

*App's Reply Brief*

COURT OF APPEALS  
WASHINGTON

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STATE OF WASHINGTON

NO. 35504-3-11

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DEPUTY

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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**REPLY BRIEF OF APPELLANT JAMES JOHANNES IN  
RESPONSE TO BRIEF OF GERALD JOHANNES**

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## **REPLY TO COUNTER STATEMENT OF THE CASE**

Gerald Johannes repeatedly claims that this action began as an action to collect a promissory note, implying that the Complaint of James Johannes was brought in retaliation to that action. That claim is false. James served Gerald with the Complaint for breach of fiduciary duty on January 12, 2004. (CP 61). Gerald's Complaint on the note was dated July 28, 2004 and received July 30, 2004.

### **I. ARGUMENT GERALD JOHANNES FAILS TO RESPOND TO STATUTORY DUTY TO CLOSE ESTATE**

In his Responsive Brief at page 8 Gerald Johannes asserts that the court correctly denied damages resulting from the duty to close the estate because James participated in delaying the estate closing. Gerald repeats the argument at p. 14 of his memorandum, where he argues again that James' actions prolonged the estate and result in an estoppel. Gerald's arguments are without merit both because they are contrary to the court's ruling that Gerald breached his duty by not closing the estate before 1995 and it relies on events that took place after the end of 1994 when the estate should have been closed. The events which Gerald argues delayed his closing the estate are based on Findings of Fact 29, 35, 27, 39 and 41. Finding 35 discusses the July 1995 loan, Findings 37 and 39 discuss the

1998 loan, and Finding 41 discusses Gerald's attempt to place James on the brokerage account without James' knowledge in 2000 or 2001 (Ex 102, RP 475-477). None of those events had anything to do with Gerald's breach of fiduciary duty in failing to close the estate by the end of 1994. The only other finding referred to by Gerald to allege James delayed closing the estate is Finding 29, which says nothing other than that James Johannes was dissatisfied with the trust. Nothing in that finding suggests that James' dissatisfaction with the trust delayed the closing of the estate.

Despite having no Findings of Fact that support an estoppel, Gerald argues that James is estopped from alleging Gerald breached his fiduciary duty. The argument fails. First, as above-described, the actions upon which he tries to base an estoppel took place after 1994 when the court ruled the estate should have been closed. Second, Gerald's estoppel argument ignores the statutory duty to close an estate as rapidly and quickly as possible set forth in RCW 11.48.010 and discussed in the Estate of Wilson, 8 Wn.App. at 519, 507 P.2d (1973). It also fails to respond the clear authority of In re Peterson's Estate, 12 Wn. 2d 686, 123 P.2d 733 (1942) which holds that the Personal Representative's statutory duty to close an estate as rapidly and quickly as possible is a duty to the court that cannot be waived even by request of the beneficiaries. As a matter of law

estoppel does not apply to protect Gerald from his breach of fiduciary duty to timely close the estate.

Finally, Gerald argues that the estate could not close at the end of 1993 as was testified to by the only witnesses who testified on the subject at trial because the tax return for the estate for 1993 was not complete until October 14, 1994. RCW 11.68.114 allows an estate to be closed leaving a Personal Representative with the ability to continue to deal with the governmental entities regarding taxes. Further, Gerald Johannes did not allege that preparation of the tax return precluded him from timely closing the estate at trial. He is precluded from doing so on appeal. RAP 2.5(a).

**JAMES JOHANNES' DAMAGE THEORY PRESENTED AT TRIAL IS ACCEPTED BY WASHINGTON LAW**

In his brief Gerald defends his investment strategy returning about 1.25% per annum by stating that the long term investment strategy testified to by the expert for James Johannes is not applicable because Gerald had a duty to close the estate as rapidly and quickly as possible and needed to keep the estate liquid to do so. Such an argument completely misses the point. The breach of fiduciary duty by Gerald for which damages were proven at trial was Gerald's breach in failing to timely close the estate. Had he timely closed the estate in either 1993 as it is asserted he

should have by James Johannes and Johannes grandchildren or by the end of 1994 as the trial court concluded he should have, the short-term investment strategy would have ended because the estate would have been turned over to a trustee with a long-term investment goal. It was Gerald's failure to timely close the estate that precluded the transfer to a trustee with a long term investment strategy. Gerald's argument adopts the mistake that caused the trial court to err in refusing to award damages.

