms of the will requiring him to fund the trust. Indeed, the purpose of the trust in the decedent's will was to allow the settlor to decide how the funds put into the trust would be distributed to the trust beneficiaries. That purpose would be emasculated if the Personal Representative can avoid closing the estate by doing what one of the beneficiaries requested, rather than following the will of the testator.

Third, and equally important, is that fact that the trial court did not make necessary findings to support the doctrine of estoppel. The elements of estoppel are:

- (1) an admission, a statement or act inconsistent with a claim afterward asserted; and
- (2) action by the other party on the faith of the admission, statement or act; and
- (3) injury to the party resulting from the permitting of the first party to contradict or repudiate the admission, statement or act.

Crown Plaza Corp. v. Synapse Software Systems, Inc., 87 Wn.App. 495, 962 P.2d 824 (1997). The trial court found none of the elements of estoppel in its

findings of fact. Even if it were possible for estoppel to waive the duty of a personal representative to close an estate as rapidly and quickly as possible, which it is not, the elements of estoppel have not been proven.

Fourth, any suggestion that James Johannes benefited from the delay in closing the estate, as suggested in Conclusion of Law 12, is clearly factually wrong. According to the testimony of Rick Wyman, if properly managed the estate should have received a net return of 8.33% over the period from 1993 through 2005. (Ex. 122, RP 261). Except for the Note from the estate to James Johannes which returned 8% interest, the estate made about 1.25% during that period. It is difficult to conceive how the trial court could have believed that James Johannes benefited from the delay in closing the estate when he was paying 8% interest on the loan from the estate and receiving a 1.25% return on his estate invested money. Once the court determines the date of the breach of Gerald Johannes by failing to timely close the estate, the damages resulting from that failure are recoverable under Washington law. It was error for the trial court to fail to grant those damages.

Fifth, Gerald Johannes admitted at trial that there were no discussions about keeping the estate open between 1993 and 1996. (RP 53). To apply the doctrine of estoppel when there were no discussions requesting that the estate

be kept open during the period between 1993 and 1996 when the estate was, at all times ready to be closed, is legal error.

**ACCOUNTING ACCEPTED BY THE COURT WAS INADMISSIBLE  
AS EVIDENCE**

The trial court in this case adopted, as the accounting of the Personal Representative, two hearsay documents prepared by an accountant who did not testify at trial and was not subject to cross examination. (FF 51). It is not disputed that those “accountings” are not accountings in that they do not even attempt to show income and expenses from any prior period and balance them. Instead, they are nothing more than balance sheets prepared at two different points in time demonstrating what Gerald Johannes provided the accountant as assets in existence at those points in time. As such they are irrelevant to the courts proceedings.

Those “accountings” were contained in Exhibit 16 and Exhibit 17. Both were objected to as hearsay. (RP 493-503, 767-769). Indeed, even counsel for Gerald Johannes admitted that the document was hearsay, but argued he was offering it for the purpose of demonstrating that it was delivered to James Johannes and that it should therefore be admissible for that purpose, but not for the truth of the document. (RP 497, 769).

Hearsay is an out of court statement offered to prove the truth of the matter asserted. ER 801. Hearsay is not admissible at trial. ER 802. The court erred in admitting Exhibits 16 and 17 for the truth of the matter asserted.

In addition to the evidentiary error in admitting the accounting, the court adopted Finding of Fact #51, and ruled that the Frank Johnson accounting was to be used to determine how much the Personal Representative was required to account for in the estate up through its date in 2004 and the court ruled that that accounting was accurate. The judgment itself states:

Ordered that the successor personal representative of the estate of Evelyn C. Johannes shall use that document prepared by Frank Johnson dated January 31, 2004 and filed in the probate in the cause of Evelyn C. Johannes on March 18, 2004 and prepare any final accounting only from that point forward. (Appendix 2)

The trial court not only committed error by admitting the hearsay documents, it magnified that error by adopting them as accurate. There is no basis for the trial court to admit those documents and it was legal error to do so.

The error in using that accounting is also obvious from the record. Gerald Johannes admits that he cannot tie any two years of his “accountings” together. (RP 551, 552). He also admits that there is nothing he can use to tie the Frank Johnson “accountings” together making them balance after

considering the income and expenses incurred between the two balance sheets. (RP 559). The documents quite simply are not accountings. They do not do anything to identify the sources of income that came to the estate since 1989. They do not do anything to itemize the expenses paid since 1989. They do not account for the funds administered by the estate. They do not have an income statement to explain the changes between years. They were not admissible. It was error for the court to adopt them and then rely on them in the judgment.

**TRIAL COURT ERRED IN ENTERING FINDINGS OF FACT #6 AND #16 AND IN FAILING TO INCLUDE IN THE ESTATE ASSETS THAT WERE PROVEN TO EXIST BUT WERE NOT ACCOUNTED FOR BY PERSONAL REPRESENTATIVE**

In Finding of Fact #6 and #16 the trial court limited the assets that needed to be accounted for by the Personal Representative to those shown in the Federal Estate Tax Return. It was error for the trial court to so rule and to fail to grant judgments for several items that were proven to exist but were not accounted for.

James Johannes proved, and the trial court found that the estate, through Gerald Johannes, purchased the Certificate of Deposit from Key Bank during 1993. Records of that Certificate of Deposit are found in trial court Exhibit 60. The undisputed testimony based on those records is that the CD

had a value of between \$21,000.00 and \$28,000.00 based on interest rates prevailing in 1993. (RP 139, 140). The trial court found that the estate purchased the CD and that the Personal Representative could not establish that those funds were paid back into the estate. (FF 33). Despite that finding, the trial court refused to grant James Johannes or the trust beneficiaries any judgment for the missing money because it placed the burden of proof of the disposition of those funds on the trust beneficiaries rather than on Gerald Johannes. (CL 7). In an accounting action, the burden of proving the propriety of challenged transactions rests with the fiduciary. Wilkins v. Lasater, 46 Wn.App. 766, 733 P.2d 221 (1987). That position is also taken by the Restatement of Trusts, 2<sup>nd</sup>, § 172, which states:

The trustee is under a duty to the beneficiary to keep and render clear and accurate accounts with respect to the administration of the trust.

Comment B to that restatement section says:

(b). *Effective failure to keep accounts*. If the trustee fails to keep proper accounts, he is liable for loss or expense resulting from his failure to keep proper accounts. The burden of proof is upon the trustee to show that he is entitled to the credits he claims, and his failure to keep proper accounts and vouchers may result in his failure to establish the credits he claims.

Gerald Johannes admitted at trial that he had no idea where the Certificate of Deposit money went and that he has never accounted for it. (RP 78, 79). It was legal error for the trial court to refuse to grant judgment for the CD. Since doubts have to be resolved against Gerald Johannes, this court should rule that the estate is entitled to an additional judgment of \$28,000.00 against Gerald Johannes, plus 12% interest from the date the funds were withdrawn from the account as shown in Exhibit 60, April 19, 1993. Interest on the money taken by Gerald Johannes in 1993 is collectible at 12% per annum under RCW 19.52.010. That interest is necessary to make the estate whole for the funds unaccounted for by the Personal Representative.

The trial court also erred in entering Findings #6 and #16 and in failing to include in the funds owed by the Personal Representative to the estate a judgment for \$2,093.00 that came from United Bank that the Personal Representative admitted was not included in his accounting or the estate 706 Federal Estate Tax Return. During his trial testimony the Personal Representative admitted that \$2,093.00 came from United Bank and was not accounted for in the Estate 706 (RP 87-89), (Ex 25, p.3). Despite that admission, the trial court did not find that any funds were missing from the estate as accounted for by the Estate Tax return and did not grant a judgment for those unaccounted for funds. This court should find that the estate is

entitled to an additional judgment against Gerald Johannes for \$2,093.00 plus interest at the rate of 12% per annum from May 19, 1989 when those funds were taken. (Ex 25, p.3). RCW 19.52.010.

**TRIAL COURT MISAPPLIED BURDEN OF PROOF TO  
ADDITIONAL MISSING FUNDS**

Accountant Frank Ault was hired by the trust beneficiaries to do an accounting of the funds in the Johannes Estate. Mr. Ault testified, and the trial court found, that Gerald Johannes did not keep sufficient records to prove the disposition of the estate funds. Specifically, in Finding of Fact number 50, the court found:

Gerald Johannes did not keep adequate records of the transactions he managed for the estate. Accountant Frank Ault was unable to produce an accounting of the estate funds because of the insufficient records produced by Gerald. Mr. Ault's testimony does not establish that Gerald Johannes took funds, since Ault did not testify that the funds went to Gerald Johannes. Mr. Ault was severely hampered by Gerald's failure to keep adequate, if any records.

