

CROSS-APPS

NO. 35504 3-II

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

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 K. FERRANTE; 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.

BRIEF OF CROSS-APPELLANTS

COMFORT, DAVIES & SMITH, P.S.
Brian T. Comfort, WSBA 12245
1901 65TH AVE. W. STE 200
FIRCREST, WA 98466
(253)565-3400

Attorneys for cross-appellants Ferrante
Yormark and Johannes

FILED
APR 11 2013
CLERK OF COURT
JESSE
K. S. SMITH

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. ASSIGNMENTS OF ERROR 1

II. ISSUES RELATING TO ASSIGNMENTS OF ERROR 3

III. STATEMENT OF THE CASE 4

IV. ARGUMENT 4

 1. STANDARD OF REVIEW 4

 2. THE TRIAL COURT ERRED IN FAILING TO AWARD DAMAGES ON THE FAILURE OF PERSONAL REPRESENTATIVE TO TIMELY CLOSE ESTATE 5

 3. ESTOPPEL DOES NOT APPLY TO THE JOHANNES GRANDCHILDREN 9

 4. 1998 LOAN BY PERSONAL REPRESENTATIVE WAS BREACH OF HIS FIDUCIARY DUTY 11

 5. THE TRIAL COURT ERRED IN FAILING TO INCLUDE ASSETS IN THE ESTATE THAT WERE NOT ACCOUNTED FOR BY THE PERSONAL REPRESENTATIVE 16

 6. THE PERSONAL REPRESENTATIVE HAS BURDEN OF PROOF ON ACCOUNTING ITEMS 17

 7. THE COURT ERRED IN FAILING TO CHARGE PERSONAL REPRESENTATIVE WITH OTHER LOSSES IN ESTATE. 18

 8. THE TRIAL COURT ERRED IN ADOPTING THE ACCOUNTING OF FRANK JOHNSON. 22

 9. THE ATTORNEY’S FEES AWARD TO JOHANNES GRANDCHILDREN 23

 10. ATTORNEY’S FEES AND COSTS ON APPEAL. 24

V. CONCLUSION 24

TABLE OF AUTHORITIES

SUPREME COURT CASES

Allard v. Pacific National Bank, 99 Wn.2d 394, 407-08, 663 P.2d 104 (1983) 23, 24

Ancheta v. Daly, 77 Wn.2d 255, 259-60, 461 P.2d 531 (1969) 5

Estate of Jones, 152 Wn.2d 1, 21, 100 P.3d 805 (2004) 23, 24

Estate of Larson, 103 Wn.2d 517, 521, 694 P.2d 1051 (1985) 15

King County v. Washington State Boundary Review Board, 122 Wn.2d 648, 675, 86 P.2d 1024 (1993) 5

Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 575, 343 P.2d 183 (1959) 5

APPELLATE COURT CASES

Baker Boyer Bank v. Garver, 43 Wn.App. 673, 719 P.2d 583 (1986) 9, 18, 21, 25

Crest, Inc. v. Costco Wholesale Corp., 128 Wn.App. 760, 775, 115 P.3d 349 (2005) 19

Estate of Winslow, 30 Wn.App. 575, 578, 636 P.2d 505 (1981) 15

Marriage of Scanlon, 109 Wn.App. 167, 174-175, 34 P.3d 877 (2001) 5

OTHER AUTHORITIES

Am. Jur. Second Trust § 376 17

Restatement of Trusts (Third) § 211 8

“Restatement of Trusts (Third) § 205 8

STATE RULES

RAP 18.1 26

STATE STATUTES

RCW 11.100 13
RCW 11.100.020 21
RCW 11.100.045 13, 14
RCW 11.100.047 20
RCW 11.100.090 14, 15
RCW 11.48.010 3
RCW 11.68.070 23, 24
RCW 11.68.090 13
RCW 11.96A.150 23, 24

I. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Finding of Fact #6.
2. The trial court erred in entering Finding of Fact #16.
3. The trial court erred in entering Finding of Fact #25.
4. The trial court erred in entering Finding of Fact #26.
5. The trial court erred in entering Finding of Fact #32, in that the estate should have been closed by no later than the end of 1993.
6. The trial Court erred in entering Finding of Fact # 47.
7. The trial court erred in entering Finding of Fact # 48.
8. The trial court erred in entering Finding of Fact # 49.
9. The trail court erred in entering Finding of Fact #51.
10. 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 as of 2004.
11. The trial court erred in failing to find a breach of fiduciary duty in Gerald Johannes making the \$188,000 loan to James Johannes in 1998, and in failing to find Gerald Johannes received benefits from said loan.
12. The trial court erred in refusing to grant damages placing the trust beneficiaries in the position they would have been had the estate closed in 1993.
13. The trial court erred in failing to grant a judgment awarding the estate 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.

