

No. 47124-8

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

IN RE ESTATE OF MILDRED G. JOHNSON

STEVEN C. JOHNSON,

Appellant,

v.

GUARDIANSHIP SERVICES OF SEATTLE, substitute
Personal Representative of the Estate of Mildred G.
Johnson; HOPE SOLEY, Personal Representative of the
Estate of Judy Cohn; CHRIS JOHNSON; and JOY D.
WALTER,

Respondents

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
Honorable Bryan Chushcoff

Respondents' Brief

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TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| TABLE OF AUTHORITIES..... | vi |
| I. INTRODUCTION..... | 1 |
| II. COUNTERSTATEMENT OF THE CASE..... | 2 |
| A. Four of Mildred Johnson’s children were the beneficiaries of her will, including her son Steven Johnson whom she designated as the personal representative of her estate. When Mildred died in 2009, Steven assumed the position of personal representative..... | 2 |
| B. Steven’s management of the estate raised concerns about self-dealing and conflict of interest, centering on the estate’s interest in the Seven Js limited partnership and the Forest Park Estates LLC. | 3 |
| 1. Seven Js should have dissolved as a limited partnership upon the death of Mrs. Johnson, the general partner. Instead, Steven used his position as personal representative to prolong Seven Js existence through direct infusions of the estate’s money, as well as loans from him and his wife secured by promissory notes -- all part of an effort by Steven to acquire for himself a marina owned by Seven Js. | 3 |
| 2. Forest Park Estates was the estate’s most valuable asset and Steven attempted to use his position as personal representative to arrange for the sale of Forest Park to himself based on an improperly discounted valuation. | 8 |

C. The other beneficiaries, concerned over the management of the estate and the proposed final distribution of assets, successfully moved in late 2013 for an accounting. After receiving and reviewing the accounting, they moved in March 2014 to remove Steven as the personal representative. At a hearing on May 2, 2014, the trial court proposed, and the beneficiaries and Steven agreed, to the appointment of a special master, who would investigate and report on several issues pertaining to the request for Steven’s removal as personal representative..... 9

D. On May 23, 2014, the superior court found that Steven had a conflict of interest and that he had breached his fiduciary duties to the estate and its beneficiaries. The court appointed Commissioner Watness as special master, to investigate and report on several issues pertaining to whether Steven should be removed as personal representative and what actions the court should take to address Steven’s actions. 15

E. Steven moved for reconsideration but did not object to the special master’s role; in fact, he wanted the court to defer ruling on the substantive issues resolved on May 23 until after the special master issued his report. 17

F. Steven did not object either to the role of the special master or the procedures employed by the special master at any time during the special master’s investigation. Instead, he participated in the investigation, through the efforts of counsel representing him as personal representative..... 19

G. Only when it was apparent that the special master was not going to clear Steven did Steven argue that the superior court could not implement the relief recommended by the special master without an evidentiary hearing..... 22

| | <u>Page</u> |
|--|-------------|
| H. Steven had the opportunity to make his case for an equitable exception and could not explain why he should have been afforded an evidentiary hearing or the difference a hearing would have made..... | 25 |
| III. ARGUMENT | 28 |
| A. The superior court’s findings should be reviewed under the substantial evidence standard of review, and its decisions regarding whether to remove the personal representative and to order restitutionary and other relief should be reviewed solely for an abuse of discretion. | 28 |
| B. The Trust and Estate Dispute Resolution Act, RCW Chapter 11.96A, governs this dispute. | 32 |
| 1. TEDRA provides the superior court with broad authority to employ the means necessary and appropriate to resolve the disputes over the administration of the estate. | 32 |
| 2. The dispute over removal of Steven as the personal representative and his required reimbursement of the estate falls within the definition of a “matter” subject to RCW Chapter 11.96A, and were in fact litigated -- and properly so -- under TEDRA..... | 33 |
| 3. The superior court provided Steven with numerous hearings before removing him as personal representative. | 36 |
| C. The superior court did not err by ruling that Steven breached his fiduciary duties and should be removed as personal representative. | 38 |
| 1. A personal representative owes a fiduciary duty to the beneficiaries and may be removed for breach of that duty. | 38 |