Despite that finding, the court refused to grant any judgment for the funds that accountant Frank Ault demonstrated were missing. Mr. Ault went through a painstaking process, starting with the assumption that the assets listed on the Federal Estate Tax Return were accurate. He determined that for the period

from the time the estate was opened until the end of 1990 that \$13,766.00 were unaccounted for. (RP 156, Ex. 115). He determined that the account was short an additional \$16,091.00 in 1993. (Ex. 115, RP 165). The court granted no judgment for those shortfalls because it believed that the trust beneficiaries had to prove not only that money was missing, but that they had to trace that missing money and demonstrate that Gerald Johannes ended up with it. (FF 50). Such a ruling stands Washington law on its head. The burden of proof of the propriety of an accounting is on the Personal Representative. Wilkins, supra. All doubts will be rendered against him. Wilkins, supra. The trial court improperly ruled that it was the beneficiaries' duty to prove that money was missing from the estate funds rather than requiring the Personal Representative to account for every penny he administered, which neither he nor any accountant could do based upon the records maintained. (RP 184, FF 50). The Personal Representative presented no testimony even attempting to account for the funds administered since 1989 by showing a starting balance and showing how that starting balance changed for income and expenses of the estate. Gerald Johannes admitted that there is not a single year within his administration of the estate where he could demonstrate a balance at the beginning of the year, and then by use of income and expenses, make the account balance at year end. (RP 551-553). The trial court simply erred by

failing to find that the estate was missing \$29,857.00 for 1990 and 1993 as was testified to by Frank Ault and in failing to grant a judgment to the trust for 40% of that amount plus 12% interest since those shortfalls occurred. This court should either grant that judgment or, in the alternative, remand this case for a full accounting from the Personal Representative.

**TRIAL COURT ERRED IN NOT REQUIRING PERSONAL  
REPRESENTATIVE TO ACCOUNT FOR PAYMENTS MADE TO  
PUGET SOUND NATIONAL BANK**

It is not disputed that Gerald Johannes made significant payments to Puget Sound National Bank between 1989 and 1993. During most of that time the payments were \$1,631.89 per month. A detail of the payments as disclosed by the check register admitted at the trial as Exhibit 15 is attached on Appendix 3. Gerald Johannes was unable to provide any promissory notes for the period during which he administered the estate or to demonstrate how the interest paid could possibly be correct. Indeed, the evidence established, and the trial court found, that he continued to make payments from the estate account to Puget Sound National Bank in the amount of \$328.59 per month for five months after the estate debt to the bank was paid off. (FF 30). Based upon the testimony produced at trial, it is not possible that the estate incurred

as much interest expense at Puget Sound National Bank as was paid to the bank. Gerald Johannes claims that the debt to the bank at the time of his mother's death was \$138,347.00. (Ex. 8). He admits that the mortgage payment was interest only. (RP 62-63). Yet payments of \$1,631.89 as were made between 1989 and the payoff of the mortgage in 1992 would require an interest rate of more than 14% on the note. He admitted he would not have left a 14% note in place because he had liquid assets to pay the debt. (RP 535).

The Personal Representative cannot meet his burden of proof to show that the payments he made while he was paying \$1,631.89 per month on the mortgage were all an estate expense. He further cannot demonstrate any reason why he continued to pay \$328.59 per month for five months after the estate's note to the bank was satisfied, as the court found in Finding of Fact 30. The only explanation provided at trial was that provided by Frank Ault. Mr. Ault testified that the payment of \$1,631.89 was far too much for what should have been an interest only payment on the debt of the estate. (RP 180-182). He testified that it is, in his opinion, he believed the most likely explanation was for the Personal Representative's inability to account for the high mortgage payments was that during all of the months when a \$1,631.89 mortgage payment was being made, that payment included a payment on a debt in the amount of \$328.59 per month, the amount that continued to be paid for five

months after the estate's note to the bank was satisfied. (FF 30). He testified that the total overpaid payments with 12% interest were \$44,403.00. (RP 182). Gerald Johannes could not explain the payments. Since the Personal Representative was unable to provide any other explanation or produce notes that demonstrated the interest rates that would have had to have been in excess of 14% for his payments to be accurate, the trial court should have entered a judgment against Gerald Johannes for \$328.59 for each month for which the mortgage payment was made in the amount of \$1,631.89 together with a judgment for the five months that the trial court found were paid at \$328.59 per month after the obligation was satisfied. Wilkins, *supra*. Instead, despite finding that the Personal Representative did not keep adequate records to demonstrate what the payments to Puget Sound National Bank were for, and despite the fact that the court expressly found that the Personal Representative continued to make payments to Puget Sound National bank for five months after the debt was satisfied without explanation, the court refused any judgment for the overpayments to Puget Sound National Bank. (CL 20). That was legal error. The trust is entitled to a judgment for 40% of \$44,403.00 as proven at trial.

**TRIAL COURT ERRED IN CONCLUDING THAT LIFETIME GIFTS  
WERE MADE TO THE PERSONAL REPRESENTATIVE**

The trial court also erred by entering Findings #6 and #16 and by allowing Gerald Johannes a \$20,000.00 credit against the debt he owed his mother for a 1989 gift for which the elements of a gift were not testified to at trial. The trial court addressed the \$20,000.00 gift in Finding of Fact #25. There is nothing technically inaccurate about the Finding of Fact, which does not make a finding that a gift was made, but only a finding that the Federal Estate Tax Return listed the debt at \$13,769.00 after making a credit for a \$20,000.00 gift. In Conclusion of Law #9 the court only awarded a judgment against Gerald Johannes for \$13,769.00 with 7% simple interest rather than 33,769.00 plus the statutory rate of interest of 12% as the court should have done.

Documents produced by Gerald Johannes during discovery demonstrate that the balance of \$13,769 due on that debt was reached by giving Gerald Johannes a credit against the note for a \$20,000 gift in January of 1989. (Ex 125).

It was error to allow a \$20,000.00 credit against the debt in determining balance owed by Gerald Johannes to the estate at the time of

his mother's death because there is no evidence in the record that would support a gift taking place in 1989.

The requirements for a completed gift are: (1) An intention of the donor to presently give; (2) A subject matter capable of passing delivery; (3) An actual delivery; (4) Acceptance by the donee. Sinclair v. Fleischman, 54 Wn. App. 204, 773 P2d 101 (1989). Gifts will not be presumed and one must prove the elements by clear, convincing, strong and satisfactory evidence.

Brin v. Stutzman, 89 Wn. App. 809, 951 P2d 291 (1998).

Gerald Johannes provided no evidence of any of the four elements of a gift taking place during 1989. The only reference to that gift in the record is an accounting entry showing a gift in January 1989. (Ex 125). Indeed, Gerald Johannes admitted at trial that he had no idea why Exhibit 125 showed a credit on the note in 1989. (RP 97, 98). The trial court erred in entering Finding of Fact #25 which found that there was a gift of \$20,000 from Evelyn Johannes in 1989. It is undisputed that Gerald Johannes did not pay back any of the debt owed at the time of his mother death. The judgment for the unpaid balance on the Note should have been \$33,769.00 rather than \$13,769.00 as was granted by the trial court plus interest at 12% per annum since January 1, 1989. Further, regardless of

whether the judgment is for \$13,769.00 or \$33,769.00, it was error for the court to fail to award interest at 12% per annum since there was no promissory note supporting a different interest rate. (FF 25). RCW 19.52.010.

The trial court also erred by entering Findings of Fact #6 and #16 in ruling that there had been a valid gift from Evelyn Johannes to Gerald Johannes and to his wife and children of \$100,000.00 in Phoenix bonds in 1988. In making that ruling the court entered Finding of Fact #26. It is not disputed that the last two sentences of that Finding are correct. The first sentence which concludes that the facts that the court found constitute a valid gift is wrong. The trial court erred in failing to find, based on the undisputed evidence of Gerald Johannes, that those bonds were never endorsed from Evelyn Johannes to Gerald Johannes. Gerald Johannes admitted at trial that the bonds were never endorsed over to him. (RP 282, 283). The facts related to that purported gift are not disputed. Evelyn Johannes provided a written statement of a gift in 1988 (Ex 34). She physically delivered the bonds to Gerald Johannes, but she did not endorse them and they stayed in her name. (RP 282, 283). The bonds were never transferred prior to her death. (RP 282, 283). Gerald Johannes could cash

the bonds only by placing them in the estate account of Evelyn Johannes because they remained in her name. (RP 283).

Without the bonds being endorsed to Gerald Johannes the delivery requirement is as a matter of law not met. In re Slokum's Estate, 83 Wn.158, 145 P. 204 (1915). Under that case, even though Evelyn Johannes may have had an intent to make a gift, there is no completed gift because of the failure to have the bonds endorsed precludes a completed delivery. The one hundred thousand dollars (\$100,000) in bonds, which were cashed by placing them in the estate account in September of 1990, a year and a half after the death of Evelyn Johannes, were estate assets. Gerald Johannes must account for them along with interest at 12% per annum since September, 1990 when they were cashed. (RP 284) RCW 19.52.010.