Once the date by which the estate should have enclosed is selected, the damage evidence produced by James Johannes at trial requires an award of damages for the difference between the investment return achieved by Gerald Johannes and the investment return that would have been achieved by the bank trustee. Boyer Bank v. Garver, 43 Wn.App. 673, 719 P.2d 583 (1986). Boyer, *supra*, establishes that in Washington those damages can be proven by showing no more than the increase in the stock market from the time of the breach until trial. Gerald fails to respond to or discuss that case. Instead, he cites Gillespie v. Seattle First National Bank, 70 Wn.App. 150, 855 P.2d 680 (1983), alleging that it holds that the evidence of damages from a breach of trust must come from a professional trustee. Gillespie, *supra*, does not so hold. Indeed, no professional trustee testified on the damage claim in Gillespie. In

Gillespie the persons who testified as experts were real estate experts who testified as to the increase in value of assets in the real estate market in the Seattle area during the period of the trustee's breach. Gerald's argument that evidence of actions that would have been taken by a professional trustee is mandated by the case law is unsupportable. It is also contrary to Boyer, supra, where the testimony regarding the type of investments that would have or should have been made in the trust and the returns that would have been received came from an investment expert. (see Boyer, p. 685). James Johannes produced more detailed evidence at trial than was accepted by the appellate court as appropriate in Boyer, supra, or Gillespie, supra. He presented evidence from investment expert who was familiar with the investment strategy of the trust department of Puget Sound National Bank, the trustee appointed for the Johannes Trust under the will at issue in this case. (RP 252, 253). The results of the S&P 500 and the bond market between 1993 and the time of trial in this case are not speculation. The damages proven by James were based on actual market results of the average performing bond fund each year during that time between 1993 and 2006 upon the increases in the S&P 500, a recognized market of investments whose gains can be identified to the penny. There is no speculation or opinion involved in the financial results of those

markets. It was error for the court to fail to follow, Gillespie, *supra*, and Boyer Bank, *supra*. This court should reverse the trial court and adopt the damage evidence presented by James Johannes.

In his brief Gerald Johannes argues that the growth model presented by Rick Wyman was inaccurate because it was not reduced for income that would have been paid out under the trust. Such an argument is utterly without merit for two reasons. First, under the facts of this case the income was not distributed, therefore the argument that the model should be reduced by income that could have been but wasn't paid out to James Johannes is nonsense. Second, Gerald argues that the tax effect in the Rick Wyman calculations is erroneous because the income was taxed at the tax rates for James Johannes rather than the trust rate which would have been applicable if no distributions occurred. That argument is easily refuted. At trial the tax expert for Gerald Johannes admitted that if the income as shown in the model of Rick Wyman had been distributed to James Johannes annually as the lifetime income beneficiary, and he had invested that income exactly in the same manner as it was invested in the trust, that the tax computations in the Rick Wyman model was exactly correct (RP 615 -- 616). It is never possible to know exactly what investment strategies would have been undertaken by the trustee had

Gerald Johannes not breached his fiduciary duty and failed to timely close the estate. The type of evidence presented in this case is, however, far more detailed and accurate than was accepted in either Boyer Bank, *supra*, or Gillespie, *supra*. The trial court erred in refusing to grant damages because it believed that the non payment by James of the 1998 loan made it impractical to close the estate (FF 40). The court failed to realize that if Gerald had closed the estate by 1994 as it ruled he should have, there would have been no 1998 loan and none of James' actions alleged to create an estoppel could have delayed the closing of the estate. Finally, since Gerald admitted at trial that there were no discussions about keeping the estate open between 1993 and 1996, (RP 53) there is no basis for the claim that James is estopped from arguing that the estate should have been closed before the end of 1994.

