

COURT OF APPEALS  
STATE OF WASHINGTON  
BY: *JM*

NO: 36339-98-II

COURT OF APPEALS DIV II  
OF THE STATE OF WASHINGTON

In re Estates of	)	No. 36339-98-II
ALFRED S. PALMER and SARAH	)	BRIEF OF APPELLANT
L. PALMER,	)	
Deceased.	)	
Respondent	)	
DAWN PALMER GOLDEN,	)	
Appellant,	)	

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### ASSIGNMENTS OF ERROR

1. Failure to dismiss petition as to joint accounts with right of survivorship and set aside order regarding joint accounts pursuant to RCW 11.11.070. (Rp 226, Cp 331,332)
2. Failure to allow addition of Edward Jones account records to list of documents to be admitted as evidence. ((Grp<sup>1</sup> 3-12, Rp 37,38,39, Cp 329,330, 368,370,372,373,374)
3. Finding Appellant opened the Edward Jones joint account with right of survivorship with Appellant and Sarah Palmer using a power of attorney. (Rp 327, Cp 342)
4. Finding Respondent's burden of proof as to the joint accounts was by the preponderance of the evidence, not clear and convincing as stated in RCW 11.11. (Rp 136)
5. Ruling Appellant had burden of proving a gift of the joint accounts. ( Rp 328)
6. Finding that Appellant had duty to account for financial transactions that occurred six years prior to the petition being filed with no

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Grp is Judge Grant

- evidence that the funds had been misappropriated. (Cp 345)
7. Finding Appellant had breached her fiduciary duty in making gifts.(Cp 344)
  8. Finding active concealment by Appellant from Respondent of her activities on Sarah Palmer's behalf. (Cp 346)
  9. Finding Respondent had no duty to inquire, as trustee, to inquire or actively manage trust prior to Sarah Palmer's death. (Cp 341, Rp 325)
  10. Finding respondent became the trustee of trust upon the death of Sarah Palmer. (Cp341, Rp 325)
  11. Finding that the deposition testimony of Brian Duffy as creditable but his trial testimony as not creditable. (Rp 325,327, Cp342)
  12. That the opening of the joint account for Alfred Palmer and Sarah Palmer at Edward Jones is evidence of opening the Sarah Palmer/Dawn Golden joint account using a power of attorney.(Rp 327)
  13. Finding expenditures by Appellant during Sarah Palmer's lifetime were not in good faith.( Rp 330)
  14. Finding Appellant breached her fiduciary duty in making loans with low interest and without security and gifts during Sarah Palmer's

lifetime. (Rp 328, 329, Cp 343, 344)

15. Finding trust rental property was sold by Appellant without cooperation of Respondent. (Rp 334)
16. Awarding Respondent attorney fees. (Rp 335, Cp 347)
17. Denying admittance of Edward Jones' opening account form.(Grp 3-12)
18. Refusing to admit deposition and attached exhibits of Brian Duffy pursuant to CR 32©. (Rp 117)
19. That the court confused unable to handle her affairs with testamentary capacity which was never challenged (Cp 346)

#### **ISSUES**

1. Does RCW 11.11.070, a statute of repose, apply to the Edward Jones account and the joint bank accounts or is there an exception that allows the personal representative of an estate or testamentary beneficiary to use the three-year statute of limitations?
2. Is it error for the assigned judge to prevent additional evidence of documents after the discovery cut off date and after the list of documents is due and has been filed when the documents are determinative to the major issue before the court and were requested

by the Appellant five months earlier from a third party, Edward Jones, but were not supplied until after the cut off dates? Court found Appellant's attorney was diligent in his attempts to acquire them. (Grp 12)

3. Is the burden of proof to set aside a joint tenancy with right of survivorship stock broker accounts preponderance of the evidence or clear and convincing as required by RCW 11.11?
4. Can the trial court claim a witness's deposition is creditable but his trial testimony not creditable or is a witness's testimony creditable or not creditable?
5. Is a document transferring a joint account with right of survivorship to another joint account with right of survivorship, same owner and same beneficiary evidence of opening the second account with a power of attorney? Further, is the opening of a joint account by the attorney-in-fact with Alfred Palmer and Sarah Palmer with the Palmers' community property, evidence of opening of the Sarah Palmer-Dawn Golden joint account with a power of attorney?
6. Does the Respondent, Respondent, have a duty to obtain or at least attempt to obtain the records of Edward Jones showing how the

account was opened prior to filing a petition? In other words, does CR 11 apply?

Further, does the Respondent, have a duty to prove that the joint account with right of survivorship could be opened by an attorney-in-fact with the attorney-in-fact as the beneficiary without specific written authority?

7. Does the beneficiary of a joint account with right of survivorship have the burden of proving that the balance in the account at date of death was a gift?
8. When there are no records of financial transactions because they are no longer available because of time passed, does the Respondent, have the burden of proving misappropriation or does the attorney-in-fact have the burden of proving there was no misappropriation of funds of the principal?
9. When the power of attorney gives the attorney-in-fact authority to make gifts and further states that gifts made in good faith shall not be a breach of fiduciary duty, who has the burden of proving good faith and is the burden of proof clear and convincing or preponderance of the evidence? Further, is the power of attorney to be read liberally or

strictly as to authority to act?

10. Can trial court find that attorney-in-fact must charge going rate of interest and obtain security in making loans that the power of attorney authorizes but does not put conditions on or is it to be read liberally in favor of the attorney-in-fact?
11. Can the alternate trustee who has knowledge of the trust and its terms and who alleges trustor-trustee is unable to handle her affairs, consulted legal counsel (Rp 90) and made no attempt to act as trustee claim active concealment of attorney-in-fact and agreed to attorney-in-fact's handling of the trustor's affairs without alleging and proving lack of testamentary capacity of the trustor?
12. Can trustee ignore his duties under the trust during trustors' lifetime on claim he believed he became the trustee only on the death of the trustor with knowledge of the trust and its terms and consulted legal counsel? (Rp 90)
13. What is good faith? Who has the burden of proving good faith or lack thereof and is the burden of proof clear and convincing or preponderance evidence?
14. When does the statute of limitations start to run for trustee to bring

action to recover assets for the trust?