To summarize the position of James Johannes based on the damages he proved at trial, he requests that this court adopt the legal position of Garver, *supra*, and hold, as testified by Rick Wyman, that the trust should be funded as of the end of 2005 with \$616,110.00 plus forty percent (40%) of the following items that cannot be accounted for by the Personal Representative.

- (1) A Certificate of Deposit for \$28,000.00 cashed in on April 19, 1993, plus interest since that date at 12% per annum; and
- (2) the sum of \$29,857.00 that was missing from the estate account by the end of 1993 plus interest at 12% per annum since that date; and
- (3) the sum of \$44,403.00 for the overpaid payments to Puget Sound National Bank that could not have applied to the estate's debt plus interest at the rate of 12% per annum since March 1993; plus
- (4) the sum of \$2,093.00 for funds that came from United Bank that were not accounted for in the Estate 706 Tax Return plus interest of 12% per annum since May 19, 1989; plus
- (5) \$20,000.00 for a gift that was credited by Gerald Johannes to a debt he had to his mother at the time of her death without any trial proof of that gift taking place during 1989 plus interest at 12% per annum since January 1, 1989 on \$33,769.00; and
- (6) \$100,000.00 plus interest at the rate of 12% per annum since September 1990, when the Phoenix bonds were cashed in and the funds were taken by Gerald Johannes.

If this court does not grant that relief, the case needs to be remanded to trial court for an accurate accounting. The trial court found in finding of fact

#50 that it is not possible to do an accounting based on the records produced by Gerald Johannes. It erred in adopting the “accounting” of Frank Johnson when that accounting is nothing more than a balance sheet and does not tie to any income or expense statement, and was inadmissible for the truth of its content. In the absence of adopting James Johannes’ requested relief, the case must be remanded to the trial court for an accurate accounting.

**COURT ERRED IN FAILING TO CHARGE PERSONAL REPRESENTATIVE WITH OTHER LOSSES IN ESTATE**

If this court does not accept the position of James Johannes and grant damages by requiring the Personal Representative to fund the trust with the amount of money that it would have had had the estate been closed at the end of 1993 and had the funds been invested as it is undisputed they would have been by Puget Sound National Bank, then the court must also consider breaches of fiduciary duty that occurred after 1993. There are three primary problems that resulted from the investment strategy that was followed by Gerald Johannes after 1993. First, evidence established and the court found that Gerald Johannes invested \$297,962.00 in Kmart junk bonds on November 19, 2001. (FF 44). Those bonds were redeemed for \$70,655.96 on August 11, 2003 (Ex 117). Because Gerald Johannes filed a claim against the broker and

made a recovery on that claim, the trial court found that there was a net arbitration loss of \$84,000.00 to the estate. (FF 46). While James Johannes does not contest the net dollar figure of the loss, the trial court erred in failing to award additional damages based on the estate's loss of use of the money between the time of the investment and the time the funds were back into the estate. Specifically, the trial court granted a judgment against Gerald Johannes for \$84,000.00 without awarding any prejudgment interest or any award for loss of use of the funds. (FF 46, CL 3). Gerald Johannes invested \$297,962.00 on November 19, 2001. The estate received back a net amount of \$84,000.00 less than the invested figure on August 11, 2003. (Ex. 117). Therefore, the estate not only suffered a loss of \$84,000.00, it also had no return on \$297,962.00 for twenty-one months. Further, the estate received no prejudgment interest on the \$84,000.00 award. The evidence at trial established that at 8% interest the total amount lost by the estate was \$64,892.00. (Ex. 117). If the court is not going to adopt Gerald Johannes' argument and rule that the estate should have been closed in 1993 and provide that the damages must be awarded in accorded with the testimony of Rick Wyman at trial, then the court should award an additional judgment of \$64,892.00 against Gerald Johannes for lost opportunity costs of the money resulting from his breach of fiduciary duty in his Kmart bond investment.

Evidence established and the trial court properly found that Gerald Johannes invested in three high-tech companies in 2000 in an amount equal to approximately 20% of the estate's assets. The court found that those stocks were sold in 2004 at a loss of \$52,542.00. (FF 43). The trial court erred in not finding that the investment in high-tech stocks was a breach of fiduciary duty, causing a loss to the estate. There are two bases for this argument. First, if Gerald Johannes had not breached his fiduciary duty by failing to close the estate in 1993, this investment would not have occurred and the loss would not have occurred. Second, placing 20% of the estate assets in a speculative high-tech stock arena fails to meet the prudent investor rule and breached the Personal Representative's duty to diversify the assets. RCW 11.100.020, 11.100.047.

#### **THE TRIAL COURT ERRED IN IT'S ATTORNEY FEE AWARDS**

The Trial Court erred both in requiring James Johannes to pay \$43,090.78 in attorney's fees and \$1,959.70 in costs incurred by Gerald Johannes in defending the breach of fiduciary duty claims and in failing to award James Johannes the \$57,648.50 in fees he incurred in prosecuting the breach of fiduciary claims of Gerald Johannes. (CL 16, 22).

The Trial Court found, that Gerald Johannes committed four (4) major breaches of fiduciary duty. It found that Gerald Johannes breached his duty to keep accurate records in the estate (CL 2.) It found that Gerald Johannes breached his fiduciary duty by purchasing \$300,000.00 of K-Mart bonds which were junk bonds causing a loss in the estate of at least \$84,000.00. (CL 3). It found that Gerald Johannes breached his fiduciary duty by failing to timely close the estate. (CL 4). The Court found that Gerald Johannes breached his fiduciary duty by loaning money to himself to buy a home from the Estate, not paying the loan back in full and not collecting interest. (CL 5). The court entered a judgment against Gerald Johannes for \$124,512.34 for those losses to the estate, and \$13,769.00 he owed to the estate plus interest.

In light of those significant breaches of fiduciary duty, the court removed Gerald Johannes as the Personal Representative of the Estate of Evelyn Johannes, but it required Gerald Johannes to pay only one-half ( $\frac{1}{2}$ ) of the attorney's fees incurred by him in defending the claims in the breach of his fiduciary duty personally and it required James Johannes to pay the other one-half ( $\frac{1}{2}$ ) of those fees. (CL 16, 18). It also failed to require Gerald Johannes to pay the attorney's fees of James Johannes in bringing the action and proving the breaches of fiduciary duty. (CL 22).

Where litigation is necessitated by inexcusable conduct by a fiduciary, the fiduciary individually must pay the attorney's fees in defending the claims of breach of his fiduciary duty. Allard v. Pacific National Bank, 99 Wn.2d 394, 663 P2d 104 (1983). It is abuse of discretion to award attorney's fees to a trustee for a litigation caused by his misconduct. Allard, supra. The Allard standard has been applied to Personal Representatives. In Re Estate of Jones, 152 Wn.2d 1, 100 P.3d 805 (2004). By bringing the action alleging a breach of fiduciary duty, James Johannes proved that Gerald Johannes had breach his fiduciary duty by his investment in the KMart bonds. It is not disputed that Gerald Johannes had not told any of the trust beneficiaries, including James Johannes or James Johannes' children of the KMart investment and that that breach of fiduciary duty was uncovered at the deposition of Gerald Johannes in this litigation. (RP 61). As a matter of law, attorney's fees must be awarded to James Johannes and it was an abuse of discretion to award attorney's fees for Gerald Johannes to be paid by James Johannes.

It was also error under Allard, supra, to fail to award attorney's fees to James Johannes for the necessity of instituting the successful litigation to expose breaches of fiduciary duties and obtain a judgment against Gerald Johannes. Allard also holds that because of Gerald

Johannes' breach of fiduciary duty that James Johannes is entitled to all of his attorney's fees in prosecuting the claims against Gerald Johannes. Counsel for James Johannes provided the court with a declaration regarding fees. James Johannes incurred \$57,648.50 in fees at trial. (CP pending). It was legal error for the court to fail to award those attorney's fees to James Johannes. This court should reverse the trial court and award attorney's fees in that amount to James Johannes against Gerald Johannes personally.

#### **ATTORNEY'S FEES ON NOTE WERE EXCESSIVE**

The trial court required James Johannes to pay \$7,500.00 as attorney's fees for the suit brought by Gerald Johannes on the note had he owed. (CL 1, Judgment). It was error for the court to find that amount to be reasonable fees for the suit on the note as the court did at trial. James Johannes did not ever dispute that he had signed the note or that he had made no payments on the note. (RP 5). The attorneys for Gerald Johannes filed affidavits regarding their fees. (CP pending). In those affidavits they could not identify time spent related to this action other than drafting a complaint. Since counsel for Gerald Johannes who sued on the note were charging at an hourly rate, there is no basis to award \$7,500.00 in fees

when less than \$500.00 in fees can be identified from their own records as billed on the suit on the note. This court should reverse the attorney's fee award against James Johannes on the promissory note of \$7,500.00 and award \$1,000.00 as reasonable fees, as requested by counsel for James Johannes at trial.