14. The trial court erred in failing to award a judgment to the estate in the sum of \$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.
15. The trial court erred in failing to grant a judgment to the estate for \$44,403.00 for the overpayments to Puget Sound National Bank made by the personal representative for debt that could not have belonged to the estate, plus prejudgment interest.
16. The trial court erred in failing to grant a judgment to the estate for \$2,093.00 in funds from United Bank, that were not accounted for by the Personal Representative, together with 12% interest since May 19, 1989.
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 rather than \$13,769.
18. The trial court erred in failing to find that \$100,000 in bonds 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.
19. 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.
20. The trial court erred in entering Conclusion of Law #5, to the extent it incorrectly computed the damages on account of the breach of fiduciary duty.
21. The trial court erred in entering Conclusion of Law #6.

22. The trial court erred in entering Conclusion of Law #7.
23. The trial court erred in entering Conclusion of Law #8.
24. The trial court erred in entering Conclusion of Law #9.
25. The trial court erred in entering Conclusion of Law #10.
26. The trial court erred in entering Conclusion of Law #11.
27. The trial court erred in entering Conclusion of Law #12.
28. The trial court erred in entering Conclusion of Law #13, to the extent it failed to award prejudgment interest.
29. The trial court erred in entering Conclusion of Law #20.
30. The trial court erred in entering Conclusion of Law #21.

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

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?
2. What is the measure of damages for a Personal Representative's breach of fiduciary duty to timely close an estate?
3. Is a Personal Representative's breach of fiduciary duty to timely close an estate subject to estoppel?
4. Is hearsay that is objected to at trial admissible in evidence?
5. Does the Personal Representative have the burden of proof regarding the accuracy of the accounting of an estate?

6. 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?
7. What are the elements of a gift and who has the burden of proof of those elements?
8. Is it a breach of fiduciary duty for a personal representative to make an unsecured loan from the estate, and what is the liability of a personal representative who benefits from an unsecured loan made to a beneficiary of the estate?

III. STATEMENT OF THE CASE

Cross-appellants Sherry K. Ferrante, Kathleen D. Yormark, Jeffrey W. Johannes, Matthew S. Johannes and Tim F. Johannes, (hereinafter collectively referred to as the “Johannes grandchildren”) are the grandchildren of decedent Evelyn C. Johannes. They are remainder beneficiaries of a trust established under the last will and testament of the decedent, comprised of 40% of the residuary estate (Ex. 7)). The Johannes grandchildren accept the statement of the case stated in the brief of appellant James Johannes.

IV. ARGUMENT

1. STANDARD OF REVIEW

The appellate court applies a “substantial evidence” standard of review to findings of fact. The finding of fact needs to be supported by

substantial evidence. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Substantial evidence exists “if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *King County v. Washington State Boundary Review Board*, 122 Wn.2d 648, 675, 86 P.2d 1024 (1993).

The trial court though cannot make factual findings without evidentiary support in the record. The appellate court can reverse an erroneous finding of fact when the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Ancheta v. Daly*, 77 Wn.2d 255, 259-60, 461 P.2d 531 (1969).

Generally, conclusions of law that deal with a question of law in a judge-trying case, are subject to de novo review, and it is an abuse of discretion if the decision is based on an erroneous view of the law. See *Marriage of Scanlon*, 109 Wn.App. 167, 174-175, 34 P.3d 877 (2001).

2. THE TRIAL COURT ERRED IN FAILING TO AWARD DAMAGES ON THE FAILURE OF PERSONAL REPRESENTATIVE TO TIMELY CLOSE ESTATE.

The trial court misapplied the law regarding the personal representative’s duty to close the estate. The Johannes grandchildren adopt

the arguments made by appellant James Johannes' brief on the issues of the personal representative's duty to close the estate by the end of 1993.