### **STATEMENT OF THE CASE**

This matter was commenced by the Respondent, as both the personal representative of the Palmer Estates and trustee of the Palmer Living Trust, the sole beneficiary of the estates, when he filed a petition (Cp 202-226) to declare certain assets, claimed by the Appellant, as assets of the estates. The primary asset is a joint account with right of survivorship with Edward Jones, with Sarah Palmer as owner and the Appellant as beneficiary valued in excess of \$400,000. There are also claims to several bank accounts, personal property and allegations of improper loans and gifts made by Appellant as attorney-in-fact for Sarah Palmer and Alfred Palmer.

The petition was filed June 29, 2006 just short of three years from Sarah Palmer's death (7/10/2003) alleging that the Appellant had opened the Edward Jones account as attorney-in-fact for Sarah Palmer. The petition attached copies of the power of attorneys executed by Alfred Palmer and Sarah Palmer appointing the Appellant as attorney-in-fact. No copies of any records from Edward Jones or the banks showing the accounts being opened were attached. There are records of how the accounts were opened with the institutions. They were not attached to the petition nor were they offered by



the Respondent at any time. In fact, Respondent opposed and the assigned judge would not allow the records of Edward Jones used to open the accounts to be used as evidence at trial.(Grp3-12)

The trial court ruled that RCW 11.11.070, limiting the time for challenging the right of a beneficiary of non probate assets to ownership did not apply to the Respondent here. (Rp 226, Cp 331,332)

The trial court ruled that the Respondent's burden of proof to challenge the Edward Jones joint account was preponderance of the evidence rather than clear and convincing as required by RCW 30.22.100 and RCW 11.11.010.(Rp 136)

The trial court ruled that the Appellant had the burden of proving that Sarah Palmer intended a gift of the joint account to Appellant. (Rp 328)

The trial court ruled that the Respondent did not become the trustee of the Palmer Trust until the death of Sarah Palmer although he did sell a home belonging to the trust and removed the funds from the trust account prior to Sarah Palmer's death.( Rp 96) In addition, he had temporary possession of the trust document and consulted an attorney shortly after Alfred Palmer's death in August, 2001. ( Rp 90)

The trial court held that based on the transfer documents transferring

the Evergreen joint account with Sarah Palmer and Appellant, when opened is unknown, the fact that Appellant opened an Edward Jones joint account for Alfred Palmer and Sarah Palmer in December of 2000 and that the Edward Jones representative, Mr. Duffy, stated in his deposition that account in question was opened using the power of attorney (Rp 327). Mr. Duffy testified in court that Edward Jones would not allow the account to be opened by power of attorney (Rp 231). The court said his court testimony was not creditable (Rp 325).

The trial court granted judgment against the Appellant because she could not account for stock transfers made in 1999 and 2000.(Rp 325) There are no records available from issuing companies according to Mr. Handmacher.

The trial court ruled that since the Respondent did not believe that he was the trustee based on the terms of the trust that he would be the trustee if Sarah Palmer was unable to act as such which is what the Respondent alleged was the fact.(Rp 323) It also ruled that there had been active concealment by the Appellant tolling the statute of limitations.(Rp 323)

The trial court held that the Appellant violated her fiduciary duty as attorney-in-fact in making gifts and loans.(Rp 330) The power of attorney

specific authorizes loans with no conditions and that making gifts in good faith is not a breach of the Appellant's fiduciary duty.(Cp 217)

The court also granted attorney fees to the Respondent pursuant to RCW 11.96.150. (Rp 335)

### **ARGUMENT**

The testamentary capacity is not at issue in this case according to Respondent's counsel.(Rp 57). Since testamentary capacity is presumed unless proven not to exist by clear and convincing evidence, **Estate of Watlack, 945 P.2d 1154 (1997)**, Sarah Palmer must be considered to have testamentary capacity until her death. Therefore, she had the capacity to direct the Appellant's actions with regard to her assets. The Respondent therefore, has the burden of proving she did not approve of or acquiesced to Appellant's actions or were contrary to her wishes. There is no evidence in the record indicating that anything the Appellant did was not approved by or acquiesced to by Sarah Palmer or contrary to her wishes.

### **THE APPLICABILITY OF RCW 11.11.070**

**A STATUTE OF REPOSE** is a nonclaim statute. It is a statute that cuts off certain legal rights if they are not acted on by a certain deadline. A statute of repose "terminates a right of action after a specific time, even if the

injury has not yet occurred.” Parkridge Associates, Ltd v. Ledcor Industries, Inc. 54 P.3d 225 (2002). The will contest statute specifies the time in which such contest be started. The court has no jurisdiction by law nor does the court in equity have the power to entertain such jurisdiction. Laack v Hawkins, 284 P. 89(1930), State es rel Wood v Superior Court, 135 P. 494.

RCW 11.11.070 is a statute of repose just as RCW 11.24, 4 months to challenge a will, and RCW 11.40.51, filing a creditor’s claim, 4 months. A statute of repose sets a time limit to bring an action. If the action is not brought within the time stated in the statute of repose, (1 year from date of death) the court has no jurisdiction and there is no method or act that can give it jurisdiction. Laack v. Hawkins, supra.

The court held in Shoop v. Kittitas County, 30 P.3d 529, 534, (2001) “... no objection is necessary to preserve an objection to lack of subject matter jurisdiction, RAP 2.5(a), and a judgment entered without subject matter jurisdiction is void . . . Such a judgment must be vacated even if the party actively participated in the lawsuit, because lack of subject matter jurisdiction is not subject to waiver.’