**IT WAS ERROR TO REQUIRE JAMES JOHANNES TO PAY  
ATTORNEY'S FEES TO COUNSEL FOR HIS CHILDREN**

The trial court also erred in requiring James Johannes to pay \$27,076.80 of attorney's fees for the other trust beneficiaries, his children, as the court required in Conclusion of Law #17. The trial court required James Johannes and Gerald Johannes to each pay one half of the attorney's fees for the Johannes children. There is no basis for the award against James Johannes. All the fees that were incurred by the children for Gerald Johannes were incurred prosecuting the claims for breach of fiduciary duty against Gerald Johannes. Those trust beneficiaries made no claims against James Johannes and did not request attorney's fees against him. Allard, *supra*, controls. Since the litigation over Gerald Johannes' administration of the estate resulted in a finding that he breached his fiduciary duties to the estate and an affirmative judgment for those

breaches, Gerald Johannes must pay all attorney's fees incurred in prosecuting the claims against him. It was error to require James Johannes to pay any of the fees for the other trust beneficiaries.

#### **ATTORNEY'S FEES ON APPEAL**

James Johannes is also entitled to an award of attorney's fees on appeal. Allard, *supra*. This court should order payment of attorney's fees for the appeal to be determined in accordance with RAP 18.1.

#### **IV. CONCLUSION**

Gerald Johannes did not keep adequate records to establish the financial transactions that took place between 1989 when he was appointed as the Personal Representative of the decedent's estate and 2006 when he was removed as the Personal Representative. That failure was found by the trial court to be a breach of fiduciary duty. Gerald Johannes also failed to timely close the estate. That was found by the trial court to be a breach of fiduciary duty. Regardless of whether the court accepts 1993 or 1994 as the date when the estate should have been closed, the court should award damages to place the trust and the trust beneficiaries in the same position they would have been in had the estate been timely

closed and the funds turned over to Puget Sound National Bank. The trial court committed legal error by finding the breach in failing to have the estate timely close, but not awarding damages for that breach. Had the estate been timely closed, there would have been no purchase of KMart bonds as occurred in 2001 and was a breach of fiduciary duty. Had the estate been timely closed, there would have been no purchase of high tech stocks which caused a loss to the estate in excess of \$52,000.00. Had the estate been timely closed there would have been no loans to James Johannes that he was unable to repay. This court should reverse the trial court, find that the estate should have been closed by the end of 1993, and accept that the estate would have been invested as testified to by Rick Wyman and confirmed by defendant's expert Owen Dahl and enter an additional judgment in favor of the trust and against Gerald Johannes for \$249,313.07.

In addition to that judgment, based upon the assets that were not included in the \$885,374.00 that Gerald Johannes admitted that he was administering at the end of 1993 there were significant assets that are not accounted for. The assets that were not included in the \$885,374.00 are: (1) a Certificate of Deposit for \$28,000.00 cashed in April, 1993 that was never put back into the estate funds; and (2) the sum of \$29,857.00

missing from the estate account for 1990 and 1993; and (3) the sum of \$44,403.00 for overpaid payments to Puget Sound National Bank that could not be explained by the Personal Representative; and (4) the sum of \$2,093.00 for funds that came from United Bank but were not included in the estate assets; and (5) \$20,000.00 that was credited on a debt owed by Gerald Johannes to his mother during 1989 for which there is no evidence of a gift; and (6) \$100,000.00 in Phoenix bonds that were never properly gifted to Gerald Johannes. The court should therefore award a judgment for 40% of all of those amounts plus interest of 12% per annum since they occurred, together with the judgment for \$249,313.07.

In the alternative, this court should rule that as a matter of law the estate should have been closed by the end of 1993 and remand the case to the trial court to determine damages under Washington law as set forth in Garver, *supra*, and to require Gerald Johannes to provide a complete accounting or, in the absence of such accounting, direct the trial court to find all ambiguities in any accounting issues against Gerald Johannes as required by law.

Finally, this court should reverse the trial court's orders regarding attorney's fees. It should reverse the trial court ruling that required James Johannes to pay one half of the attorney's fees for Gerald Johannes in

defending the breach of fiduciary duty claim in the amount of \$45,050.48 and one half of the attorney's fees incurred by the children of James Johannes in the amount of \$27,076.80 and require Gerald Johannes to pay all of those attorney's fees personally based upon his breach of fiduciary duties. This court should also reverse the trial court and award James Johannes all of his attorney's fees from the trial court totaling \$57,648.50 and award James Johannes attorney's fees for this appeal, to be determined pursuant to RAP 18.1.

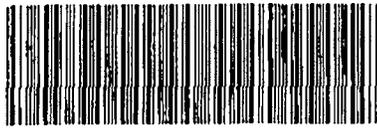
Respectfully submitted

A handwritten signature in black ink, appearing to read 'Bart L. Adams', written over a horizontal line.

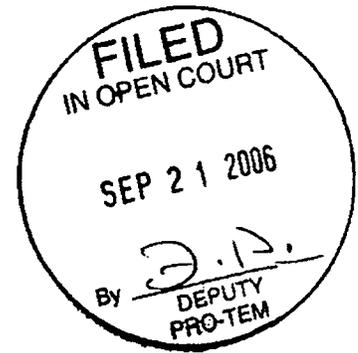
Bart L. Adams WSBA #11297  
Attorney for James Johannes

# APPENDIX

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SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

ESTATE OF EVELYN C. JOHANNES,  
GERALD JOHANNES Personal  
Representative,

Plaintiff,

vs.

JAMES JOHANNES, JANE DOE  
JOHANNES and the martial community  
composed thereof,

Defendants.

No. 04-2-10194-3

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

SHERRY KAY FERRANTE; KATHLEEN  
D. YORMARK; JEFFERY W. JOHANNES;  
MATTHEW S. JOHANNES; AND TIM F.  
JOHANNES, as beneficiaries of the Evelyn C.  
Johannes Testamentary Trust,

Intervenor Plaintiffs,

vs.

GERALD JOHANNES, in his individual  
capacity and as personal representative of the  
estate of Evelyn C. Johannes,

Intervenor Defendant.

THIS MATTER was tried to the Court, without a jury, from April 24, 2006 through April  
27, 2006. The undersigned Judge presided at the trial. The claims presented at trial for

FINDINGS OF FACT, CONCLUSIONS OF LAW

Page - 1

APPENDIX 1

Law Offices of  
**TURNBULL & BORN, P.L.L.C.**  
Commerce Building, Suite 1050  
950 Pacific Ave., Tacoma, WA 98402  
(253) 383-7058; FAX (253) 572-7220

1 adjudication were a consolidation of two cases involving the Estate of Evelyn C. Johannes (the  
2 "Estate"), as follows:

3 1. Defendants brought an action against Gerald Johannes as personal representative  
4 of the Estate under cause number 04-2-10900-6 for breach of fiduciary duty. That action was  
5 consolidated into this cause. The intervenor plaintiffs intervened in this action and joined the  
6 defendants in their claims.

7 2. Plaintiff Estate brought an action under this cause to collect on a defaulted loan  
8 and promissory note made by defendant James Johannes in favor of the Estate.

9 Plaintiff Gerald Johannes appeared personally at trial and through his attorneys of record,  
10 Brian M. Born, Eric M. Mount of Turnbull & Born, P.L.L.C. Defendant James Johannes appeared  
11 personally at trial and through his attorney of record Bart L. Adams. Intervenor plaintiffs  
12 appeared at trial through their attorney of record Brian T. Comfort.  
13

14 The witnesses, who were called and testified at the trial were as follows:

15 (A) Defendant and Intervenor plaintiff's witnesses:

- 16 (1) Gerald Johannes  
17 (2) Tom Pagano  
18 (3) Frank Ault  
19 (4) Robin Balsam  
20 (5) Rick Wyman  
21 (6) Donna Whitney  
22 (7) Tim Johannes

23 (B) Plaintiff's witnesses:

- 24 (1) Gerald Johannes  
25 (2) Edward Horwitz  
(3) Owen M. Dahl  
(4) James Johannes

FINDINGS OF FACT, CONCLUSIONS OF LAW

Page - 2

Law Offices of  
**TURNBULL & BORN, P.L.L.C.**  
Commerce Building, Suite 1050  
950 Pacific Ave., Tacoma, WA 98402  
(253) 383-7058; FAX (253) 572-7220

1 The exhibits, which were offered, admitted into evidence and considered by the court, are  
2 set out in the list attached hereto as Exhibit "A".