| | <u>Page</u> |
|-----|---|
| 2. | Substantial evidence supported the superior court’s May 23 rulings that Steven breached his fiduciary duties and should no longer have nonintervention powers. 40 |
| (a) | Steven waived any assignment of error to the findings made on May 23 as to whether they are supported by substantial evidence. 40 |
| (b) | Steven breached his fiduciary duty by using the estate’s funds in an unauthorized manner that benefitted his own interests. 41 |
| 3. | The special master’s report was consistent with the superior court’s understanding of the facts and provided further evidentiary support for the superior court’s November 7, 2014 findings and decision to remove Steven as the personal representative. 44 |
| 4. | Steven failed to preserve any claim of error as to the trial court considering the special master’s report as evidence, because Steven did not object to the procedure followed by the special master -- and in fact, endorsed and cooperated with it -- until it became clear that the special master would not absolve him. 46 |
| 5. | The special master’s appointment conformed to the requirements of ER 706..... 48 |
| D. | The superior court’s findings as to the amounts Steven should reimburse to the estate to make it whole were supported by substantial evidence..... 51 |
| E. | The superior court did not err in awarding or determining the amount of attorney fees to award to the beneficiaries. 56 |

| | <u>Page</u> |
|--|-------------|
| F. The superior court did not err in entering a judgment against Steven and the marital community..... | 59 |
| G. This Court should award the beneficiaries their fees on appeal under RAP 18.1..... | 60 |
| IV. CONCLUSION..... | 61 |

TABLE OF AUTHORITIES

| | <u>Page(s)</u> |
|---|----------------------------|
| Washington Cases | |
| <i>Allard v. First Interstate Bank of Washington, N.A.</i> , 112 Wn.2d 145, 768 P.2d 998, amended 773 P.2d 420 (1989) | 52 |
| <i>Allard v. Pacific National Bank</i> , 99 Wn.2d 394, 663 P.2d 104 (1983) | 38, 39 |
| <i>Baker Boyer National Bank v. Garver</i> , 43 Wn. App. 673, 719 P.2d 583 (1986) | 52 |
| <i>Carpenter v. Folkerts</i> , 29 Wn. App. 73, 627 P.2d 559 (1981) | 31 |
| <i>City of Bellevue v. Pine Forest Properties, Inc.</i> , 185 Wn. App. 244, 340 P.3d 938 (2014), <i>review denied</i> , 355 P.3d 1152 (2015)..... | 29 |
| <i>City of Seattle v. Harclaon</i> , 56 Wn.2d 596, 354 P.2d 928 (1960) | 47 |
| <i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992) | 40 |
| <i>Delany v. Canning</i> , 84 Wn. App. 498, 929 P.2d 475 (1997) | 31, 48, 49 |
| <i>Dickson v. U.S. Fiduciary & Guaranty Co.</i> , 77 Wn.2d 785, 466 P.2d 515 (1970) | 40, 44 |
| <i>Dolan v. King County</i> , 172 Wn.2d 299, 258 P.3d 20 (2011) | 28, 29, 30 |
| <i>Esmieu v. Hsieh</i> , 92 Wn.2d 530, 598 P.2d 1369 (1979) | 31 |
| <i>Foster v. Gilliam</i> , 165 Wn. App. 33, 268 P.3d 945 (2011) | 28, 29, 30, 32, 37, 40, 50 |

| | <u>Page(s)</u> |
|--|----------------|
| <i>Gillespie v. Seattle-First National Bank</i> , 70 Wn. App. 150, 855 P.2d 680 (1993) | 51, 52, 58 |
| <i>Grange Insurance Association v. Roberts</i> , 179 Wn. App. 739, 320 P.3d 77 (2013), <i>review denied</i> , 180 Wn. 2d 1026 (2014) | 47 |
| <i>In Re Estate of Ardell</i> , 96 Wn. App. 708, 980 P.2d 771 (1999) | 35 |
| <i>In re Estate of Beard</i> , 60 Wn.2d 127, 372 P.2d 530 (1962) | 31, 39 |
| <i>In re Estate of Cooper</i> , 81 Wn. App. 79, 913 P.2d 393 (1996) | 39, 50, 51 |
| <i>In re Estate of Crane</i> , 15 Wn. App. 161, 548 P.2d 585 (1976) | 35 |
| <i>In re Estate of Ehlers</i> , 80 Wn. App. 751, 911 P.2d 1017 (1996)..... | 38, 52 |
| <i>In re Estate of Evans</i> , 181 Wn. App. 436, 326 P.3d 755 (2014)..... | 31 |
| <i>In re Estate of Fitzgerald</i> , 172 Wn. App. 437, 294 P.3d 720 (2012)..... | 31 |
| <i>In re Estate of Jones</i> , 152 Wn. 2d 1, 93 P.3d 147 (2004)..... | 38, 39, 58 |
| <i>In re Estate of Larson</i> , 103 Wn.2d 517, 694 P.2d 1051 (1985) | 38 |
| <i>In re Estates of Aaberg</i> , 25 Wn. App. 336, 607 P.2d 1227 (1980)..... | 39 |
| <i>In re Personal Restraint of Thompson</i> , 141 Wn.2d 712, 10 P.3d 380 (2000) | 47 |
| <i>In re Welfare of Angelo H.</i> , 124 Wn. App. 578, 102 P.3d 822 (2004)..... | 31, 48 |