The question before the court is does RCW 11.11.070 apply to the

joint accounts in this case?

RCW 11.11 is the Washington State adaptation of the Uniform Nonprobate Transfer Act of 1989.

RCW 11.02.005 is **Definitions and use of terms.** (15) states “**Nonprobate assets**” means those rights and interests of a person having beneficial ownership of an asset that pass on the person’s death under a written instrument or arrangement other than a person’s will. **“Nonprobate asset” includes, but is not limited to a right or interest passing under joint tenancy with right of survivorship, . . . transfer on death security or security account ...**. (Edward Jones account)

RCW 11.11.003 Purposes.

“ The purposes of this chapter are to:

(1) **Enhance and facilitate the power of testators to control the disposition of assets that pass outside their wills;**

(2) **Provide simple procedures for the resolution of disputes regarding entitlement to such assets; . . . ”.**

RCW 11.11.005. Construction.

“(1) **When construing sections and provisions of this chapter, the sections and provisions must:**

**(a) Be liberally construed and applied to promote the purposes of this chapter; ...RCW 11.11.003.**

**RCW 11.11.007 Intent - Controversies between beneficiaries and testamentary beneficiaries.**

**“This chapter is intended to establish ownership rights to nonprobate assets upon the death of the owner, as between beneficiaries and testamentary beneficiaries . . . ”.**

**RCW 11.11.010. Definitions.**

**(1)(b) requires that presumptions may be rebutted only by clear and convincing evidence to the contrary.**

**“ (2) “Beneficiary” means the person designated to receive a nonprobate asset upon the death of the owner by means other than the owner’s will.”(Appellant)**

**(6) “Financial institution” means . . . broker, or issuer of stock or its transfer agent. (Edward Jones)**

**(7) “Nonprobate asset” means a nonprobate asset within the meaning of RCW 11.02.005 . . . (The Edward Jones and bank accounts)**

**(10) “Testamentary beneficiary” means a person named in the**

**owner's will to receive a nonprobate asset under this chapter, including but not limited to the trustee of a testamentary trust.”** (The Palmer's Living Trust is the sole testamentary beneficiary claiming the accounts.)

**RCW 11.11.020 Disposition of nonprobate assets under will.**

“(2) A general residuary gift in an owner's will, or a will making general dispositions of all the owner's property, does not entitle the devisees to receive nonprobate assets of the owner.

(4) If the owner designates a beneficiary for a nonprobate asset after the date of the will, the will does not govern the disposition of that nonprobate asset . . . ”. (The Palmer wills were executed April 3, 1997 and the Edward Jones Account was opened December 22, 2000.)

**RCW 11.11.070 Ownership rights as between individuals preserved - Testamentary beneficiary may recover a nonprobate asset from beneficiary - Limitation on action to recover.**

“(3) A testamentary beneficiary claiming a nonprobate asset who has not filed such a petition within the earlier of : ... (b) one year from the date of the owner's death, shall be barred from making such a claim or commencing such an action.”.( Sarah Palmer died July 10, 2003. The petition was filed June 28, 2006, almost three years after death.)

**RCW 11.11.080 (2) ...” The personal representative has no duty to administer upon a nonprobate asset ... ”.**

Therefore, the trial court had no jurisdiction to hear the petition as to the nonprobate assets in accordance with **RCW 11.11.070**. Even if it did, there is **no clear and convincing evidence** required by **RCW 30.22.100** to set aside the bank accounts. In addition, there is no creditable evidence that the Edward Jones account was opened using the power of attorney, only the documents transferring the Evergreen Fund, a joint account with right of survivorship with Sarah Palmer as owner and Appellant as beneficiary which was opened at some time in the past by Sarah Palmer. The documents do not open the Edward Jones account. In addition, the power of attorney gives Appellant the power to make investment decisions in her sole discretion which these documents represent.(Cp 216)

#### **BURDEN OF PROOF**

**RCW 30.22.100 requires clear and convincing evidence and applies to the bank accounts.**

**RCW 11.24, challenge to will requires clear and convincing evidence of fraud or undue influence. Estate of Kessler 977 P.2d 591 (1999).**

Challenge to testamentary capacity **requires clear and convincing evidence.** Estate of Watllack, 945 P.2d 1154 (1997).

Further, RCW 11.88.01(1)© states that the determination of incapacity is a legal, not a medical determination and that a medical diagnosis alone is not enough. The Respondent only put forth the medical records which stated that Sarah Palmer was pleasantly confused.

Who has the burden of proof? The petitioner/plaintiff, Respondent, always has the burden of proof. No defendant or respondent is required to prove a negative, innocence or no obligation without a statutory presumption against him/her. In this case, the Respondent filed a petition requesting that the Edward Jones account and the joint bank accounts be declared property of the estate based on a claim that they were opened by Ms. Golden with a power of attorney.(Cp 203) No document supporting the claim was attached to the petition nor has there been any document presented by the Respondent to this date that was used by the institution to open the accounts. Appellant has been put in the position of defending herself by proving a negative, she did not open the account with a power of attorney or otherwise while the Respondent has produced no creditable evidence that she had.

The trial court held in its decision that the Edward Jones account was

opened by Appellant using her power of attorney based on:

1. Brian Duffy's deposition (Rp 327).
2. Exhibit 16 which are the opening documents for the Edward Jones account of Alfred Palmer and Sarah Palmer.
3. Exhibit 17 which are the documents to transfer the Evergreen Fund, joint tenancy with right of survivorship, Sarah Palmer owner and Appellant, beneficiary.

As to factor #1, by entering the deposition of Brian Duffy the Respondent made Mr. Duffy his witness pursuant to CR32 © by listing him as a witness. Therefore, his testimony at trial impeaches his deposition testimony. In addition his deposition testimony was based on trying to recollect events six years previous. The court held that is credible. (Rp 325, 326) However, his testimony at trial, regarding Edward Jones procedures and policies are not. (rp 327).