**2001 AND 2004 ACCOUNTINGS WERE NOT ADMISSIBLE FOR THE TRUTH OF THE MATTER ASSERTED**

The arguments of Gerald Johannes on the accounting issue are impossible to reconcile. At p. 18 and p. 19 of his brief, Gerald argues that the trial court action did not include an action for an accounting, stating:

Even if James had brought an action for an accounting, these Findings of Fact would not be preclusive of requiring the Personal Representative to account for assets acquired subsequent to the filing of the estate tax return and inventory.

(See p. 18). If the action below was not an accounting and does not preclude a further action for an accounting of all of the funds administered by the Personal Representative this court should reverse Finding of Fact 51 adopting the “accounting” of Frank Johnson as accurate and remand the matter to the trial court for an accounting and a determination of the damages to the trust beneficiaries for Gerald’s breach of his duty to close the estate at a date selected by this court, either at the end of 1993 as argued by James, or the end of 1994 as found by the trial court.

If the issue of the “accounting” was tried by the trial court by the consent of the parties, then the pleadings are automatically amended to include the accounting claims discussed on this appeal CR 15(b). If this was an accounting action, then it was reversible error to admit the accountings of Frank Johnson for the truth of the matter asserted that the 2004 accounting as accurate.

Gerald tries to justify the admission of the Frank Johnson “accounting” as a business record. There is no basis for such an argument. In order to qualify as a business record, the custodian or other qualified witness must testify to the (1) mode of the business records preparation; and (2) that the record was made in the ordinary course of business; and (3) that the events recorded in the business records were recorded near the

time of the events recorded. RCW 5.45.020. None of those elements are met. First, the document was prepared in 2004. it attempts to describe events that occurred over a 16 year period. The entries were not made at or near the time of the events recorded. Second, the accounting was not prepared in the ordinary course of any business activity. It was prepared to try to describe what had happened to estate assets, the disposition of which could not be ascertained due to the lack of records maintained by Gerald Johannes in breach of his fiduciary duty. Finally, no witness testified as to the mode of preparation of the document. It is impossible to identify the sources of information from which the “accounting” was derived and it is impossible to cross-examine it for its accuracy. It is not disputed that the “accountings” do not tie to the income and expense records of the estate and it is not disputed that the two accountings cannot be tied together and reconciled with income and expenses during the interim between them. (RP 551, 552, 559). Without testimony from Frank Johnson as to how he prepared the accountings to determine their accuracy, the records are hearsay and inadmissible.

Gerald Johannes also argues that James Johannes invited error that allowed the inadmissible hearsay accounting to be admitted. There is no basis for that argument. In making that argument Gerald Johannes

confuses two different issues. The first of those issues is whether or not James Johannes invited error regarding the admission of the “accounting”. The record is absolutely clear he did not. James Johannes objected to the admissibility of the accounting at RP 493-503 and RP 767-769. Nowhere in the record did James Johannes say anything that Gerald Johannes can point to that suggests that the accountings were admissible for the truth of the matter asserted. Indeed, counsel for Gerald Johannes admitted that they were not being offered for that purpose. (RP 497, 769). The suggestion that James Johannes did anything to invite the court to admit the documents for the truth of the matter asserted is completely unsupportable.

Gerald Johannes argues that James Johannes invited error by proposing that a finding be entered adopting the “accounting” of Frank Johnson. That argument is wrong for two reasons. First, had the court not erroneously admitted the accounting of Frank Johnson for the truth of the matter asserted it could not have relied on it as it did as the accounting to be adopted by the court for the period from the commencement of the estate through January, 2004. Since James Johannes objected to its admission at all times, it is impossible to argue that it consented to the court using that accounting as accurate.