| | <u>Page(s)</u> |
|---|----------------|
| <i>McWhorter v. Bush</i> , 7 Wn. App. 831, 502 P.2d 1224 (1972) | 35 |
| <i>Sloan v. West</i> , 63 Wash. 623, 116 P. 272 (1911)..... | 31 |
| <i>State ex rel. Carlson v. Superior Court</i> , 47 Wn.2d 429, 287 P.2d 1012 (1955) | 31 |
| <i>Thorndike v. Hesperian Orchards, Inc.</i> , 54 Wn. 2d 570, 343 P.2d 183 (1959) | 31 |
| <i>Trask v. Butler</i> , 123 Wn.2d 835, 872 P.2d 1080 (1994) | 39 |
| Other State Cases | |
| <i>Schildberg v. Schildberg</i> , 461 N.W.2d 186 (Iowa 1990) | 39 |
| Federal Cases | |
| <i>Anderson v. City of Bessemer City</i> , 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) | 29, 30 |
| <i>Orvis v. Higgins</i> , 180 F.2d 537 (2d Cir. 1950) | 30 |
| <i>Wainwright v. Sykes</i> , 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977) | 30 |
| Statutes and Court Rules | |
| RCW Chapter 4.48..... | 49 |
| RCW Title 11..... | 32, 33, 57 |
| RCW 11.28.250 | 39 |
| RCW 11.40.051(1)(b)(ii)..... | 5, 7 |

| | <u>Page(s)</u> |
|--------------------------------|----------------|
| RCW 11.40.140 | 43 |
| RCW 11.48.010 | 3, 38 |
| RCW 11.68.070 | 36, 57 |
| RCW 11.68.090(2)..... | 38 |
| RCW 11.96A.010..... | 32 |
| RCW 11.96A.020..... | 32, 51 |
| RCW 11.96A.020(1)..... | 34 |
| RCW 11.96A.020(1)(b)..... | 33 |
| RCW 11.96A.020(2)..... | 32 |
| RCW 11.96A.030..... | 34 |
| RCW 11.96A.030(2)..... | 33 |
| RCW 11.96A.030(2)(c)(ii) | 34 |
| RCW 11.96A.030(2)(c)(iv) | 34 |
| RCW 11.96A.040(1)..... | 34 |
| RCW 11.96A.040(3)..... | 33 |
| RCW 11.96A.060..... | 32, 33, 51 |
| RCW 11.96A.080(1)..... | 33 |
| RCW 11.96A.090..... | 34, 35 |
| RCW 11.96A.090(3)..... | 35 |
| RCW 11.96A.100..... | 41 |
| RCW 11.96A.100(7)..... | 37, 50 |
| RCW 11.96A.150..... | 34 |

| | <u>Page(s)</u> |
|---|-----------------------|
| RCW 11.96A.150(1)..... | 57, 58, 61 |
| RCW 11.96A.150(2)..... | 57 |
| RCW 11.96A.170..... | 36 |
| Former RCW 11.96A.090 (2000), Laws of 1999, ch. 42, § 302..... | 34 |
| CR 26(b)(5) | 49 |
| CR 60 | 61 |
| ER 706..... | 49, 50, 52, 54 |
| RAP 18.1 | 28, 60 |

Treatises

| | |
|--|----|
| 5B WASH. PRACTICE, EVIDENCE LAW AND PRACTICE § 706.3 (5th ed. 2015) | 48 |
|--|----|

I. INTRODUCTION

This case illustrates the wisdom underlying the enactment of the Trust and Estate Dispute Resolution Act.