The trial court also denied Appellant's motion to publish Mr. Duffy's deposition pursuant to CR32 © (Rp153) which would have included documents that Respondent did not enter into the record.

Appellant realizes that it is up to the trial court to determine credibility of witnesses. However, Appellant contends a witness is credible

or not credible. Therefore, as evidence of opening the Edward Jones account with a power of attorney is weak at best and Appellant claims it does not even meet the more likely than not standard.

As to factor#2, Appellant had under the 1999 power of attorney, to make any decisions with regard to investments at her sole discretion.(Cp 216) The assets prior to opening the account were held by Alfred Palmer and Sarah Palmer as joint tenants with right of survivorship (community property). After the opening of the account, the Palmers held the account funds as joint tenants with right of survivorship (community property). This does nothing to support the court's decision. The actions of the Appellant were authorized and reasonable to have funds to support her parents. (Cp 216)

As to factor#3, exhibit 17,the Evergreen Fund account, was a joint tenancy with right of survivorship with Sarah Palmer as owner and Appellant as beneficiary. There is no evidence as to when it was opened except Appellant's testimony that she first learned about it when the 1099's showed up after her father's stroke. (Rp 161)

The documents do not support an opening of the account because the court stated in its oral decision that it was not the first money in the account

but used as the first deposit into the account. (Rp 327). Exhibit 17 consist of several documents. One of which is the 1997 power or attorney of Sarah Palmer. In that power of attorney, the first attorney in fact is Alfred Palmer, then Respondent, then Respondent's and Appellant's brother Douglas Palmer who was alive at that time. He died after his father and before his mother. The fourth appointed power of attorney is the Appellant. She had no authority under the power of attorney submitted with the Evergreen Fund documents to Edward Jones. She could not have done anything with that power of attorney and it is clear on its face to anyone who would read it.

Therefore, the evidence that the court relied on does not even meet the preponderance of the evidence standard much less the clear and convincing standard.

By way of further argument, if Appellant, instead of closing the Evergreen Fund joint account and transferring the funds to Edward Jones, took the funds available and deposited them with the Evergreen Fund joint account, would that be prohibited? The 1999 power of attorney gives the Appellant the power to make any investments at her sole discretion. (Cp 216) The Evergreen Fund account was set up without the knowledge of the Appellant and therefore, by Sarah Palmer herself. (Rp 161)

The records of Edward Jones, which are in the court file show clearly that the account was opened by Sarah Palmer on 12/22/00.(Cp 325& 326)(A-1 through A-6) The Respondent has opposed the admittance of the documents which should, if he is correct, prove his case. (Grp 4-7, 13-17) Judge Grant denied respondent's request to add the documents based on an alleged violation of discovery rules even though Respondent had subpoenaed the same records previously and received hard copies one day after respondent.(Grp 3-12). In addition, the trial court indicated it would not overturn Judge Grant's decision as to admittance.(Rp38,39) Appellant believes that Respondent was required to present the evidence pursuant to RPC 3.3 and 8.4.

The requirement that a challenge to a will or nonprobate assets must be supported by **clear and convincing evidence** is that the beneficiary of a will or nonprobate asset is under a disadvantage in defending him/herself because of the deadman's statute. The person who knew the facts to defend the beneficiary is dead and cannot testify.

No evidence was given as to the bank accounts. Just records showing Appellant as a joint tenant. None show how her name was put on it. **RCW 30.22.100 requires clear and convincing evidence to set it aside.** There is

no evidence as to how Appellant's name was put on the accounts. It was put on the account shortly after Sarah Palmer executed power of attorney. If she was competent to execute the power or attorney, she was competent to add Appellant to her account. She had previously put Appellant on the Evergreen Fund account as a joint tenant with right of survivorship.

As to the Edward Jones account, the only evidence support for the Respondent's claim is exhibit #17, the transfer documents for the Evergreen fund to the Edward Jones Golden-Palmer account. Under the power of attorney, Appellant had the power to make investments for her mother as she saw fit. (Cp 216) The Edward Jones records, attached, show that the account was not being operated with a power of attorney until January 29, 2001 (Cp 327)(A-6) and then without trading authority. Therefore, the use of the power of attorney on the account was not authorized on December 22, 2000. The documents are not the record of opening the account and Sarah Palmer's signature was required.

The court has found Mr. Duffy not creditable in his court testimony but creditable in his deposition.(Rp 325) Appellant believes that Mr. Duffy is creditable or not creditable. Creditable if he is explaining Edward Jones procedures but not if he is trying to remember events six years earlier. This

leaves no evidence to prove the Respondent's contention that Appellant opened the account using the power of attorney. Nothing to even use for the burden of proof by the preponderance the evidence which the court has held here as an **exception to the Clear and Convincing evidence rule for all other attacks on the wills and nonprobate assets in the probate code without citing any authority for such ruling.** (Rp 136) The court ruled that Edward Jones is not a financial institution covered by RCW 30.22.100. However, RCW 11.11.010(6) does state that firms such as Edward Jones are financial institutions under the probate code.

The Respondent has the burden of proving his allegation that Appellant opened the account using a power of attorney.

Since the Respondent has the duty to prove his allegations, the question arises, why certain evidence was not submitted to the court to prove them? Appellant is not required to prove an allegation is false. Appellant has always maintained that there are records as to how the account was opened. All that needs to be done is to get them from Edward Jones. Either they prove Respondent's case or they destroy his case. Mr. Handmacher apparently did not subpoena the Edward Jones records until December, 2006.(Cp 321). The petition was filed in June 28, 2006 with no

documentation to back it up.

The following were available to the Respondent to prove his case. The lack of them should defeat his case.