Why the trial court chose 1995 as the date the estate should have been closed is puzzling. The only expert at trial who testified on that issue, Robin Balsam, believed that the estate could and should have been closed by the summer of 1990 (RP 201). James Johannes and the Johannes grandchildren believe at minimum the estate should have been closed in 1993, when the last non-liquid asset in the estate, a four-plex, was sold in April of 1993. By that time the estate was completely liquid and there were no obstacles whatsoever to closing the estate (RP 452, 463).

Of even greater concern though is the trial court's ruling there were no damages on account of the breach of the fiduciary duty by Gerald Johannes in failing to timely close the estate. The trial court found that the estate should have been closed prior to 1995, which would have required the trust to be funded in order to close the estate. The difference between the argument of appellant James Johannes and Johannes grandchildren that the estate should have been closed in 1993, versus the ruling of the trial court that it should have been closed prior to 1995, is only at most a one year difference.

Regardless of whether the estate should have been closed by the end of 1993 or prior to 1995 as the trial court ruled, the loss to the Johannes grandchildren was that a trust to which they were residuary beneficiaries, was not funded as it should have been, and invested as a long term trust would have been.

The failure to timely close the estate and fund the trust caused significant damage to the trust. Financial expert Rick Wyman opined that if the trust had been established at the end of 1993, the appropriate long-term investment strategy for this trust was a mix of sixty percent 60% stock and forty percent 40% bonds (RP 259-262). Mr. Wyman then used the S & P 500 Index in establishing the trust should have had a value at the end of 2005 in the amount of \$616,110, which is an approximate 8% return per year (Ex. 122). Even if this court adopts the conclusion of law of the trial court that the estate should have been closed prior to 1995, the trust still has been damaged as testified to by Mr. Wyman, albeit the calculations of Mr. Wyman for the year 1994 should be disregarded.

This approach as testified to by Mr. Wyman has been called the total return approach, with the objective of restoring the trust to the place it would

have been but for the breach of the fiduciary duty. The rule is stated in

“Restatement of Trusts (Third) § 205:

§ 205. Trustee’s Liability in Case of a Breach of Trust

A trustee who commits a breach of trust is

(a) accountable for any profit accruing to the trust through the breach of trust; or

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

In addition, the trustee is subject to such liability as necessary to prevent the trustee from benefitting personally from the breach of trust (see § 206).

[Emphasis added.]

A comment on the total return approach is also in Restatement of Trusts

(Third) § 211, comment c:

The total return approach to damages in new §§ 205 and 208-211 is extended to breaches of trust with respect to general investment authority. **This approach is facilitated by the ready availability of relevant performance data in the modern financial world and is appropriate to the avowed objective of the traditional approach (e.g., Restatement, Second, Trusts § 205(c)) as well as that of the newer approach of this Restatement—that is, the goal of restoring the trust estate and beneficiaries to the position they would have been in if the trust had been properly administered.**

[Emphasis added.]

The state of Washington adopted this approach in *Baker Boyer Bank v. Garver*, 43 Wn.App. 673, 719 P.2d 583 (1986), where the beneficiaries of the trust put forth testimony of an investment expert who testified the trust estate should have contained between forty to sixty percent in equities, and the remainder in bonds. The Court of Appeals affirmed the trial court, holding it was proper to use the testimony of an investment expert in determining the damages the beneficiaries are entitled to recover stating, supra at 686:

Since the court found the Bank should have placed 40 percent of the funds in equity securities (approximately \$77,600), the measure of damages should properly reflect the increase in their value. . . The court found that the stock equity market, as measured by the broad stock indexes, rose approximately 20 to 22 percent during the trusts administration. If properly diversified, the trusts should have totaled \$171,270 when liquidated. Instead, the trusts totaled approximately \$130,250.

The trial court by refusing to award damages on account of the breach of fiduciary duty by Gerald Johannes in failing to timely close the estate essentially excused this breach of fiduciary duty.