Second, Gerald Johannes has not pointed to any point in the proceedings prior to the judge's written decision upon which it relies in alleging that James Johannes invited error. In his brief Gerald Johannes argues that the conversation in the record at RP 963 demonstrates that James Johannes invited error asking the court to rule that the accounting should be used to determine what should have been in the estate as of January, 2004. Such an argument attempts to mislead the court. The discussion at RP 963 dealt with a conclusion of law proposed by counsel for the Johannes grandchildren. The parties completed argument on the Findings of Fact and began considering the Conclusions of Law at p. 930 of the trial transcript. The discussion referred to at p. 963 by Gerald Johannes refers to a conclusion of law proposed by Mr. Comfort. As is clear from RP 964 line 18, that conclusion of law was deleted. The suggestion that invited error applies to a conclusion of law that was not adopted by the court is without merit.

Finding of Fact 51, which discusses the accounting of Frank Johnson, is based entirely on the written decision of the judge Pro Tem (CP 98) which stated, on the last page, p. 5 as follows:

To determine the present value of the estate, and the amount needed to fund the trust, I would begin with Frank Johnson's latest accounting and bring it up to date, if possible.

The judge insisted that that finding be included at the presentation, as it was his ruling, despite the objection of James Johannes to the admissibility of the accounting. (RP 924, 925). See Appendix 1. Entering a finding in accordance with the judge's written ruling is not invited error. Lavigne v. Chase, Haskell, Hayes and Kalamon, P.S., 112 Wn.App. 677 50 P.3d 306 (2002). The claim of invited error is without merit.

**NO EVIDENCE SUPPORTS CLAIM THAT PHOENIX BONDS WERE ENDORSED TO BEARER**

Gerald Johannes argues that the bonds were bearer bonds and that therefore the gift of the \$100,000.00 in Phoenix bonds to him was completed upon delivery. That is wrong because the trial court did not find that they were bearer bonds and because the record is clear that they were not. The starting point in the analysis is to look at the bonds themselves. The bonds, (Ex 24), were registered in the name of Evelyn C. Johannes. They were not registered to bearer. Gerald Johannes cites language from the front of the bonds in his brief at p. 24. He, however, omits the critical language on the front of the bonds which demonstrates that they are not bearer bonds. The applicable language from the bonds, including the sentence intentionally omitted from the brief of Gerald at p. 24 is on Appendix 2. The dispositive language of the registration is contained in

the first two sentences. The bonds were registered in the name of Evelyn C. Johannes. The second sentence of the registration section makes it absolutely clear that no transfer will be valid unless made on the books of the Registrar, the city of Phoenix. It is undisputed that the bonds were never transferred on the books of the city of Phoenix. Indeed, Gerald Johannes admitted at trial that they remained in his mother's name. Under questioning by his counsel, he admitted the bonds were not bearer bonds, but were in his mother's name. (RP 395-396). See Appendix 3. Based on the testimony of Gerald Johannes and the language of the bonds themselves, the evidence is absolutely clear that the bonds remained in the name of Evelyn C. Johannes and were not endorsed in blank as bearer bonds pursuant to RCW 62A.3-104.

In Gerald Johannes' brief he attempts to argue that the signature on the statement of gift was sufficient to create an endorsement on the bonds. He argues that the Statement of Gift was stapled to the bonds and intended as an endorsement created bearer bonds. That argument fails for three reasons. First, although Gerald Johannes claims in his brief that it is undisputed that Evelyn delivered the bonds to Gerald Johannes stapled to the Statement of Gift, there is no evidence in the record to support that. Gerald Johannes cites for that proposition (RP 394). Nothing in that

testimony indicates that the Statement of Gift was stapled to the bond and the trial court did not so find. Second, for a signature to be an endorsement, it must be made for the purpose of negotiating the instrument. RCW 63A.3-204. That section reads:

Endorsement means a signature, other than that of a signer as maker, drawer, or acceptor that alone or accompanied by other words is made for the purpose of (1) negotiating the instrument...

There is no language in the Statement of Gift that the signature was an attempt to negotiate the bonds.