1. W-9 for the account.
2. The transfer documents:
  - (a) affidavit of domicile to transfer Alfred Palmer's interest to the Palmer - Golden account.
  - (b) transfer form for the transfer of the Alfred Palmer and the Sarah Palmer account to the Sarah Palmer - Appellant account.
3. The Edward Jones records first opening the account.

These documents/records would, if the Respondent was correct, prove his case and the trial would never have been necessary. All these records are in the court file. The most important, the records of Edward Jones opening the account, was filed in the court with a motion requesting that they be added to the list of exhibits. Mr. Handmacher received the same records one day after counsel.(Grp 3-12) However, **Mr. Handmacher opposed the addition of the very records which would prove his case without trial.** The assigned Judge denied the motion on the basis that counsel did not give

proper notice of his subpoena for the records while holding that counsel did make a good faith effort in attempting to acquire the records. Ruling that process is more important than justice and contrary to **Eagle Group v. Pullen, 58 P.3d 2992 (2002)** which held that the case schedule cannot be used to keep out relevant evidence. What is more relevant to the issue of the Edward Jones account than the records of Edward Jones showing how it opened the account?

**The Rules of Professional Conduct 3.3 “CANDOR TOWARD THE TRIBUNAL**

(a) A lawyer ***shall not*** knowingly:

(4) ***Offer evidence he knows to be false.***

© If the lawyer has offered material evidence and comes to know of its falsity, the lawyer ***shall promptly disclose this fact to the tribunal . . .***”

This rule uses the mandatory “**SHALL**”.

Further, **RULE 8.4 MISCONDUCT**

“It is professional misconduct for a lawyer to:

© Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) Engage in conduct that is prejudicial to the administration of

justice.”

Attached are copies of the following documents, all of which are in the file and counsel is well aware of them but has not informed the court and has in fact hid them from the trial court.

1. Edward Jones electronic record opening the account without a power of attorney by Sarah Palmer, including, letter from Mr. Groat, who identified himself as the chief counsel for Edward Jones, and the Business Records Affidavit. (Subpoened by both parties.) (A-1 through A-6)

In addition, as stated earlier, were not submitted by the Respondent:

1. The W-9 signed 8/28/2001 by Sarah Palmer as owner of the account. (Subpoened by both parties.)
2. Letter of Authorization for Estates Processing re Alfred Palmer, customer, signed by Sarah Palmer 8/28/2001. (Subpoened by both parties.)
3. Affidavit of Domicile for Alfred Palmer account signed by Sarah Palmer 9/4/2001, notarized. (Subpoened by both parties.)
4. Irrevocable Stock or Bond Power signed for Alfred Palmer

account signed 9/4/2001. (Subpoened by both parties.)

However, the Appellant, instead, was required to prove a negative, that she did not open the account turning the burden of proof on its head.

A secondary argument against the Edward Jones account being set up is **RCW 11.94.040**, Release from liability for reliance on power of attorney document. It requires good faith reliance on the power of attorney document. Since the financial institutions as defined in the probate code, stock brokerage firms, are presumed to know the law, they would be aware of **RCW 11.94.050** which requires specific authorization for the attorney-in-fact to do certain acts, make gifts, etc..

If Edward Jones or the banks opened a joint account with right of survivorship with only the attorney-in-fact applying, listing the attorney-in-fact as the beneficiary, they would be liable to the estate because they could not claim the release from liability under **RCW 11.94.040** because they would be assumed to know the restrictions on the attorney-in-fact and ignored them. If the banks and Edward Jones allowed Appellant to open or added her name to an account which Sarah Palmer owned, the estate should have gone after them. The one year statute of repose would not apply to them. **RCW 11.11.070**. Repondent didn't. The obvious reason is it did not happen. The

accounts were not opened using a power of attorney. The Respondent has tried to miss-appropriate the joint accounts and the trial court has allowed him to do so.

### **GIFTS AND LOANS**

The trial court has held that Appellant violated her fiduciary duty as attorney-in-fact in making certain loans and gifts. (Rp 328, 330)

First of all, because of the deadman's statute, she cannot defend herself. Sarah Palmer is presumed to have testamentary. There is no evidence in the record that she did not approve of, acquiesce to or direct to any acts of the Appellant. In addition, the power of attorney gives wide latitude. As to the gifts, it gives guide lines, not limitations (Cp223) and it further states, ***"My attorney-n-fact shall not breach any fiduciary duty to me by reason of gifts made or withheld in good faithi.*** it is not a breach of her fiduciary duty to make gifts in good faith. How does the court or anyone else know whether Sarah Palmer approved of or disapproved the gifts? Bad faith must be proved as a matter of law. **Ellwein v Hartford Acc and Int., 15 P.3d 640 (2001).**

As to the loans, the power of attorney makes no requirement that security be given or interest charged. (Cp 216)

Second, what attorney-in-fact knows what a fiduciary is or what the

duties or standards are required of a fiduciary? Fiduciary duty is only mentioned once in the power of attorney. No definition or duties of the attorney-in-fact as a fiduciary are given. The court has applied standards retroactively to Appellant. It would appear fair, that the Respondent be required to prove Appellant knew her limitations and ignored them rather than assume a layman would know them.

Attorney for the Appellant I has never seen the word “fiduciary” in a power of attorney, aside from the one word in the power of attorney here, much less define the duties and responsibilities and duties of a fiduciary.

#### **ACCOUNTING FOR OLD INVESTMENTS**

The trial court has required Appellant to account for actions that have not been proved she knew or had reason to know were forbidden, the sale of securities. At the same time, she is forbidden to testify as to the conversations with her mother by the deadman’s statute as to what her mother’s wishes were.

The court has interpreted the power of attorney strictly where as, considering the language of the document, it appears to be meant to be read liberally as to the attorney-in-fact’s actions.

The IRS only goes back six years for records if a return has been filed.