3. ESTOPPEL DOES NOT APPLY TO THE JOHANNES GRANDCHILDREN.

The trial court found in conclusion of law 12 that James Johannes encouraged and directed Gerald Johannes to delay the closing of the probate and that he should be estopped from benefitting therefrom. One of the

problems with that conclusion is there were other beneficiaries of the estate comprised of the Johannes grandchildren. The record is devoid of anything the Johannes grandchildren did as beneficiaries that the doctrine of estoppel would apply against them. They had nothing to do with any representations made by James Johannes. The only way the Johannes children are made whole is if judgment is awarded against Gerald Johannes in an amount equal to put the trust in the position it would have been if the estate had been properly closed, the trust funded and invested as testified to by financial expert Rick Wyman.

In regards to any argument of Gerald Johannes if the trust had been funded, that possible requests of James Johannes for distributions of principal would have exhausted the trust assets, there are a number of problems with that argument. It states facts not in evidence especially since there was only one distribution over the years to James Johannes, which was the \$68,000 in 1995, when at the same time Gerald Johannes received \$102,000.

But it also disregards that if the trust had been funded it would have been managed by an independent trustee. That independent trustee would have had duties to each of the classes of beneficiaries pursuant to RCW 11.100.045. Any proposed distribution of principal to James Johannes would

have been under what is known as an ascertainable standard. James Johannes could not compel a distribution of principal. The only expert who testified at trial as to the analysis that a trustee would do when dealing with the rights of an income beneficiary versus a residuary beneficiary as is the case with this trust, is Robin Balsam. Ms. Balsam testified at great length on the analysis a trustee would go through before authorizing principal distributions to an income beneficiary like James Johannes. She testified someone like James Johannes would have had to show a specific need for distribution of principal, and made full financial disclosure. Even then the trustee would evaluate whether or not to make a distribution of principal. In fact, because of the fiduciary duty of the trustee to the residuary beneficiaries, the likelihood of significant principal of a trust being exhausted for the benefit of an income beneficiary is extremely unlikely. (RP 207-209, 227-229, 247). Any argument that James Johannes would have exhausted the principal of the trust is simply rank speculation.

4. 1998 LOAN BY PERSONAL REPRESENTATIVE WAS A BREACH OF HIS FIDUCIARY DUTY.

The trial court found several breaches by Gerald Johannes of his fiduciary duties as personal representative for the estate, but the court held in conclusion of law 8 the \$188,000 loan from the estate to James Johannes in

March of 1998 was not a breach of a fiduciary duty by Gerald Johannes. There were several issues with the loan, including it was unsecured as well as there is no legal authority that allows a personal representative to make a loan like the one made by Gerald Johannes to James Johannes.

Of greater concern though was that Gerald Johannes benefitted from that loan. This was testified to by accountant Tom Pagano who performed accounting services for both Puyallup Valley Cold Storage and Valley Packers (RP 99-100). Valley Packers was an entity that was owned by James Johannes, while Puyallup Valley Cold Storage was one that Gerald Johannes owned 51% and James Johannes owned 49% (RP 103-104). Mr. Pagano made an analysis of the \$188,000 loan in 1998 that was made by the estate to James Johannes. At that time Valley Packers owed Puyallup Valley Cold Storage significant storage charges, and from that loan \$106,000 was used by Valley Packers to pay the overdue storage charges to Puyallup Valley Cold Storage (RP 104).

Gerald Johannes thereafter received substantial benefits from these monies from Puyallup Valley Cold Storage. That included \$23,445 in additional salary in 1998; \$22,542 of 1997 accrued pension that was paid in 1998; a note payable to him in the amount of \$24,735 owed to him by

Puyallup Valley Cold Storage was paid off; Gerald Johannes received 1998 dividends from the corporation of \$12,000; and, Gerald Johannes received payments on an auto loan of \$6,576. The analysis of Mr. Pagano is that the benefits Gerald Johannes received from the \$188,000 loan made by the estate to James Johannes, was in the amount of \$89,298. (Ex. 120 and RP 104-105).

Expert Robin Balsam testified the 1998 loan in the amount of \$188,000 from the estate to James Johannes was an improper transaction. Further, Ms. Balsam testified if Gerald Johannes received benefits from the loan, that it was self-dealing and contrary to his duty of loyalty to all the beneficiaries of the estate. (RP 205-206).