Third, Gerald Johannes admitted at trial that the bonds had not been negotiated as bearer bonds. (RP 395, 306), Appendix 3. The arguments of Gerald Johannes that the bonds were bearer bonds fail. Gerald Johannes does not even attempt to suggest that In Re Slokum's Estate, 83 Wn. 158, 145 P. 204 (1915) is no longer good law. As a matter of law the gift was not complete and the Phoenix bonds were estate assets. Gerald owes the estate \$100,000.00 plus interest at 12% per annum since he cashed those bonds on September 20, 1990 (RP 394-397).

#### **ACCOUNT AT UNITED BANK**

Despite the fact that Gerald Johannes admitted at trial that \$2,093.00 came from United Bank and was not accounted for in the estate 706, he attempts to argue in this brief that since at one point he testified

that the money went into the estate bank account there is no error in failing to grant a judgment for this account. Such an argument misses the point. The “accounting” of Frank Johnson that the court relied on used the estate 706 return as the starting point which does not include the \$2,093.00 as an estate asset. It is not possible for that “accounting” to balance if it does not consider that asset. The Johannes Estate is entitled to a judgment for the \$2,093.00 plus interest at 12% per annum since 1989.

**THE PERSONAL REPRESENTATIVE HAS THE BURDEN OF  
PROOF OF THE ACCURACY OF RECORDS**

In his brief, Gerald Johannes attempts to argue that James Johannes cannot recover \$29,857.00 in proven by Frank Ault to be missing from the estate because the lack of records has precluded accurate proof of the damages. That argument mirrors the trial court’s ruling. It, however, is an obvious error of law. In Finding of Fact 50 the court found that the records kept by Gerald Johannes were so inadequate that it was impossible to do an accounting. At issue in this case is the legal result of that breach of fiduciary duty. Gerald’s reliance on Micro Enhanced v. Cooper Lybrand, 110 Wn.App. 412, 40 P.3d 1206 (2002) claiming that it holds that James Johannes had the burden of proof on the accuracy of the records kept by Gerald Johannes is misplaced. That case discusses the

burden of proof in determining whether or not a fiduciary breached his fiduciary duty. It does not discuss the burden of proof on damages once a breach is found. Here, the trial court found that Gerald breached his fiduciary duty by failing to keep records. The issue is what the court is to rely on for an accounting when the Personal Representative does not have adequate records. Boiled down to its simplest elements, the argument of Gerald Johannes is that if a Personal Representative keeps such poor records that it is impossible to prove the amount that should be in an estate, that no party may successfully sue him for that breach because they cannot prove damages. That is the ruling that the trial court made in this case. (FF 50). It is obvious error. Both Wilkins v. Lasater, 46, Wn.App. 766, 733 P.2d 221 (1987) and the Restatement Second of Trusts, § 172 which are cited in the opening brief of James Johannes clearly require the Personal Representative to be able to account for every cent he administered and to resolve all doubts against the Personal Representative. Finding of Fact 50, which denied recovery because Frank Ault could not testify where the missing funds went due to lack of records, is error. Gerald Johannes should have been required to pay back to the estate \$29,857.00 that was missing in 1990 and 1993 with interest at 12% per annum.

## **THE CD**

Despite the trial court's express finding that Gerald could not establish that the funds from the \$28,000.00 CD were paid into the estate when the funds were cashed, Gerald responds to the request for judgment against him by asserting that there is some evidence in the record which the court could have, but did not believe, that those funds were used to pay off the debt in the estate fourplex. Indeed, Gerald testified at RP 431 that the disappearance of the CD funds might be related to the missing CD money. The trial court did not believe Gerald on that issue and entered Finding of Fact 33. Since he cannot account for the funds, the estate is entitled as a matter of law to a judgment against Gerald for \$28,000.00 plus interest at 12% per annum since 1993. Wilkins v. Lasater, 46 Wn.App. 766, 733 P.2d 221 (1987), Restatement Second of Trusts, §172.