3 Based on the evidence presented at trial, the Court makes the following Findings of Fact.

4 **I. FINDINGS OF FACT**

5 1. Evelyn C. Johannes died testate on March 26, 1989 as a resident of Pierce County,  
6 Washington. Evelyn C. Johannes was not married at the time her death and was survived by two  
7 children, Gerald Johannes and James Johannes.

8 2. Evelyn C. Johannes left a Last Will and Testament (the "Will") dated December  
9 22, 1987.

10 3. The Will was admitted to probate under cause number 89-4-00518-5 on April 12,  
11 1989.

12 4. On or about April 12, 1989, Gerald Johannes was appointed as the non-  
13 intervention personal representative pursuant to the terms of the Will.

14 5. On or about April 21, 1989, James Johannes, through his counsel John F. Hansler,  
15 filed a Request for Special Notice under the probate cause number.

16 6. At the time of Evelyn C. Johannes's death, the Estate had a gross value of  
17 \$1,072,444.00 as reported on the Estate's IRS Form 706 tax return.

18 7. In December, 1989, the Estate paid \$146,187.00 in federal estate taxes to the  
19 Internal Revenue Service. In December, 1989, the Estate paid estate taxes to the state of  
20 Washington in the amount of \$23,733.00.  
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1           8.     The Will made specific bequests of \$10,000.00 to Good Samaritan Hospital and  
2 \$2,000.00 to the Anderson Island Fire Department. These bequests were paid by Gerald  
3 Johannes acting as personal representative.

4           9.     Evelyn C. Johannes also left a directive to dispose of tangible personal property.  
5 This personal property was delivered by Gerald Johannes to the individuals specified in the  
6 directive.

7           10.    Gerald Johannes received the sum of \$4,000.00 as a fee for his service as personal  
8 representative of the Estate.

9           11.    Excluding the personal representative's fee, the Estate paid \$15,886.00 in funeral  
10 expenses and expenses incurred in administering property subject to claims, as shown on the  
11 Estate's IRS form 706.

12           12.    As of Mrs. Johannes's date of death there were \$7,773.00 in debts of the decedent  
13 and \$213,347.00 in mortgages and liens as shown on the Estate's IRS form 706.

14           13.    The Will provided that the residue of the Estate was to be divided and distributed  
15 60% outright and free of trust to Gerald Johannes and 40% to Puget Sound National Bank, as  
16 Trustee of a trust for the lifetime benefit of James Johannes (the "James Trust").  
17

18           14.    Pursuant to the terms of the Will, James Johannes was to be paid all of the annual  
19 net income generated by the James Trust. Additionally, the trustee of the James Trust was to  
20 have the power to invade the principal of this trust for the benefit of James Johannes for his  
21 "health and support in reasonable comfort." The trustee was also to have the power to invade  
22 principal for the "health, support and education of any of his children dependent upon him for  
23 support." To date, the James Trust has not been funded.  
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1           15.    The children of James Johannes are Sherry K. Ferrante, Kathleen D. Yormark,  
2 Jeffrey W. Johannes, Mathew S. Johannes and Tim F. Johannes.

3           16.    The assets of the Estate at the time of the death of Evelyn Johannes were itemized  
4 on the IRS form 706 and an inventory filed in the probate cause and are summarized as follows:

- 5                   (a)    A residence located at 1832 Tacoma Rd., Puyallup, Washington (the  
6                   "Residence");  
7                   (b)    A four-plex located at 2672 Initial Place in Enumclaw, Washington (the  
8                   "Four-plex");  
9                   (c)    A bank account with Puget Sound National Bank;  
10                  (d)    A bank account with Pacific First Federal Savings;  
11                  (e)    Shares of stock in Puget Power and GNMA Mortgage Certificates;  
12                  (f)    A securities brokerage account with Shearson Lehman;  
13                  (g)    Bearer bonds from five different issuances (the "Bearer Bonds");  
14                  (h)    A securities brokerage account with Bateman, Eichler, Hill and Richards  
15                  ("Bateman Eichler"); and,  
16                  (i)    A demand note from Gerald and Leslie Johannes.

17           17.    From March until December of 1989, Gerald Johannes would tender the Bearer  
18 Bond coupons for interest payments. In December of 1989 the Bearer Bonds were placed in the  
19 Bateman, Eichler, Hill and Richards account.

20           18.    The Estate owed money to Puget Sound National Bank on two separate  
21 instruments, identified as Note 00008 ("PSNB Note 00008") and Note 00009 ("PSNB Note  
22 00009"). The date of death principal balance of PSNB Note 00008 was \$75,000.00. The date of  
23 death principal balance of PSNB Note 00009 was \$138,347.00. PSNB Note 00009 was secured  
24 by the Four-plex and certain bonds. PSNB Note 00008 was secured by cash accounts, the  
25 Residence and securities.

19.    PSNB Note 00008 was paid off by the Estate in December, 1989.

20.    The shares of stock in Puget Power and the GNMA Mortgage Certificates were  
consolidated into the securities brokerage account with Bateman Eichler.

1           21.    The account at Pacific First Federal Savings and the Shearson Lehman account  
2 were closed and those funds were deposited in the Estate's bank account at Puget Sound  
3 National Bank.

4           22.    The Residence was sold on August 4, 1989. The sales price was \$108,000.00; the  
5 net proceeds payable to the Estate were \$105,369.94.

6           23.    The Four-plex was occupied by tenants. Gerald Johannes, as Personal  
7 Representative of the Estate, acted as manager of the Four-plex. The Estate incurred expenses  
8 for the up-keep of the Four-plex.

9           24.    In the early 1980's, Evelyn C. Johannes and C.F. Johannes deeded Gerald  
10 Johannes and Leslie Johannes real property located in the stadium district of Tacoma (the  
11 "Stadium Property").

12           25.    While there was no instrument of indebtedness, Evelyn C. Johannes during her  
13 lifetime executed partial discharges of indebtedness related to the Stadium Property from time to  
14 time. Evelyn C. Johannes signed a letter purporting to discharge a debt in the amount of  
15 \$81,320.00 owed by Gerald Johannes and Leslie Johannes on December 4, 1985. On the  
16 Estate's IRS form, 706, this debt was listed at \$13,769.00 as of Mrs. Johannes's date of death,  
17 after crediting a \$20,000.00 gift from Evelyn Johannes in 1989 to Gerald Johannes and Leslie  
18 Johannes.

19           26.    During her lifetime, in 1988, Evelyn C. Johannes made a gift of \$100,000.00 in  
20 City of Phoenix bearer bonds (the "Phoenix Bonds") to Gerald Johannes, Leslie Johannes, Ryan  
21 Johannes and Kyle Johannes. She delivered possession of the bonds to Gerald Johannes along  
22  
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1 with a document titled "Statement of Gift." This gift was reported to the IRS on an IRS form  
2 709 gift tax return for 1988.

3 27. Gerald Johannes redeemed the Phoenix Bonds through the Estate's brokerage  
4 account on September 21, 1990, after they matured.

5 28. In 1992 Gerald Johannes proposed that the estate be distributed in an asset  
6 allocation that varied from the terms of the Will and avoided the trust. The bank refused to vary  
7 from the Will demanded a full accounting at the time the trust was funded, See Exhibit 20.

8 29. James Johannes expressed his displeasure with the idea of the James Trust to  
9 Gerald Johannes. James Johannes wanted to avoid having his inheritance from the Estate placed  
10 in trust and discussed ideas for avoiding the trust with Gerald Johannes.

11 30. The loan on the Four-plex was paid-off in October 1992. Subsequently the estate  
12 made five payments of \$328.59 to Puget Sound National Bank. The Personal Representative did  
13 not keep adequate records to determine to what these payments were for.

14 31. The Four-plex was sold in April of 1993 at a gross sales price of \$182,500.00.  
15 After payment of closing costs, the net proceeds of sale were \$167,457.26, which were deposited  
16 in the Estate's money market account.

17 32. The four-plex was the last real property owned by the Estate. The Estate could  
18 have been closed by 1995.

19 33. The Estate had a certificate of deposit that was cashed in 1993. The evidence does  
20 not establish the disposition of those funds.  
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1       34. The Estate distributed \$68,000.00 to James Johannes and \$102,000.00 to Jerry  
2 Johannes in January, 1995. This distribution from the Estate varied from the terms of the Will of  
3 Evelyn Johannes.

4       35. In July, 1995 James Johannes, on behalf Valley Packers, Inc., requested a loan  
5 from the Estate. The Estate loaned \$300,000.00 to Valley Packers, Inc.