RCW 11.68.090, which deals with the powers of a personal representative that has non-intervention powers, indicates that a personal representative is bound by the duties of a trustee under RCW 11.100, et seq. That includes that a fiduciary has the following duty to beneficiaries under RCW 11.100.045:

Fiduciary - Duty to beneficiaries. A fiduciary shall invest and manage the trust assets solely in the interests of the trust beneficiaries. If a trust has two or more beneficiaries, the fiduciary shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries.

There is no evidence Gerald Johannes ever consulted with or considered the positions of the Johannes grandchildren, who were also beneficiaries of the estate. He never told the Johannes grandchildren that he did not intend to fund the trust. He never told the Johannes grandchildren of any of the distributions of the estate, including the \$188,000 loan to James Johannes. Gerald Johannes indicated that he thought James Johannes was communicating what was happening with the estate to the Johannes grandchildren (RP 297-298). Gerald Johannes violated his fiduciary duties to the Johannes grandchildren, despite his knowledge that the purpose of the trust was to protect the interests of the Johannes grandchildren (RP 310).

A fiduciary is also strictly prohibited from self-dealing as stated in RCW 11.100.090:

Dealings with self of affiliate. Unless the instrument creating the trust expressly provides to the contrary, any fiduciary in carrying out the obligations of the trust may not buy or sell investments from or to himself, herself, or itself or any affiliated or subsidiary company or association.

The 1998 \$188,000 loan from the estate to James Johannes violated both RCW 11.100.045 and RCW 11.100.090. Gerald Johannes cannot show that he acted impartially in managing the estate assets in making this loan, nor did he take into account the differing interests of the beneficiaries,

including the Johannes grandchildren. That Gerald Johannes ended up profiting from this loan since the majority of it was used to pay off storage charges of a corporation that he controlled, violated RCW 11.100.090. Gerald Johannes cannot show that he acted in good faith in making this loan or that it was in the best interests of the heirs. See *Estate of Larson*, 103 Wn.2d 517, 521, 694 P.2d 1051 (1985):

The personal representative stands in a fiduciary relationship to those beneficially interested in the estate. He is obligated to exercise the utmost good faith and diligence in administering the estate in the best interests of the heirs. *Hesthagen v. Harby*, 78 W.2d 934, 481 P.2d 438 (1971).

The case of *Estate of Winslow*, 30 Wn.App. 575, 578, 636 P.2d 505 (1981) also expressly stated that a fiduciary like Gerald Johannes has an undivided loyalty to the beneficiaries and that he is not entitled to make a profit from the estate:

The court later extended this reasoning to a case involving a nonintervention will. *In re Estate of Johnson*, 187 Wash. 552, 554-55, 60 P.2d 271, 106 A.L.R. 217 (1936).

The law is that a trustee is under a duty to the beneficiary to administer the trust solely in the interest of such beneficiary, and, in doing this, an undivided loyalty to the trust is required. The trustee is not permitted to make a profit out of the trust An executor, or executrix or administrator of an estate of a deceased person acts in a trust capacity, and must conform to the rules governing a trustee.

The actions of Gerald Johannes in causing the estate to make an unsecured loan of \$188,000 to James Johannes was clearly a breach of his fiduciary duties in that he failed to exercise good faith and diligence as is required by law. That Gerald Johannes profited from this loan was prohibited self-dealing in his capacity as personal representative of his mother's estate.

5. THE TRIAL COURT ERRED IN FAILING TO INCLUDE ASSETS IN THE ESTATE THAT WERE NOT ACCOUNTED FOR BY THE PERSONAL REPRESENTATIVE.

The brief of appellant James Johannes on pages 24 through 37 identify numerous assets that were shown to exist in the estate that the personal representative did not account for, yet the trial court failed to grant judgment for these items. These items were as follows:

1. 1993 certificate of deposit from Key Bank with a value between \$21,000 and \$28,000 (RP 139, 140).
2. A bank account with United Bank in the amount of \$2,093 that the personal representative admitted was not accounted for in the estate (RP 87-89 and Ex. 25, pg. 3).
3. Unaccounted for missing monies of \$13,766 in 1990 and \$16,091 as identified by accountant Frank Ault (RP 156 and 165 and Ex. 115).
4. The \$44,403 of unexplained loan payments of \$328.59 per month to Puget Sound National Bank identified by accountant Frank Ault (RP 180-182).