Banks only go back seven years with their records. It is undisputed that the Palmer's cost of nursing home care was very high (Rp 161) and therefore the need for funds to pay them. The logical use of the missing funds, since there is no evidence that Appellant life style greatly improved at that time. The court has put Appellant to a strict interpretation of her duties for keeping records, which the banks may not have and the IRS does not require.

The Appellant has plead as a defense , the statute of limitations which is three years from event or action or when the right of action could have been discovered. **RCW 96A.070**. In this case, Respondent accepted the position of trustee, which he now claims, on the death of Sarah Palmer and there were no other trustees of the trust which relates back to when his parents could not act as trustee, October, 1999. Therefore, he allowed, by direct statements, Appellant handle their parent's financial and other needs. He could have challenged her actions. He did not. Therefore the statute of limitations started at the latest, 1/1/2001.

Appellant contends the trial court was in error when it found the Respondent became the trustee at Sarah Palmer's death and that he became the trustee for his parent's trust in October, 1999. Respondent could have taken steps to fund and run the trust. Instead, he left it to the Appellant to

handle their parents' affairs and now wishes to Monday morning quarterback her every decision for the last four years of their mother's life. The logical use of the alleged missing funds, since there is no evidence that Appellant life style greatly improved at that time, is maintenance of the Palmers' in their nursing homes. The court has put Appellant to a strict interpretation of her duties for keeping records, which the banks and financial institutions may not have and the IRS does not require.

#### **TRUSTEE**

The court has ruled that Respondent was not the trustee or was not responsible as trustee until his mother's death.(finding #4 Cp 341)). However, he sold the rental house in the trust and took and invested the proceeds prior to his mother's death. If he wasn't acting as the trustee until her death, what authority did he have for his actions?

By that reasoning, Sarah Palmer was the trustee until her death.

In addition, Mr. Palmer testified that of the \$58,000 (Rp 81) of the estate/trust assets he invested, while he was not the trustee according to the court, he has only recovered one-third (Rp 85) leaving the trust/estate approximately \$40,000 poorer. There was no reason to invest trust funds in that there was no income beneficiary. The trust was to be terminated and the

assets distributed on the death of Sarah Palmer.

### CONCLUSION

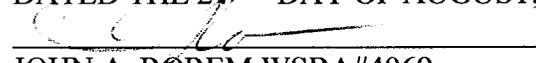
The Appellant requests the court enter judgment/order as follows:

1. That the judgment entered March 2, 2007 should be reversed on the basis that the actions on the joint accounts, Edward Jones and the bank accounts is time bared under RCW 11.11.070.
2. That Edward Jones as a broker is covered by RCW 11.11 and clear and convincing evidence is the standard to set aside a joint account with right of survivorship.
3. That the court rule that the Respondent had the burden of proof on all allegations and that the burden of proof is clear and convincing and the Respondent's proof does not meet that standard.
4. That testamentary capacity is presumed and the lack thereof must be proved by clear and convincing evidence and the Respondent did not challenge Sarah Palmer's testamentary capacity.
5. That the three year statute of limitations started to run when

Respondent believed his parents were unable to handle their affairs, October, 1999, according to the trust.

6. That actions of an attorney-in-fact, when the grantor is presumed to have testamentary capacity, can only be challenged by proving bad faith and /or breach of fiduciary duty by clear and convincing evidence.
7. That the Appellant, attorney-in-fact, is not required to prove a negative, “she did not deal in bad faith or contrary to Sarah Palmer’s wishes”.
8. That the Respondent had the burden of proving all his allegations by clear and convincing evidence and he did not do so.
9. That the Respondent’s petition be dismissed with prejudice and she be awarded her attorney fees.

DATED THE 24<sup>TH</sup> DAY OF AUGUST, 2007.

  
\_\_\_\_\_  
JOHN A. ROREM WSBA#4069  
Attorney for Appellant

1245 JJ Keller Memorial Drive  
St. Louis, MO 63181-3600  
314-515-2000  
www.edwardjones.com

**Edward Jones**

January 19, 2007

VIA FACSIMILE - (253) 858-5358

Mr. John A. Rorem  
Attorney At Law  
3022 Harbor View Dr.  
Gig Harbor, WA 98335

RE: In the Matter of the Estate of Alfred S. Palmer and Sarah L. Palmer

Dear Mr. Rorem:

Pursuant to our conversation this letter confirms that we have satisfied your request for documents as set forth in your subpoena dated January 12, 2007, by locating and producing (via facsimile & with copies to follow via UPS) three New Account Form Approvals which had not previously been located. Further, it is our understanding that you no longer need anyone to appear for deposition on January 22, 2007 at 10:00 a.m. Last, please be advised that we will also produce the aforementioned documents to James Handmacher pursuant to his subpoena served on us in December.

Very truly yours,



TROY E. GROAT  
Attorney at Law

700 Maryville Centre Drive  
St. Louis, MO 63141-5818  
314-515-2000  
www.edwardjones.com

15366 1/24/2007 320149

**Edward Jones**

January 19, 2007

**FACSIMILE (253) 858-5358**  
**JOHN A. ROREM (253) 858-5358**  
Attorney at Law  
3022 Harborview Dr.  
Gig Harbor, WA 98335

**RE: In the Matter of the Estate of Alfred S. Palmer and Sarah L. Palmer**  
**Case No. 01-04-00774-0**

Dear Mr. Rorem:

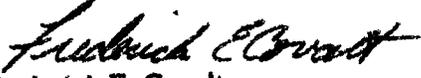
This letter will acknowledge receipt of the above referenced Subpoena pertaining to Alfred S. Palmer and Sarah L. Palmer. Enclosed please find the following:

1. Three New Account Form Approvals
2. Contact Information Form
3. Affidavit of Records

We trust that presentation of the requested materials will be sufficient.

If you have any questions, please direct your written correspondence to the Subpoena Team via facsimile at (314) 515-6101 or via US Mail to the above address. If you need immediate assistance, please contact me direct at (314) 515-6049.