6       36. In connection with this loan, Valley Packers, Inc. executed a promissory note in  
7 favour of the Estate in the amount of \$300,000.00 dated July 19, 1995. This note was timely  
8 repaid with interest at 5% per year. The terms of this loan were better than James Johannes  
9 could get from his bank.

10       37. In March of 1998, James Johannes requested that the Estate loan \$188,000.00 to  
11 him personally. Consequently, the Estate loaned \$188,000.00 to James Johannes personally and  
12 James Johannes executed a promissory note dated March 26, 1998 in favour of the Estate in the  
13 amount of \$188,000.00 (the "Note"). The terms of the loan from the Estate were better than the  
14 terms James Johannes would have received from his bank.

15       38. The Note called for interest to accrue at 8% per annum. The due date of the  
16 obligations under the Note was September 26, 1998. The Note contained an attorney's fee  
17 provision which provided that Jim Johannes would pay reasonable attorney's fees related to the  
18 enforcement of the Note.

19       39. Neither James Johannes nor anyone else on his behalf made any payments on the  
20 Note.  
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1           40. James Johannes loaned the funds received from the Estate in March, 1998 to his  
2 company Valley Packers, Inc. to receive a tax benefit. After the \$188,000.00 loan was made, it  
3 was not practical to close the Estate without repayment of the Note by James Johannes.

4           41. James Johannes was added as an authorized trader on the Estate's brokerage  
5 securities account at McDonald Investment.

6           42. In October of 2000, the Estate purchased the stock of three high-tech companies,  
7 namely Jabil Circuit, Inc., Sanmina-SCI Corp. and Silicon Storage Technology, Inc. (the "High-  
8 Tech Stocks"), as suggested by James Johannes and the Estate's investment advisor Steven R.  
9 Beck of McDonald Investments (a division of Key Corp.).  
10

11           43. This purchase placed approximately 20% of the Estate's assets in high-tech  
12 securities. The High-Tech Stocks were ultimately sold in 2004 at a loss to the Estate of  
13 approximately \$52,542.00.

14           44. In 2001, acting on the advice of the Estate's broker Steven R. Beck of McDonald  
15 Financial, the Estate purchased K-Mart Bonds for the sum of \$297,962.00 (the "K-Mart Bonds").

16           45. At the time of the purchase, the K-Mart Bonds were rated investment grade. A  
17 minimal investigation would have disclosed the high degree of risk that the K-Mart Bonds  
18 presented as well as the over concentration of the investment of Estate assets in one asset.

19           46. Subsequently, K-Mart filed for bankruptcy protection and the Estate took legal  
20 action against McDonald Investments and Steven R. Beck. Through an NASD securities  
21 arbitration, the Estate was awarded \$304,603.00. The NASD award included an award of lost  
22 investment opportunity and arbitration costs. After payment of expert witness fees and  
23 attorney's fees related to the NASD arbitration, there was a net loss to the Estate of \$84,000.00.  
24  
25

1           47.    Except for the High-Tech Stocks, throughout the administration of the Estate,  
2 Gerald Johannes largely invested the Estate funds in short term cash equivalent investments,  
3 through money market or bond funds offered by the Estate's investment brokers. Gerald  
4 Johannes testified that he was waiting for James Johannes to re-pay the Note before closing the  
5 Estate and no definite time-line could be established for when probate would close.

6           48.    Gerald Johannes kept the Estate assets invested in short term cash equivalents to  
7 preserve liquidity, so that the Estate could be rapidly closed once James Johannes paid off the  
8 Note.

9           49.    Investment in longer term, speculative or illiquid investments, would not have  
10 been compatible with funding the James Trust and completing probate.

11           50.    Gerald Johannes did not keep adequate records of the transactions he managed for  
12 the Estate. Accountant Frank Ault was unable to produce an accounting of the Estate funds  
13 because of the insufficient records produced by Gerald. Mr. Ault's testimony does not establish  
14 that Gerald Johannes took funds, since Ault did not testify that the funds went to Gerald  
15 Johannes. Mr. Ault was severely hampered by Gerald's failure to keep adequate, if any, records.

16           51.    Gerald Johannes did have prepared and delivered to James Johannes an  
17 accounting on or about September 30, 2001. This accounting was prepared by Frank Johnson.  
18 Frank Johnson prepared an updated accounting that was filed in the probate cause on or about  
19 March 18, 2004. The court adopted the 2004 accounting of Frank Johnson and the income and  
20 expenses of the Estate after the date of that accounting will be determined at the time the Estate  
21 is closed.  
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1 52. At no time did James Johannes file any petition requesting the removal of Gerald  
2 Johannes as Personal Representative of the Estate.

3 53. The Estate paid \$97,600.97 in attorney's fees and costs related to this litigation.

4 54. The children of James Johannes paid \$54,153.60 in attorney's fees and costs  
5 related to this litigation.

6 55. As witnesses neither Gerald Johannes or James Johannes were very credible, but  
7 Gerald Johannes was most credible. Any dispute in testimony between them is resolved in  
8 favour of Gerald Johannes.

9  
10 56. On July 17, 1998, Gerald Johannes loaned Estate funds of \$240,000.00 to himself  
11 for the apparent purpose of purchasing a house. When he repaid the loan on October 21, 1998 he  
12 paid \$895.70 less than he borrowed and he paid no interest on the loan.

13 Based on the above findings, the Court makes the following Conclusions of Law:

14 **II. CONCLUSIONS OF LAW**

15 1. The promissory note made by James Johannes in favour of the Estate is in default  
16 and sums owing thereunder are due and payable, with interest, and Judgment should be entered  
17 in favour of the Estate against James Johannes, individually and the marital community  
18 composed of James Johannes and Jane Doe Johannes in the principal amount of \$188,000.00,  
19 plus pre-judgment interest of \$127,696.59 (through date of hearing), plus attorney's fees in the  
20 amount of \$7,500.00, with post-judgment interest to accrue at 8% per year.

21  
22 2. Gerald Johannes breached his duty as personal representative of the Estate by  
23 failing to keep complete account records.

1           3.       Gerald Johannes breached his fiduciary duty as Personal Representative of the  
2 Estate by purchasing K-Mart Bonds. The Estate was damaged as a result of this purchase in  
3 amount of \$84,000.00 and is entitled to judgment for that amount; no interest is awarded on this  
4 sum.

5           4.       Gerald Johannes breached his fiduciary duty by not closing the Estate before  
6 1995. No damages are awarded from that breach.

7           5.       Gerald Johannes breached his fiduciary duty to the Estate of loaning money  
8 himself to buy a home, by not paying back that loan in full and by not collecting interest. The  
9 Estate was damaged in the sum of \$895.70, plus interest on \$240,000.00 from July 17, 1998  
10 through October 21, 1998 of \$5,049.86 as a result of those breaches of duty.

11           6.       The purchase and liquidation of the High-Tech Stocks by Gerald Johannes did not  
12 breach his fiduciary duty and the defendants are entitled to no damages resulting from that  
13 purchase.

14           7.       The defendants claims for damages resulting from the failure of the Key Bank CD  
15 funds held in the name of the Estate to be placed back in the Estate is denied.

16           8.       The \$188,000.00 loan from the Estate to James Johannes was not a breach of the  
17 fiduciary duty of Gerald Johannes.

18           9.       The Estate is entitled to a judgment against Gerald Johannes for \$13,769.00 plus  
19 interest at the rate of 7%, simple interest, since the date of death of Evelyn Johannes.

20           10.      Gerald Johannes did not breach his fiduciary duty by investing the estate proceeds  
21 in short term, safe, fixed income securities or equivalent investments.  
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1           11.    The delivery of the Phoenix Bonds by Evelyn C. Johannes to Gerald Johannes,  
2 Leslie Johannes, Ryan Johannes and Kyle Johannes in 1988 was a completed gift by Mrs.  
3 Johannes of her entire interest in the Phoenix Bonds.

4           12.    James Johannes encouraged or directed Gerald Johannes to delay the closing of  
5 probate, should not benefit therefrom and is estopped from benefiting therefrom.

6           13.    The Estate is entitled to a judgment against Gerald Johannes for \$4,000.00 for  
7 return of the Personal Representative's fee he was paid. No pre-judgment interest is awarded on  
8 this sum.

9           14.    On account of the multiple breaches of fiduciary duties by Gerald Johannes as  
10 personal representative, he is removed as Personal Representative of the Estate of Evelyn  
11 Johannes.

12           15.    James Johannes individually (distinct from his capacity as a beneficiary of the  
13 James Trust) is not entitled to an award of any damages or costs.

14           16.    James Johannes must also pay to the Estate one-half of the costs and attorney's  
15 fees incurred by the Estate, said amount being \$45,050.48 and judgment will be awarded on this  
16 amount, separate from the Judgment on the Note.