Mildred Johnson died in 2009. Four years later, her estate remained open. Four of her children were the beneficiaries of her will; one of those children, Steven, was named the estate's personal representative. By 2013, the other three beneficiaries had begun to suspect that Steven had delayed closing the estate for personal financial reasons. They sought an accounting, and when that accounting appeared to confirm their suspicions, they moved to have Steven removed as personal representative. Steven denied any wrongdoing, claiming that his actions were justified by an effort to minimize the estate's potential liability on a commercial loan.

The dispute required the trial court to untangle a number of complex issues. The court decided, with the parties' consent, to appoint a special master to investigate. All parties cooperated with the investigation; no party objected to the procedure employed. When the special master's conclusions went against Steven, he demanded an evidentiary hearing. The trial court was willing to hold such a hearing, if Steven could identify a dispute of fact to be resolved during one, but Steven could not -- indeed, ultimately he *refused* to do so. The trial court then approved the special master's findings, removed Steven as personal representative, and ordered repayment to the estate of funds found to have

been wrongfully diverted, and also ordered payment of the attorney's fees incurred by the beneficiaries in bringing Steven's wrongdoing to light.

Steven would have this Court reverse the trial court's determinations, claiming that the trial court had no authority to employ a special master in the fashion done here. Steven is wrong. The Trust and Estate Dispute Resolution Act ("TEDRA") provides ample authority for what the trial court did here. Indeed, the way the trial court used the special master to help resolve disputes that had been pending for years exemplifies why TEDRA was enacted -- to promote the speedy resolution of estate disputes. Steven was afforded all the process he was due. The trial court properly exercised the broad discretion granted to a trial court in a case like this, and this Court should defer to and affirm the trial court's determinations.

II. COUNTERSTATEMENT OF THE CASE

A. Four of Mildred Johnson's children were the beneficiaries of her will, including her son Steven Johnson whom she designated as the personal representative of her estate. When Mildred died in 2009, Steven assumed the position of personal representative.

Mildred Johnson passed away on November 3, 2009. CP 20. Four of her children were the beneficiaries of her will: Joy Diane Johnson Walter, Judy Ann Johnson Cohn, Chris Bernard Johnson, and Steven Claude Johnson. CP 7.¹

¹ The respondents will use first names for all parties but Mrs. Johnson to avoid confusion. No disrespect is intended. Judy passed away during the probate proceedings and her estate is represented by personal representative Hope Soley, her daughter. CP 194. Further, while Steven is a beneficiary, the term "beneficiaries" will be used in this
(Footnote continued next page)

Mrs. Johnson named Steven as the personal representative of her estate in the first codicil to her last will. CP 14. Accordingly, in November 2009, the Pierce County Superior Court appointed Steven as the personal representative of Mrs. Johnson's estate. CP 19. He was granted nonintervention powers. CP 3. Steven swore that he would "perform the duties of [his] trust as personal representative according to law[]" and verified that he understood his duties under RCW 11.48.010. CP 22-23.

B. Steven's management of the estate raised concerns about self-dealing and conflict of interest, centering on the estate's interest in the Seven Js limited partnership and the Forest Park Estates LLC.

The estate owned interests in two entities at issue in this appeal: a 6.53% interest in Seven Js Investment Limited Partnership ("Seven Js") and a 42.5776% interest in Johnson Investment Company/Forest Park Estates, LLC ("Forest Park Estates"). CP 261.

- 1. Seven Js should have dissolved as a limited partnership upon the death of Mrs. Johnson, the general partner. Instead, Steven used his position as personal representative to prolong Seven Js existence through direct infusions of the estate's money, as well as loans from him and his wife secured by promissory notes -- all part of an effort by Steven to acquire for himself a marina owned by Seven Js.**

The Seven Js limited partnership was formed in 1983 and owned a marina in Bremerton at the time of Mrs. Johnson's death. CP 700, CP

brief in the same sense it was used in the trial court to include Joy Walter, the estate of Judy Cohn, and Chris Johnson.