## **PUGET SOUND NATIONAL BANK DEBT**

In response to a detailed argument demonstrating that it is impossible that the payments made by the Personal Representative to Puget Sound National Bank between 1989 and 1993 paid bank notes, Gerald Johannes argues in his brief at p. 22:

“There was no evidence presented at trial that these funds were paid to any party other than Puget Sound National Bank.”

That argument again misapplies the burden of proof. Gerald Johannes had the burden to prove that these payments were for an estate debt. The trial court found in Finding of Fact 30 that Gerald Johannes continued to pay the Puget Sound National Bank payments of \$328.59 after the estate debt to the bank was paid in full. Gerald Johannes argues, and the trial court ruled that the trust beneficiaries have the burden to show that the payments were not for an estate purpose. That argument and ruling are error. It is the Personal Representative's burden to show why the payments were made. Restatement Second of Trusts, §172, Wilkins, *supra*. Further, the Personal Representative admitted at trial all of the facts necessary to establish a judgment for the estate in the amount of \$44,403.00. He paid \$1,689.31 per month between 1989 and the mortgage payoff in October, 1992. That would require an interest-only payment as was testified by him (RP 62, 63) of more than 14% on the note. He admitted that the note was not 14% (RP 535). He had no explanation why he continued to pay \$328.59 per month for five months after the note was paid. (RP 530). The court erred in failing to award a judgment of \$44,403.00 as was proven at trial.

**\$20,000.00 GIFT FROM 1989**

Faced with the accounting records admitted in Exhibit 125 prepared by the accountant for Gerald Johannes showing that as of

January 1, 1989 Gerald Johannes owed \$33,769.00 to his mother, Gerald Johannes argues that a writing from 1985 renounced the debt and thereby extinguished it under RCW 62A.3-604. Unfortunately for Gerald Johannes, Exhibit 32 does not state a present intention to make a gift. It expresses an intent to make a gift in the future, which is not sufficient for a gift to occur. Sinclair v. Fleischman, 54 Wn.App. 204, 773, P.2d 101 (1989). The accountant who maintained the ledger on that gift showed that it continued to have a balance of \$33,769.00 on January 1, 1989. (Ex 125). Gerald Johannes presented no evidence of a gift taking place in 1989. It was error for the trial court to find that there was gift of \$20,000.00 from Evelyn Johannes to Gerald Johannes in 1989. The estate is entitled to a judgment against Gerald Johannes for \$20,000.00 plus interest at 12% per annum since January 1, 1989.

#### **ATTORNEY'S FEES**

Gerald Johannes argues that Allard v. Pacific National Bank, 99 Wn.2d 394, 663 P.2d 104 (1983) is not applicable to establish his right to attorney's fees because it is a pre-TEDRA case and because that involved a trust and not an estate. Neither of those arguments has any merit. Notably absent from Gerald Johannes' argument is a discussion of Estate of Jones, 152 Wn.2d 1, 100 P.3d 805 (2004) which rejects both arguments.

In Jones, *supra*, like here, the Personal Representative breached his fiduciary duties to the estate by using estate property for his personal use, commingling estate funds, and refusing to disclose information to beneficiaries. Based on those breaches the court removed the Personal Representative. In this case, the trial court found, and Gerald Johannes has not contested, that there were four breaches fiduciary duty which include using estate property for his personal use by commingling estate funds with his own when he took money from the estate to buy his house which he paid back with less than the full amount and without interest, (CL 5), by failing to keep accurate estate records, by purchasing \$300,000.00 in KMart junk bonds causing a loss of \$84,000.00 principle plus a loss of interest accruing to the estate, and by failing to timely close the estate. Gerald Johannes himself admitted at trial that he had not disclosed his breaches of fiduciary duty in buying the KMart bond to the beneficiaries and that that fact was uncovered at his deposition (RP 61). The breaches in this case by Gerald Johannes were far more significant than they were in Jones, *supra*.