17           17.    James Johannes must also pay to the Intervenor Plaintiffs one-half of the costs  
18 and attorney's fees incurred, said amount being \$27,076.80 and judgment will be awarded on  
19 this amount.

20           18.    Gerald Johannes must also pay to the Estate one-half of the costs and attorney's  
21 fees incurred by the Estate, said amount being \$45,050.48 and judgment will be awarded on this  
22 amount.

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FINDINGS OF FACT, CONCLUSIONS OF LAW

Page - 13

Law Offices of  
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Commerce Building, Suite 1050  
950 Pacific Ave., Tacoma, WA 98402  
(253) 383-7058; FAX (253) 572-7220

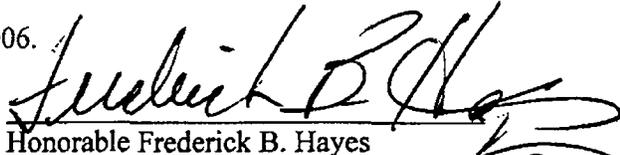
1 19. Gerald Johannes must also pay to the Intervenor Plaintiffs one-half of the costs  
2 and attorney's fees incurred, said amount being \$27,076.80 and judgment will be awarded on  
3 this amount.

4 20. No damages are awarded related to the claim for mis-appropriation of the PSNB  
5 Note 9 payments.

6 21. The \$188,000.00 loan from the Estate to James Johannes was not an instance of  
7 self-dealing by Gerald Johannes.

8 22. James Johannes is not entitled to recovery of any of his legal fees and costs.

9 Dated this 21st day of September, 2006.



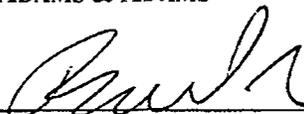
Honorable Frederick B. Hayes

12 Presented by:  
13 **TURNBULL & BORN, P.L.L.C.**

14 

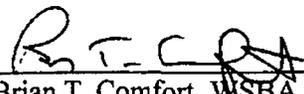
15 Brian Born, WSBA #25334  
16 E.M. Mount, WSBA #32973  
16 Attorneys for Plaintiff

17 **ADAMS & ADAMS**

18 

19 Bart L. Adams, WSBA #11297  
20 Attorney for Defendants

21 **COMFORT DAVIES & SMITH, P.S.**

22 

23 Brian T. Comfort, WSBA #12245  
24 Attorney for Intervenor Plaintiffs





1 The Court having heard the trial of the above-entitled action, having entered its Findings of Fact  
2 and Conclusions of Law and entered its Judgment herein, now therefore it is hereby

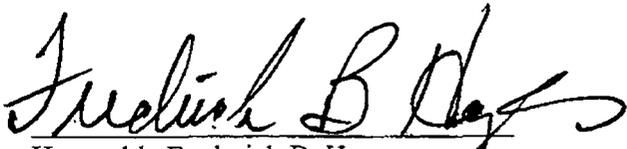
3 ORDERED that the plaintiff Estate of Evelyn C. Johannes shall have judgment against  
4 defendant GERALD JOHANNES, for the principal amount of \$102,664.70, plus pre-judgment  
5 interest in the amount of \$21,907.64, plus reasonable attorney's fees of \$43,090.78, plus costs of  
6 \$1,959.70; it is further

7 ORDERED that the judgment herein, except pre-judgment interest, shall bear interest at  
8 the rate of 12% per annum; it is further

9 ORDERED that Gerald Johannes shall be removed as Personal Representative of the  
10 Estate of Evelyn C. Johannes; it is further

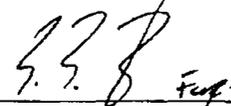
11 ORDERED that the successor Personal Representative of the Estate of Evelyn C.  
12 Johannes shall use that document prepared by Frank Johnson dated January 31, 2004 and filed in  
13 the probate cause of the Estate of Evelyn C. Johannes on March 18, 2004, and prepare any final  
14 accounting only from that point forward.

15 DATED this 26 day of September, 2006.

16  
17  
18   
19 Honorable Frederick B. Hayes

20 Presented by:

21 **TURNBULL & BORN, P.L.L.C.**

22   
23 Brian M. Born, WSBA # 25334  
24 Attorneys for Gerald Johannes

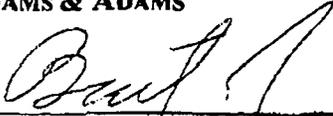
25 FILED  
26 IN COUNTY CLERK'S OFFICE

27 A.M. SEP 26 2006 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

1 Approved; Notice of Presentation Waived:

2 **ADAMS & ADAMS**

3 

4 

---

Bart L. Adams, WSBA #11297  
Attorney for Defendants

5 **COMFORT, DAVIES & SMITH, P.S.**

6  
7 

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Brian T. Comfort, WSBA #12245  
8 Attorney for Intervenor Plaintiffs

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1 Approved; Notice of Presentation Waived:

2 **ADAMS & ADAMS**

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4 

---

Bart L. Adams, WSBA #11297  
Attorney for Defendants

5 **COMFORT, DAVIES & SMITH, P.S.**

6  
7 [BY TELEPHONE AUTHORIZATION]  
8 Brian T. Comfort, WSBA #12245  
Attorney for Intervenor Plaintiffs

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04-2-10194-3 28204717 JD 09-26-06

FILED  
IN COUNTY CLERK'S OFFICE

A.M. SEP 26 2006 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

ESTATE OF EVELYN C. JOHANNES,  
GERALD JOHANNES Personal  
Representative,

No. 04-2-10194-3

Plaintiff,

JUDGMENT FOR ATTORNEY'S FEES &  
COSTS

vs.

(Clerk's Action Required)

JAMES JOHANNES, JANE DOE  
JOHANNES and the martial community  
composed thereof,

Defendants.

JUDGMENT SUMMARY

ATTORNEY'S FEES:	\$ 43,090.78
COSTS:	\$ 1,959.70
JUDGMENT INTEREST RATE:	12% on principal, costs and fees
JUDGMENT DEBTOR:	JAMES JOHANNES, individually, and the martial community composed of JAMES JOHANNES and JANE DOE JOHANNES, husband and wife
JUDGMENT CREDITOR:	ESTATE OF EVELYN C. JOHANNES.
ATTORNEY FOR JUDGMENT DEBTOR:	Bart L. Adams

This matter having come on for trial before the undersigned Judge of the above-entitled Court on April 24, 2006, the parties appearing personally and through their respective counsel.

The Court having heard the trial of the above-entitled action, having entered its Findings of Fact and Conclusions of Law and entered its Judgment herein, now therefore it is hereby

ORDERED that the plaintiff Estate of Evelyn C. Johannes shall have judgment against defendants JAMES JOHANNES, individually, and the martial community composed of JAMES JOHANNES and JANE DOE JOHANNES, husband and wife, for reasonable attorney's fees of \$43,090.78, plus costs of \$1,959.70; it is further

ORDERED that this judgment is independent of and is in addition to that judgment entered against defendants in favor of the Estate of Evelyn C. Johannes on even date in the principal amount of \$188,000.00 plus \$127,696.59 of interest and \$7,500.00 in attorney's fees; it is further

ORDERED that the judgment herein shall bear interest at the rate of 12% per annum.

DATED this 26<sup>th</sup> day of September, 2006.

*Frederick B. Hayes*  
Honorable Frederick B. Hayes

FILED  
IN COUNTY CLERK'S OFFICE

A.M. SEP 26 2006 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

Presented by:

TURNBULL & BORN, P.L.L.C.

*B. M. Born* *Fap:*

Brian M. Born, WSBA # 25334  
Attorneys for Gerald Johannes

Approved; Notice of Presentation Waived:

ADAMS & ADAMS

Bart L. Adams, WSBA #11297  
Attorney for Defendants

The Court having heard the trial of the above-entitled action, having entered its Findings of Fact and Conclusions of Law and entered its Judgment herein, now therefore it is hereby

ORDERED that the plaintiff Estate of Evelyn C. Johannes shall have judgment against defendants JAMES JOHANNES, individually, and the martial community composed of JAMES JOHANNES and JANE DOE JOHANNES, husband and wife, for reasonable attorney's fees of \$43,090.78, plus costs of \$1,959.70; it is further

ORDERED that this judgment is independent of and is in addition to that judgment entered against defendants in favor of the Estate of Evelyn C. Johannes on even date in the principal amount of \$188,000.00 plus \$127,696.59 of interest and \$7,500.00 in attorney's fees; it is further

ORDERED that the judgment herein shall bear interest at the rate of 12% per annum.

DATED this \_\_\_ day of September, 2006.

Honorable Frederick B. Hayes

Presented by:

TURNBULL & BORN, P.L.L.C.