1871. Seven Js was owned by Mrs. Johnson as sole general partner and as limited partner, Steven as limited partner, and Judy as limited partner. CP 1936 (unchallenged finding no. 3). Steven owned a 47.87% interest. CP 1936 (unchallenged finding no. 4). His sister Judy owned 45.6%. CP 699. Mrs. Johnson owned the remaining 6.53% interest in the partnership. CP 698. That interest was valued at only \$1,592 when Mrs. Johnson died. CP 698. Steven’s personal investment in Seven Js exceeded \$300,000 and he “made a significant contribution of personal funds to Seven Js prior to [Mrs. Johnson]’s death”). CP 702, CP 1936 (unchallenged finding no. 4). Steven also managed the marina and received 6% of the gross monthly receipts in exchange. CP 233, 700.

“Mildred G. Johnson was dissociated as general partner of Seven Js on the date of her death.” CP 1936 (unchallenged finding no. 5). “Pursuant to RCW 25.10 *et seq* and the Limited Partnership Agreement for Seven Js, Seven Js was dissolved and should have been wound up following the death of Mildred G. Johnson, the sole general partner, on November 3, 2009.” CP 1936 (unchallenged finding no. 6).

Mrs. Johnson had personally guaranteed the mortgage encumbering Seven Js’ marina property. CP 700. Seven Js owed in excess of \$1,200,000 on that loan at the time of her death. *Id.* The land and building were appraised at \$1,230,108 as of November 2009. CP 1455.² Mrs. Johnson’s death constituted an event of default under the

² The appraisal valued the mortgage as a \$1,358,486 liability in November 2009. CP 1455. As of March 6, 2012, counsel for the personal representative understood that the
(Footnote continued next page)

terms of the loan and the personal guarantee. CP 700. Steven published a general notice to creditors on December 1, 2009. CP 24-26. On March 17, 2011, Steven gave actual notice to the bank that it was a creditor of the estate. CP 1932. The bank, however, did not file a creditor's claim until June 14, 2012 -- seven months *after* the expiration of the longest possible claims period allowed under RCW 11.40.051(1)(b)(ii). CP 35, 774, 1355, 1884.

Rather than wind up the partnership, Steven worked to try to buy Seven Js from his sister Judy (and later from Judy's estate), and negotiated with the bank in an attempt to secure financing to facilitate this purchase. CP 700-01. As the negotiations continued, Steven and Gail Johnson personally funded Seven Js to cover loan payments and operating expenses and Steven postponed receipt of the management fees he was set to earn for continuing to manage the property under the Seven Js Management Agreement. CP 700-01; CP 758-60 (handwritten summary of the money loaned to Seven Js); CP 799. Purporting to exercise the authority of the general partner of Seven Js, Steven made out promissory notes totaling \$61,000 from Seven Js to himself and his wife, Gail Johnson, supposedly in exchange for the money they had put into Seven Js which was now characterized as "loaned" to the partnership. CP 995-1004.³

debt on the marina was \$1.3 million and the most recent appraisal was \$1.2 million, making the marina "marginally upside down" at that time. CP 1574.

³ The promissory notes were dated March 2, 2010 (\$1,000); April 27, 2010 (\$20,000); July 23, 2010 (\$5,000); January 29, 2011 (\$5,000); February 24, 2011 (\$5,000); July 8, (Footnote continued next page)

In other words, between March 2010 and January 2012, Steven obligated Seven Js to pay \$61,000 to himself and his wife. Moreover, Steven caused the estate to make a series of payments totaling \$57,000 to Seven Js to cover the marina's operating expenses. CP 701.⁴

Counsel for the personal representative warned Steven, as early as March 2010, that the estate should not make contributions to Seven Js for cash flow or any other purpose: "You cannot have the estate make contributions that will benefit you and Judy at the expense of other estate beneficiaries." CP 559. The estate's lawyer further advised:

There are certain fundamental facts that cannot be ignored. The debt relating to the marina is not going to go away; the status of the entity needs to be determined and confirmed; estate funds cannot be used to benefit certain children but not others; walking away from the marina will likely cost you and Judy substantially more than making contributions now; your mother's ownership should be acquired by you and/or Judy for purposes of moving forward with the operation of the marina; and you and Judy need to agree on how to proceed and to issues of valuation; and the above matters need to be resolved soon.