In Jones, *supra*, the Supreme Court applied the Allard test to the award of attorney's fees for the breach by the Personal Representative. In disposing of Gerald Johannes' argument that Allard is distinguishable

because that involved a trust and not an estate, Estate of Jones says, in footnote 16:

*Allard* is a trust case, but it is still applicable here since a Personal Representative has a fiduciary duty similar to those of a trustee, as he is acting in a trust capacity.

Just as in Jones, *supra*, in this case there are two bases for attorney's fees against Gerald Johannes. Attorney's fees are available under RCW 11.68.070 and RCW 11.96A.150. Jones, *supra*, reiterates the Allard test for attorney's fees awarded under both RCW 11.68.070 and RCW 11.96A.150, holding that where the Personal Representative of an estate was found to have breached his fiduciary duties he must personally pay all of the attorney's fees of the parties who sued to expose the fiduciary duty, both at trial and on appeal. It was error to order James Johannes to pay one-half of the attorney's fees for Gerald Johannes in defending the claims for breach of fiduciary duty and his removal as Personal Representative and it was error for the court to fail to award to James Johannes his attorney's fees for exposing the breaches and recovering affirmative judgments benefiting the beneficiaries of the estate.

Lastly, Gerald Johannes argues that James Johannes' conduct was a significant factor in the breaches of fiduciary duties of which he complained and therefore an award of attorney's fees was not appropriate.

No findings of fact are cited for that allegation and it is simply not true.

The trial court found that Gerald Johannes failed to keep adequate records of the transactions involving the estate (CL 2). There was no allegation at trial and the trial court did not find that James Johannes had any participation in the record keeping for the estate.

The trial court found that Gerald Johannes bought KMart junk bonds, causing a loss to the estate of \$84,000.00 (CL 3). It is not disputed that James Johannes discovered that breach during discovery in this case (RP 61).

The trial court found that Gerald breached his fiduciary duty by failing to close the estate by the end of 1994. Not one of the 56 findings entered by the court supports an argument that James delayed the closing of the estate. Even if the court had so found, the law is clear that the duty to timely close an estate is not subject to a defense that a beneficiary requested that the estate not be closed. In re Peterson's Estate, 12 Wn.2d 686, 123 P.2d 733 (1942).

Finally, the trial court found that Gerald Johannes breached his fiduciary duty by loaning money to himself to buy a home, not paying the loan back in full and not paying interest (CL 5). James Johannes did not know about that breach until the trial in this case and he did not participate

in it. There is no basis for Gerald Johannes' argument that attorney's fees should be awarded against James Johannes to reimburse the attorney's fees incurred by Gerald Johannes based on an encouragement of the breach of fiduciary duties. Allard, *supra*, and Jones, *supra*, require a reversal of the award of attorney's fees of \$43,090.78 against James Johannes and award of attorney's fee to James Johannes from Gerald Johannes personally for all of his fees, both at trial and in this appeal.

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

Despite having no records to support a fee award, Gerald argues that \$7,500.00 was appropriate attorney's fees on the action to collect the note. The only action taken for the fee was drafting a Complaint on the note. James Johannes never filed an Answer to the Complaint and admitted at the beginning of trial that no note payments had ever been made. At the hourly rate charged by counsel for Gerald Johannes, the award of attorney's fees on the note would pay for 50 hours of work. Gerald Johannes cannot demonstrate that even two hours were spent on the note. An award of \$7,500.00 was error.

In his brief Gerald Johannes confusingly argues first that the claims were not inseparable and that the court had a duty to determine those fees attributable to recovery, citing Kastanis v. EECU, 122 Wn.2d

483, 859 P.2d 26 (1993). Thereafter he argues that the claims were so interrelated that there need be no segregation of attorney's fees citing Parnell v. Servs. of Am., 61 Wn.App. 418, 810 P.2d 952 (1991). While it is difficult to reconcile to inconsistent positions taken by Gerald Johannes, Kastanis clearly requires the court to segregate between claims on the note and claims on actions to remove the Personal Representative and for breach of his fiduciary duties. The claim on the Promissory Note in this case and the claims brought by James Johannes and the Johannes grandchildren are clearly not related. They involve entirely separate cores of facts and legal theories. Parnell, supra, holds that for claims to be inseparable for attorney's fees purposes, they must arise out of the same core of facts. Gerald's breaches of fiduciary duty have nothing to do with James' non payment of the 1998 note. This court should reverse the trial court's award of \$7,500.00 of attorney's fees on the note, which cannot be substantiated and award \$1,000.00 as reasonable attorney's fees as requested by James Johannes at trial.