5. A \$20,000 credit against a debt owed by Gerald Johannes in 1989, despite there being no evidence on the record to support a gift (RP 97, 98); and,
6. \$100,000 in Phoenix bonds never endorsed by the decedent to Gerald Johannes (RP 282-283).

The Johannes grandchildren adopt the arguments of appellant James Johannes that the trial court should have awarded judgment against Gerald Johannes for these items.

6. THE PERSONAL REPRESENTATIVE HAS BURDEN OF PROOF ON ACCOUNTING ITEMS.

Despite the court finding that Gerald Johannes breached his duties as personal representative of the estate by failing to keep complete accounting records, as well as failing to identify the disposition of several assets, the trial court did not impose judgment against Gerald Johannes. An example is the missing monies identified by accountant Frank Ault of \$13,766 in 1990 and \$16,091 in 1993, yet the court held in finding of fact 50 that accountant Ault's testimony did not establish that Gerald Johannes took the funds. The problem with that though is Gerald Johannes was the fiduciary with the responsibility to provide an accounting. Am. Jur. Second Trust § 376 states:

If clear, distinct, and accurate accounts are not provided, all intendments and presumptions are against the trustee, and all obscurities and doubts are to be taken adversely to him or her.

For each and every asset unaccounted for, the trial court should have entered judgment against Gerald Johannes in amount equal to those items, plus prejudgment interest at 12% per annum, in order to restore to the estate the monies for the missing CD; missing United Bank account, the monies identified by Frank Ault of \$29,857 that were missing by the end of 1993; the \$44,403 on the overpayments to Puget Sound National Bank on the alleged loan Gerald Johannes was not able to document as an estate expense; as well as the alleged gifts to which there was either no proof in the case of the \$20,000 credit taken by Gerald Johannes on the \$33,769 debt owed by him to the estate, and the \$100,000 in Phoenix Bonds that the decedent never signed over to Gerald Johannes.

7. THE COURT ERRED IN FAILING TO CHARGE PERSONAL REPRESENTATIVE WITH OTHER LOSSES IN ESTATE.

The Johannes grandchildren believe under the total return approach as adopted by *Baker Boyer Bank v. Garver*, that this court should put the trust in the position that it would have been in if funded timely. If this court adopts the total return approach placing the trust where it should have been based on the testimony of Rick Wyman, then the lack of performance by Gerald Johannes in investing estate assets, as well as the bad investment in

K-Mart junk bonds, and other speculative and ill-advised investments, can be disregarded by this court, as well as disgorging any gain on account of the self-dealing by Gerald Johannes in making the 1998 loan from the estate of \$188,000 to James Johannes.

If this court does not adopt the total return approach though, then the court needs to consider the various breaches of fiduciary duty of Gerald Johannes after 1993. There are at least three specific instances that need to be addressed. In finding of fact 44 the court found Gerald Johannes invested \$297,962 in estate funds in K-Mart junk bonds on November 19, 2001. In finding of fact 46 the trial court found a net loss on the K-mart junk bonds of \$84,000. While the Johannes grandchildren have no disagreement with the finding of the court that the net loss was \$84,000, the court failed to award any prejudgment interest on the \$84,000. Prejudgment interest has been defined as a make-whole remedy and is proper when the amount of the funds at issue is liquidated, which means the amount can be calculated without reliance on opinion or discretion. *Crest, Inc. v. Costco Wholesale Corp.*, 128 Wn.App. 760, 775, 115 P.3d 349 (2005). There was no opinion or discretion needed to determine the \$84,000 loss to the estate on account of the K-Mart investment. Judgment should have been awarded against Gerald Johannes for

prejudgment interest on the \$84,000 at the statutory rate of 12% after the settlement date of August 11, 2003 (Ex. 117). Additionally, the trial court failed to award damages from Gerald Johannes for the period of time the estate lost the use of investing the funds of \$297,962, on the K-Mart bonds. The bonds were purchased on November 19, 2001, and the estate lost the use of those monies of \$297,962 from November 19, 2001 through August 11, 2003. Accountant Ault prepared a statement that identified loss to the estate from the lost opportunity of investing the \$297,962 for twenty one months at 8% compounded interest which was \$44,619, while at 12% statutory simple interest the loss was \$62,572 (Ex. 117).