CP 560.

2011 (\$3,500); October 3, 2011 (\$10,000); December 12, 2011 (\$3,500); January 31, 2012 (\$8,000), for a total of **\$61,000**. CP 996-1004. The deposit ledgers from Seven Js confirm deposits from Steven and Gail Johnson for these amounts. CP 1025 (March 2, 2010), 1027 (April 27, 2010), 1029 (July 23, 2010), 1035 (February 14 and 24, 2011), 1039 (July 8, 2011), 1042 (October 3, 2011), 1044 (Dec. 12, 2011) & 1045 (January 31, 2012); *see also* CP 1275-1283 (copies of the checks from Gail and Steven to Seven Js).

⁴ According to the estate check ledger, the estate issued checks to Seven Js on the following dates: October 21, 2010 (\$15,000, CP 496); February 28, 2011 (\$16,000, CP 496); October 31, 2011 (\$10,000, CP 497-98); April 3, 2012 (\$15,000, CP 497); and May 1, 2012 (\$1,000, CP 498), for a total of **\$57,000**. *Cf.* CP 701 (missing the \$1,000 check from May 2012).

Although Steven hoped his actions would avoid the bank from calling the loan, on April 18, 2011, the bank notified Seven Js that it was in default. CP 701. But as stated, the bank failed to file a creditor claim with the estate by the 24 month anniversary of Mrs. Johnson's death -- the last date on which a creditor could maintain an action against the estate. *See* CP 35; RCW 11.40.051(1)(b)(ii). This failure

Steven caused Seven Js to continue making payments on the mortgage, using estate funds to make those payments. CP 249, 330, 765 (July 24, 2012 letter from Mark Roberts to Gail and Steven Johnson). Steven also directed the income produced by Seven Js to himself as compensation for managing the marina. CP 316-17 (unrebutted September 20, 2012 letter from Rachel Merrill to Mark Roberts). In August 2012, Steven caused the estate to issue an \$85,096 check from the estate account to himself, to repay the loans he and Gail had made to Seven Js. CP 555, 702. Steven stated that the \$85,096 represented repayment for the \$61,000 he (and Gail) had paid to Seven Js, plus partial payment of unpaid and accrued management fees. CP 1623.⁵ Steven did not file a creditor's claim against the estate.

Steven failed to work out a deal with his sister Judy (or later with her estate) to acquire Judy's interest in Seven Js, or otherwise obtain new financing to facilitate purchasing the marina property. CP 701.⁶ The bank

⁵ Steve also had the estate billed for professional time spent on a zoning dispute relating to the Seven Js' marina. CP 1221-30.

⁶ In October 2011, Steven and Gail Johnson filed a creditor's claim against Judy's estate in the amount of \$52,333.63, representing half the amount he loaned to Seven Js
(Footnote continued next page)

began foreclosure proceedings in September 2012, and Steven lost his \$300,000 investment. CP 330, 702. A receiver was appointed for the partnership in November 2012. CP 331-32.⁷

2. **Forest Park Estates was the estate's most valuable asset and Steven attempted to use his position as personal representative to arrange for the sale of Forest Park to himself based on an improperly discounted valuation.**

Three years after the probate opened, Forest Park Estates was the most valuable remaining asset of the estate. CP 59.⁸ Steven wanted to sell the estate's interest in Forest Park Estates to himself. CP 60. As personal representative Steven moved -- by way of a request for "instructions" -- for approval of his proposed method for valuing the estate's ownership interest, a method which provided for a substantial minority interest discount even though Steven and his wife would control 100% of Forest Park Estates after the transaction. CP 60-62, 151-58.

under the theory that Judy was responsible for making capital calls to Seven Js as a limited partner, but the claim was rejected by her estate. CP 702; CP 768-69. Steven's lawyer later informed him and his wife that the limited partners were *not* obligated to make capital calls since there was no general partner to issue the demand for a capital call. CP 764-65 (July 24, 2012 letter from Mark Roberts to Gail and Steven Johnson).

⁷ As will be discussed more fully in Section II.C, Steven initially asserted that he had not provided the bank with actual notice of Mrs. Johnson's death, and that if he had "*it is certain that Union Bank would have filed a timely claim against the Estate [.]*" CP 1883 (emphasis in original). However, Steven later admitted that he had provided the bank with actual notice (as stated, on March 17, 2011). CP 1932. And, also as stated, the bank failed to timely file a creditor's claim against the estate.