Brian M. Born, WSBA # 25334  
Attorneys for Gerald Johannes

Approved; Notice of Presentation Waived:

ADAMS & ADAMS

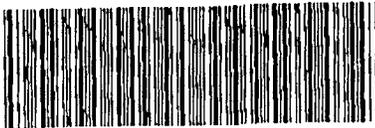
Bart L. Adams, WSBA #11297  
Attorney for Defendants

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COMFORT, DAVIES & SMITH, P.S.

BY TELEPHONIC AUTHORIZATION

Brian T. Comfort, WSBA #12245  
Attorney for Intervenor Plaintiffs



04-2-10194-3 28204718 JD 09-28-06

FILED  
IN COUNTY CLERK'S OFFICE

A.M. SEP 26 2006 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

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SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

ESTATE OF EVELYN C. JOHANNES,  
GERALD JOHANNES Personal  
Representative,

Plaintiff,

vs.

JAMES JOHANNES, JANE DOE  
JOHANNES and the martial community  
composed thereof,

Defendants.

No. 04-2-10194-3

JUDGMENT

(Clerk's Action Required)

JUDGMENT SUMMARY

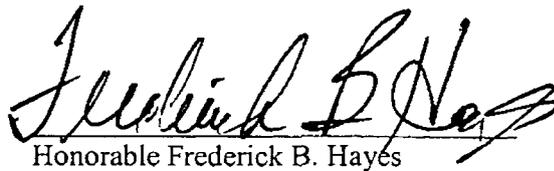
ATTORNEY'S FEES & COSTS:	\$27,076.80
JUDGMENT INTEREST RATE:	12%
JUDGMENT DEBTOR:	JAMES JOHANNES, individually, and the martial community composed of JAMES JOHANNES and JANE DOE JOHANNES, husband and wife
JUDGMENT CREDITORS:	SHERRY KAY FERRANTE; KATHLEEN D. YORMARK; JEFFERY W. JOHANNES; MATTHEW S. JOHANNES; AND TIM F. JOHANNES
ATTORNEY FOR JUDGMENT CREDITOR:	Brian T. Comfort
ATTORNEY FOR JUDGMENT DEBTOR:	Bart L. Adams

1 This matter having come on for trial before the undersigned Judge of the above-entitled  
2 Court on April 24, 2006, the parties appearing personally and through their respective counsel.  
3 The Court having heard the trial of the above-entitled action, having entered its Findings of Fact  
4 and Conclusions of Law and entered its Judgment herein, now therefore it is hereby

5 ORDERED that the plaintiffs SHERRY KAY FERRANTE; KATHLEEN D.  
6 YORMARK; JEFFERY W. JOHANNES; MATTHEW S. JOHANNES; AND TIM F.  
7 JOHANNES shall have judgment against defendants JAMES JOHANNES, individually, and the  
8 martial community composed of JAMES JOHANNES and JANE DOE JOHANNES, husband  
9 and wife, for attorney's fees and costs in the amount of \$27,076.80; it is further

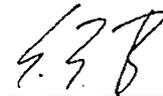
11 ORDERED that the judgment herein shall bear interest at the rate of 12% per annum.

12 DATED this 26 day of September, 2006.

13   
14 Honorable Frederick B. Hayes

15 Presented by:

16 TURNBULL & BORN, P.L.L.C.

17  *For*  
18 \_\_\_\_\_  
19 Brian M. Born, WSBA # 25334  
20 Attorneys for Gerald Johannes

FILED  
IN COUNTY CLERK'S OFFICE

A.M. SEP 26 2006 P.M.

PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY \_\_\_\_\_ DEPUTY

21 Approved; Notice of Presentation Waived:

22 ADAMS & ADAMS

23 \_\_\_\_\_  
24 Bart L. Adams, WSBA #11297  
25 Attorney for Defendants  
26  
27

1 This matter having come on for trial before the undersigned Judge of the above-entitled  
 2 Court on April 24, 2006, the parties appearing personally and through their respective counsel.  
 3 The Court having heard the trial of the above-entitled action, having entered its Findings of Fact  
 4 and Conclusions of Law and entered its Judgment herein, now therefore it is hereby

5 ORDERED that the plaintiffs SHERRY KAY FERRANTE; KATHLEEN D.  
 6 YORMARK; JEFFERY W. JOHANNES; MATTHEW S. JOHANNES; AND TIM F.  
 7 JOHANNES shall have judgment against defendants JAMES JOHANNES, individually, and the  
 8 martial community composed of JAMES JOHANNES and JANE DOE JOHANNES, husband  
 9 and wife, for attorney's fees and costs in the amount of \$27,076.80; it is further

11 ORDERED that the judgment herein shall bear interest at the rate of 12% per annum.

12 DATED this \_\_ day of September, 2006.

14 \_\_\_\_\_  
 15 Honorable Frederick B. Hayes

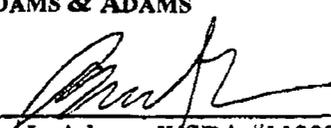
16 Presented by:

17 **TURNBULL & BORN, P.L.L.C.**

18 \_\_\_\_\_  
 19 Brian M. Born, WSBA # 25334  
 20 Attorneys for Gerald Johannes

21 Approved; Notice of Presentation Waived:

22 **ADAMS & ADAMS**

23   
 24 \_\_\_\_\_  
 25 Bart L. Adams, WSBA #11297  
 26 Attorney for Defendants  
 27

1 COMFORT, DAVIES & SMITH, P.S.

2 *L.T.B. For Brian Comfort, BY TELEPHONE AUTHORIZATION*

3 Brian T. Comfort, WSBA #12245  
4 Attorney for Intervenor Plaintiffs  
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### APPENDIX # 3

#### PAYMENTS ON PUGET SOUND NOTE AS DEMONSTRATED BY EXHIBIT #15

<u>Date</u>	<u>Amt. Paid</u>
12/12/89	\$1,631.89
01/16/90	\$1,631.89
02/15/90	\$1,631.89
04/20/90	\$1,631.89
05/23/90	\$1,631.89
06/25/90	\$1,631.89
08/21/90	\$1,656.89 (includes late fee)
08/21/90	\$1,631.89
09/18/90	\$1,631.89
10/31/90	\$1,656.89 (includes late fee)
12/17/90	\$3,288.78 (includes late fee)
01/18/91	\$1,631.89
02/18/91	\$1,631.89
03/25/91	\$1,631.89
04/19/91	\$1,631.89
05/24/91	\$1,631.89
07/21/91	\$1,656.89 (includes late fee)
07/23/91	\$1,631.89
08/26/91	\$1,631.89
09/28/91	\$1,631.89
10/26/91	\$1,631.89
12/12/91	\$3,288.78 (includes late fee)
01/24/92	\$1,631.89
02/20/92	\$1,631.89
03/25/92	\$1,631.89
04/24/92	\$1,631.89
05/25/92	\$1,631.89
06/25/92	\$1,631.89
07/24/92	\$1,631.89
08/24/92	\$1,631.89

10/05/92	\$1,656.89 (includes late fee)
11/11/92	\$ 328.59
12/21/92	\$ 328.59
01/23/93	\$ 328.59
02/22/93	\$ 328.59
03/29/93	\$ 328.59

COURT OF APPEALS  
DIVISION II

07 APR -2 PM 3: 20

STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

JAMES JOHANNES, JANE DOE )  
JOHANNES, and the marital )  
community composed thereof, )

Appellant, )

ESTATE OF EVELYN C. JOHANNES, )  
GERALD JOHANNES, Personal )  
Representative; )

Respondents. )

SHERRY KAY FERRANTE; KATHLEEN )  
D. YORMARK; JEFFREY W. JOHANNES; )  
MATTHEW S. JOHANNES; and TIM F. )  
JOHANNES, )

Cross Appellants, )

ESTATE OF EVELYN C. JOHANNES, )  
GERALD JOHANNES, Personal )  
Representative; )

Cross Respondents. )

NO. 35504-3-II

CERTIFICATE OF  
SERVICE

I certify that on the 12<sup>th</sup> day of April 2, 2007, I caused a true and correct

copy of this Brief of Appellant to be served on the following by placing said document in a sealed envelope, via first class U.S. Postal Service with correct postage affixed:

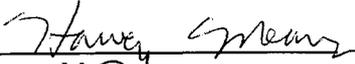
Brian Comfort  
Attorney at Law  
1901-65<sup>th</sup> Ave. W., Suite 200  
Fircrest, WA 98466

Brian Born  
Attorney at Law  
950 Pacific Avenue, Suite 1050  
Tacoma, WA 98402-4435

James F. Christnacht  
Attorney at Law  
6602-19<sup>th</sup> St. W.  
Tacoma, WA 98466

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated April 2, 2007 at Tacoma, Washington

  
Harvey Means