Thank you.

  
Frederick E. Covalt  
Legal Assistant

Enclosures

A-2

322



# Edward Jones

SARAH L PALMER &

12/22/00 11:18 (M2185)

NEW ACCOUNT FORM APPROVAL

----- CLIENT INFORMATION -----

ACCOUNT NUMBER 870-08439-1-3  
BRANCH 08709 SEATTLE  
RR NO. 870991 - BRIAN T. DUFFY

PRINCIPAL PARTY NAME/ADDRESS

SARAH L PALMER &  
DAWN L GOLDEN  
704 5TH STREET SE

PRIMARY TELEPHONE NO

P HOME 253 840-1911  
WORK

CITY PUYALLUP ST WA ZIP 98321-3801 COUNTRY US  
RESIDENT OF WA CITIZEN OF US  
SS # 539-28-4796 BIRTH DATE 10/06/10

WF ON FILE N BACKUP V/H Y BACKUP DATE VB ON FILE N  
MARGIN ACCOUNT N MKMT/CASH INT W SWEEPER IS OFF  
ACCOUNT CODES BUY R SELL H DIVIDEND N INTEREST N PRINCIPAL N V  
OBJECT TO NAME DISCLOSURE N  
RETIRED Y  
NET WORTH \$100,000 ANNUAL INCOME \$5,000 IR ESTIMATED N

INVESTMENT OBJ: INCOME GROWTH/INCOME

EMPLOYEE HOMEMAKER

OCCUPATION HOMEMAKER

EMPLOYER ADDRESS N/A

CUSTODIAN OR JOINT TENANT GOLDEN, DAWN L

EMPLOYER DISABLED

OCCUPATION HOMEMAKER

EMPL ADDR N/A

EMPL DESC NONE

SS # 534-40-9126

BIRTHDATE 02/04/48

NO MINORS ARE ON THE ACCT

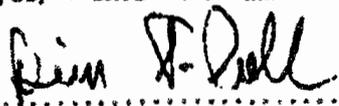
PRIOR INVESTMENT EXPERIENCE (0-4) 2

1. CUSTOMER IS A JONES EMPL. OR RELATED TO A JONES EMPL. (E/R/W) N
2. CUSTOMER OR ANYONE ASSOC WITH ACCT AFFILIATED WITH A NYSE LICENSED FIRM (E/R/W) N
3. CUSTOMER OR ANYONE ASSOC WITH ACCT AFFILIATED WITH A NASD LICENSED FIRM (E/R/W) N
4. CUSTOMER IS AN OFFICER/DIRECTOR OF FINANCIAL INSTITUTION OR INSURANCE COMPANY (Y/R/W) N
5. CUSTOMER IS EMPLOYED IN SECURITY DEPT OR INSTITUTIONAL TRADER FOR FINANCIAL INST (Y/R/W) N
6. CUSTOMER IS AN OFFICER/DIRECTOR/CONTROLLING SHAREHOLDER OF PUBLICLY TRADED FIRM (Y/R/W) N
7. ACCOUNT BEING OPERATED BY POWER OF ATTORNEY (Y/N) N

TRADING AUTHORITY (F/L/W) N

DATE ACCT OPENED 12/22/00 APPROVED DATE 12/22/00 DATE LAST CHANGED 12/22/00

APPROVED BY JULCHAPMAN



INVESTMENT REPRESENTATIVE REVIEW AND SIGN.....

DOCUMENT:1014741201 SEQ:00000

# Edward Jones

SARAH L PALMER &

12/26/00 11:02 (M2165)

NEW ACCOUNT FORM APPROVAL

----- CLIENT INFORMATION -----

ACCOUNT NUMBER 070-08459-1-3  
BRANCH 08709 SEATTLE  
RR NO. 070991 - BRIAN T. DUFFY

PRINCIPAL PARTY NAME/ADDRESS      PRIMARY      TELEPHONE NO  
SARAH L PALMER &                              P NONE 258 840-1911  
DAWN L GOLDEN                                      YORK  
704 5TH STREET SE

CITY PUYALLUP                              ST WA      ZIP 98372-3801      COUNTRY US  
RESIDENT OF      VA                              CITIZEN OF      US  
SS # 539-28-4796      BIRTH DATE 10/06/10

V9 ON FILE N      BACKUP V/H Y      BACKUP DATE      V8 ON FILE N  
MARGIN ACCOUNT N      NETT/CASH INT      N      SWEEPER IS OFF  
ACCOUNT CODES BUY N SELL N      DIVIDEND B      INTEREST B      PRINCIPAL H      V  
OBJECT TO NAME DISCLOSURE N  
RETIRED Y

NET WORTH      \$500,000      ANNUAL INCOME      \$6,000      IR ESTIMATED      N

INVESTMENT OBJ:      INCOME      GROWTH/INCOME

EMPLOYER HOME/MAKER                              OCCUPATION HOME/MAKER  
EMPLOYER ADDRESS      N/A  
CUSTOMER OR JOINT TENANT GOLDEN, DAWN L  
EMPLOYER      DISABLED                              OCCUPATION HOME/MAKER  
EMPL ADDR      N/A                                      SS #      534-40-9126  
EMPL DRBG      NONE                                      NO MINORS ARE ON THE ACCT  
BIRTHDATE      02/06/43