Gerald Johannes also had the estate invest in October of 2000 in high-tech stocks, at which time approximately twenty percent of the estate assets were invested in these high-tech securities (FOF #42 and #43). Despite this high concentration in speculative investments and that the estate ended up suffering a net loss of \$52,542, the trial court did not award any damages. Under Washington law, a personal representative has a duty to diversify pursuant to RCW 11.100.047. According to finding of fact 42, the high tech stocks in question were purchased in October of 2000. They were sold on January 12, 2004 for the net sum of \$78,109.69, but still at a loss of \$52,592.

Despite the high concentration of estate assets in speculative high-tech stocks, the trial court failed to award judgment against Gerald Johannes on the loss of \$52,592. The trial court failed to award prejudgment interest from and after January 12, 2004 on the loss of \$52,542. Finally, the trial court failed to award any damages on account that the estate had no return on the initial \$130,652 invested in speculative stocks for the thirty nine months from when they were purchased in October of 2000, and when they were sold in early January of 2004 (FOF #42, #43 and Ex. 109).

Nowhere does the record show Gerald Johannes ever addressing any of the factors as identified under RCW 11.100.020, to determine the appropriateness of the investment in the high-tech stocks, which includes looking at probable safety of the capital, general market conditions, requirements of the beneficiaries, as well as a number of other factors that are all identified in that statute.

Also at issue if the trial court does not adopt the total return approach of *Baker Boyer Bank v. Garver*, is the economics of the 1998 loan of \$188,000 made by Gerald Johannes by the estate to James Johannes. The indirect benefit to Gerald Johannes on account of that loan was the \$89,298 in additional salary, accrued pensions, a loan that was paid off to Gerald

Johannes, dividends received by Gerald Johannes and auto loan payments. (Ex. 120). While the Johannes grandchildren believe the total return approach should be used by this court in restoring the estate to where it should have been but for the breaches of fiduciary duty by Gerald Johannes, in the event the court does not adopt the total return approach then it needs to consider the true economic loss on account of the K-Mart investment, the high-tech stocks, as well as the self-dealing by Gerald Johannes and the benefits of \$89,298 he received from the 1998 loan made by the estate to James Johannes.

8. THE TRIAL COURT ERRED IN ADOPTING THE ACCOUNTING OF FRANK JOHNSON.

In finding of fact 51, the trial court adopted as the accounting for the estate through 2004, two documents prepared by accountant Frank Johnson who did not testify at trial and was not subject to cross-examination. Those accountings are identified as Exhibits 16 and 17. These were admitted over hearsay objections (RP 493-503, 767-769). A review of these documents show that they are not accountings at all. If anything they are at best a balance sheet. The personal representative never put together any sort of accounting that can tie together, from year to year, the assets and expenses of the estate. The Johannes grandchildren join in the argument of appellant James

Johannes regarding the Frank Johnson statements, and that the trial court erred in admitting and accepting those documents as accountings.

9. THE ATTORNEY'S FEES AWARD TO JOHANNES GRANDCHILDREN.

In conclusions of law 17 and 19, the trial court awarded the Johannes grandchildren a total of \$54,153.60 by awarding the Johannes grandchildren \$27,076.80 in attorney's fees and costs from James Johannes and a like amount from Gerald Johannes. The trial court properly noted that the Johannes grandchildren were entitled to reimbursement of their reasonable fees and costs incurred in the underlying litigation. In the event though this court reverses the award of \$27,076.80 in attorney's fees and costs awarded to the Johannes grandchildren from James Johannes, then the court needs to award all the fees and costs incurred by the Johannes grandchildren instead from Gerald Johannes. The authority for awarding attorney's fees and costs to the Johannes grandchildren rests under RCW 11.68.070, which allows the court to award reasonable attorney's fees and costs on account of the removal of a personal representative who has been granted nonintervention powers, as well as under RCW 11.96A.150. Also see *Allard v. Pacific National Bank*, 99 Wn.2d 394, 407-08, 663 P.2d 104 (1983), as well as *Estate of Jones*, 152 Wn.2d 1, 21, 100 P.3d 805 (2004), which states if litigation is

necessary on account of the multiple breaches of fiduciary duty by a personal representative, the personal representative should be responsible for the fees and costs of the litigation. The Johannes grandchildren are not the cause or reason for the breaches, and they need to be made whole on their fees and costs incurred.