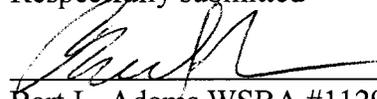
### **CONCLUSION**

This court should find that Gerald Johannes breached his fiduciary duty by not closing the estate by 1993, and award damages of \$249,313.07 as proven at trial. It should also enter judgments against Gerald Johannes

in favor of the trust beneficiaries for 40% of the \$28,000.00 missing CD, the missing funds of \$29,857.00 from 1990 and 1993 as established by Frank Ault, the payments to Puget Sound National Bank for non-estate expenses of \$44,403.00, \$2,093.00 for the United Bank funds, \$20,000.00 for the 1989 gift, and \$100,000.00 for the Phoenix bonds plus interest at 12%.

Alternatively, this court should reverse the trial court, hold that the estate should have been closed by 1993 and remand it for a trial on an accounting and damages. In either case, the attorney's fees awards against James Johannes should be reversed and he should be awarded all his attorney's fees at trial and on this appeal.

Respectfully submitted



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Bart L. Adams WSBA #11297  
Attorney for James Johannes

## **Appendix 1**

(RP 924, line 15 through 925, line 2)

THE COURT: Well, what I meant to say is – well, what I said was I would begin with Frank Johnson's latest accounting and bring it up to date. That's what is the starting point is what I meant, I thought I said.

MR. ADAMS: Just so I'm understanding, what I think you're saying is you're adopting that as correct and whatever's happened since then, we will have to do that in the probate, which is where you would normally do it.

THE COURT: Yes. Frank Johnson might or might not have been correct because of all the problems of the records, but you've got to start somewhere. It seems to me you've got to start somewhere. It seems that's an appropriate place.

MR. BORN: That language is fine.

## **Appendix 2**

The within bond may be registered as to principle in the name of the holder on the books to be kept for such purpose by the city clerk of the City of Phoenix, as Registrar. Each such registration shall be noted in the below blank by the Registrar, after which no transfer of the bond shall be valid unless made on the Registrar's books by the registered holder and similarly noted in the registration blank below. If this bond is registered as to principle it may be discharged from registration by being transferred to bearer, after which it shall be transferable by delivery but may again be registered as to principle as before. The registration of the bond as to principle shall not restrain the negotiability of the coupons hereto attached by delivery merely.

### Appendix 3

(RP 395, line 19 through 396, line 3)

Q Okay. What did you do with the bonds after the call date?

A I kept them.

Q After the call date?

A Oh, after the call date, excuse me, I cashed them in at the  
Bateman Eichler account.

Q The estate's Bateman Eichler account?

A Yeah. I had to – because her name was on it, I had to run  
through the estate, run it through the estate.

COURT OF APPEALS  
DIVISION II

07 JUN 20 PM 2:06

STATE OF WASHINGTON

BY \_\_\_\_\_ NO. 35504-3-II  
DEPUTY

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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**AFFIDAVIT OF MAILING OF REPLY BRIEF OF APPELLANT  
JAMES JOHANNES IN RESPONSE TO BRIEF OF GERALD  
JOHANNES**

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I certify that on the 20<sup>th</sup> day of June, 2007, I caused a true and correct copy of this Reply Brief of Appellant James Johannes in Response to Brief of Gerald Johannes 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:

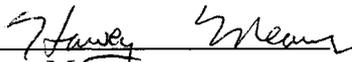
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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated June 20, 2007 at Tacoma, Washington

  
\_\_\_\_\_  
Harvey Means