PRIOR INVESTMENT EXPERIENCE (0-4) 2

1. CUSTOMER IS A JONES ENPL. OR RELATED TO A JONES ENPL. (E/R/N) N
2. CUSTOMER OR ANYONE ASSOC WITH ACCT AFFILIATED WITH A NYSE LICENSED FIRM (E/R/N) N
3. CUSTOMER OR ANYONE ASSOC WITH ACCT AFFILIATED WITH A NASD LICENSED FIRM (E/R/N) N
4. CUSTOMER IS AN OFFICER/DIRECTOR OF FINANCIAL INSTITUTION OR INSURANCE COMPANY (Y/R/N) N
5. CUSTOMER IS EMPLOYED IN SECURITY DEPT OR INSTITUTIONAL TRADER FOR FINANCIAL INST (Y/R/N) N
6. CUSTOMER IS AN OFFICER/DIRECTOR/CONTROLLING SHAREHOLDER OF PUBLICLY TRADED FIRM (Y/R/N) N
7. ACCOUNT BEING OPERATED BY POWER OF ATTORNEY (Y/N) N

TRADING AUTHORITY (E/L/N) N  
DATE ACCT OPENED 12/22/00 APPROVED DATE 12/26/00 DATE LAST CHANGED 12/26/00

APPROVED BY JULCHAPMAN



INVESTMENT REPRESENTATIVE REVIEW AND SIGNATURE.....

THE BOLD FIELDS REPRESENT THE MOST RECENT CHANGES TO THE ACCOUNT  
DOCUMENT 101506511 SEQ.00000

A-5

# Edward Jones

SARAH L PALMER &

01/29/01 13:51 (M2165)

## NEW ACCOUNT FORM APPROVAL

### CLIENT INFORMATION

ACCOUNT NUMBER 870-06459-1-8  
BRANCH 08709 SEATTLE  
ER NO. 870991 - BRIAN T. DUFFY

PRINCIPAL PARTY NAME/ADDRESS  
SARAH L PALMER A  
DAWN L GOLDEN  
704 5TH STREET SE

PRIMARY TELEPHONE NO  
P HOME 253 848-7672  
WORK 253 840-1911

CITY PUYALLUP ST WA ZIP 98372-3801 COUNTRY US  
RESIDENT OF WA CITIZEN OF US  
SS # 539-28-4796 BIRTH DATE 10/06/10

VS ON FILE Y BACKUP V/M N BACKUP DATE VS ON FILE N  
MARGIN ACCOUNT N MKKT/CASH INT N SWEEPER IS OFF  
ACCOUNT CODES BUY N SELL N DIVIDEND N INTEREST N PRINCIPAL R V  
OBJECT TO NAME DISCLOSURE N  
RETIRED Y  
NET WORTH \$500,000 ANNUAL INCOME \$6,000 IR ESTIMATED N  
INVESTMENT OBJ: INCOME GROWTH/INCOME

EMPLOYER HOMEMAKER OCCUPATION HOMEMAKER  
EMPLOYER ADDRESS N/A  
CUSTODIAN OR JOINT TENANT GOLDEN, DAWN L  
EMPLOYER DISABLED OCCUPATION HOMEMAKER  
EMPL ADDR N/A  
EMPL DESC NONE SS # 534-40-9126  
BIRTHDATE 02/04/43 NO MINORS ARE ON THE ACCT

PRIOR INVESTMENT EXPERIENCE (0-4) 3  
1. CUSTOMER IS A JONES EMPL. OR RELATED TO A JONES EMPL. (Y/R/N) N  
2. CUSTOMER OR ANYONE ASSOC WITH ACCT AFFILIATED WITH A NYSE  
LICENSED FIRM (Y/R/N) N  
3. CUSTOMER OR ANYONE ASSOC WITH ACCT AFFILIATED WITH A NASD  
LICENSED FIRM (Y/R/N) N  
4. CUSTOMER IS AN OFFICER/DIRECTOR OF FINANCIAL INSTITUTION  
OR INSURANCE COMPANY (Y/R/N) N  
5. CUSTOMER IS EMPLOYED IN SECURITY DEPT OR INSTITUTIONAL TRADER  
FOR FINANCIAL INST (Y/R/N) N  
6. CUSTOMER IS AN OFFICER/DIRECTOR/CONTROLLING SHAREHOLDER OF  
PUBLICLY TRADED FIRM (Y/R/N) N  
7. ACCOUNT BEING OPERATED BY POWER OF ATTORNEY (Y/N) Y  
TRADING AUTHORITY (P/L/N) N  
DATE ACCT OPENED 12/22/00 APPROVED DATE 01/29/01 DATE LAST CHANGED 01/29/01

APPROVED BY DEFERRANTO

INVESTMENT REPRESENTATIVE REVIEW AND SIGN.



THE BOLD FIELDS REPRESENT THE MOST RECENT CHANGES TO THE ACCOUNT  
DOCUMENT: 1032610579 SEQ: 00000

NO: 36339-98-II

COURT OF APPEALS DIV II  
OF THE STATE OF WASHINGTON

In re Estates of )  
 )  
ALFRED S. PALMER and SARAH )  
L. PALMER, )  
 )  
Deceased. )  
Respondent )  
 )  
DAWN PALMER GOLDEN, )  
Appellant, )  
 )

No. 36339-98-II  
DECLARATION OF  
SERVICE

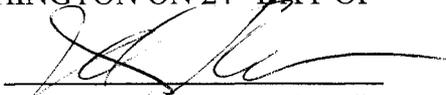
STATE OF WASHINGTON  
BY \_\_\_\_\_  
07 AUG 2007 11:10 AM

I, JOHN A. ROREM, do hereby state under the laws of perjury of

the State of Washington as follows:

That on the 24<sup>TH</sup> day of August, 2007, I, JOHN A. ROREM,  
That on the 24<sup>TH</sup> day of August, 2007, I, JOHN A. ROREM, delivered to  
JAMES V. HANDMACHER  
P.O. BOX 1533  
TACOMA, WA 98401  
a copy of the trial transcript, the motion transcript ( Judge Grant), and  
Appellant's Brief.

SIGNED AT GIG HARBOR, WASHINGTON ON 24<sup>th</sup> DAY OF  
AUGUST, 2007.

  
JOHN A. ROREM WSBA#4069  
ATTORNEY FOR APPELLANT