10. ATTORNEY'S FEES AND COSTS ON APPEAL.

The Johannes grandchildren are also entitled to an award of attorney's fees and costs on appeal pursuant to the cited authority under RCW 11.68.070, RCW 11.96A.150 and under *Estate of Jones* and *Allard*, supra.

V. CONCLUSION

The trial court found multiple breaches of fiduciary duties by Gerald Johannes in his failure to keep adequate records, his failure to timely close the estate, the purchase of K-Mart bonds, as well as loaning himself \$240,000 in July of 1998 to buy a house. The trial court found that these breaches were substantial enough that Gerald Johannes was removed as personal representative of the estate. The Johannes grandchildren agree with appellant James Johannes insofar as judgment should be entered against Gerald Johannes based on the total return approach as testified to by financial expert Rick Wyman, and also in adding back in pre-1993 items that Gerald Johannes

failed to account for, including the missing CD of \$28,000; the \$29,857 missing from the estate account for 1990 and 1993 as found by accountant Frank Ault; the \$44,403 in loan payments to Puget Sound National Bank that Gerald Johannes could not explain; the missing \$2,093 representing the United Bank account that was an estate asset; as well as the credit of \$20,000 on the \$33,769 debt owed to the estate and the \$100,000 in Phoenix bonds owned by the decedent that were never endorsed over to Gerald Johannes, and statutory prejudgment interest on all these missing items. In the alternative, this court should rule the estate should have been closed by no later than the end of 1993, and remand the case to the trial court to award damages under Washington law as set forth in *Baker Boyer Bank v. Garver*, and require Gerald Johannes to provide a complete accounting, and in his failure to do so direct the trial court to find all ambiguities on any accounting issues against Gerald Johannes. Finally, if the trial court reverses any attorney's fees and costs award in favor of the Johannes grandchildren against James Johannes, the Johannes grandchildren should recover such fees and costs from Gerald Johannes on account of his breaches of his fiduciary duties as the personal representative of the estate. The court should also award the

Johannes grandchildren their attorney's fees and costs for this appeal, to be determined under RAP 18.1.

Respectfully submitted this 10th day of May, 2007.

COMFORT, DAVIES & SMITH, P.S.

By: Brian T. Comfort
Brian T. Comfort, WSBA# 12245
of attorneys for cross-appellant

COURT OF APPEALS
DIVISION II

NO.: 35504-3-II

OCT 11 PM 2:22

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

STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

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 K. FERRANTE; 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.

AFFIDAVIT OF MAILING BRIEF OF CROSS-APPELLANTS

COMFORT, DAVIES & SMITH, P.S.
Brian T. Comfort, WSBA 12245
1901 65TH AVE. W. STE 200
FIRCREST, WA 98466
(253)565-3400

Attorneys for cross-appellants Ferrante
Yormark and Johannes

Kathy R. Goulet, certifies and states as follows:

I am a citizen of the United States of America, a resident of Pierce County, Washington, over the age of twenty-one (21) years and competent to be a witness in the above-entitled cause.

That on the 10th day of May, 2007, she forwarded a true and correct copy of the ***brief of cross-appellants*** in connection with the above-captioned matter, by ABC-Legal Messengers, Inc., and by facsimile to the following address:

Bart Adams, Esq.
2626 N. Pearl
Tacoma, WA 98407
Facsimile No. 253-752-7936
Attorney for appellant

Brian M. Born, Esq.
Turnbull & Born
Commerce Building, Suite 1050
950 Pacific Avenue
Tacoma, WA 98402
Facsimile No. 253-572-7220
Attorney for respondents

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

Dated at Tacoma, Washington this 10 day of May, 2007.


Kathy R. Goulet