⁸ The Estate's 42.5776% interest in Forest Park Estates was comprised of two parts: a voting membership component (6.5469%) and a non-voting membership component (36.0307%). CP 57-58. The John A. Johnson trust, represented by Steven as trustee, owned 34.5314% of Forest Park Estates; Steven owned 20.4768%, and Gail Johnson, Steven's wife, owned 2.4142%. CP 58. Steven and Gail Johnson managed Forest Park Estates. CP 58

The beneficiaries objected on the basis that Steven's proposed deal would have shortchanged the estate by \$700,000 and that Steven's desire for a low price for himself conflicted with the estate's interest in obtaining a high price. CP 154, 158-59. In March 2013, the superior court agreed with the beneficiaries that Steven was not entitled to discount the estate's ownership interest in Forest Park Estates. CP 167-68.

Steven had the estate pay for his failed attempt to get court approval of his proposed valuation method. CP 1202-08.

C. The other beneficiaries, concerned over the management of the estate and the proposed final distribution of assets, successfully moved in late 2013 for an accounting. After receiving and reviewing the accounting, they moved in March 2014 to remove Steven as the personal representative. At a hearing on May 2, 2014, the trial court proposed, and the beneficiaries and Steven agreed, to the appointment of a special master, who would investigate and report on several issues pertaining to the request for Steven's removal as personal representative.

Four years after Mrs. Johnson's death, the beneficiaries moved for an accounting. CP 170. That motion prompted the release of additional information, CP 607, and resulted in an order for an accounting focusing on, among other items, the attorney fees billed to the estate, the transfer of \$85,096.60 to Steven in August 2012, and the transfer of funds from the estate to Seven Js. CP 782-86. Steven filed an interim report and an accounting on March 13, 2014, and moved for an order approving both. CP 787, 1290.

On March 21, 2014, the beneficiaries moved for the removal of Steven as the personal representative, alleging conflicts of interest, breach

of fiduciary duties, self-dealing, and lack of justification for keeping the estate open for four years. CP 1302-03 (noting the hearing for the same time as Steven's motion to approve his interim report and accounting). The beneficiaries cited to Steven's unauthorized management of Seven Js after the death of the general partner, including his contribution of estate funds into the (dissolved) partnership in which he owned a 47.87% interest and reimbursing himself from the estate for loans made to Seven Js after Mrs. Johnson's death. CP 1303-26.

Steven opposed his removal, although he did not dispute that he applied estate assets to Seven Js or that he reimbursed himself for loans made to Seven Js; his position was that his goal of saving the estate from potential liability justified the means. CP 1595 (arguing that the beneficiaries "fail to recognize the real value the Estate received through the Personal Representative's actions in using approximately \$128,592 of the Estate assets in order to spare it from liability under the personal guaranty, on which approximately \$1,200,000 was owed at the time of the decedent's death."); *see also* 1591, 1619 & 1622.

These matters were heard May 2, 2014, by the Honorable Bryan Chushcoff. The beneficiaries argued that Steven had no authority to bind Seven Js for debts incurred after the death of the general partner, because the partnership had already dissolved and the estate would not have been liable for those loans in any event. VRP (5/2/14) 9; CP 1809-10. The court agreed: "Listen, I think you've got something there" with respect to the \$85,000. VRP (5/2/14) 11. The court rejected the personal

representative's argument that his actions were justified in terms of mitigating potential estate liability:

No, that isn't what was going on. What was going on was, [Steven] and [Judy] were trying to work out their own deal on this. Let's say they had resolved the matter in the first place and [Steven] had bought [Judy] out. Where does the estate come[] in paying all of these payments? Not at all, right?

VRP (5/2/14) 18. The court summarized that "we still have this \$85,000 at least. That's mostly it, I think. There is also the \$42,000 to Seven J's[.]" VRP (5/2/14) 21-22.

The superior court did not fault Steven for his actions in the short term, but viewed his authority to act on behalf of Seven Js as "pretty fuzzy[:]"

I will give him a pass for a few months. As a personal representative, you have a least claim of authority to act on behalf of this thing given that he -- and I'm going to guess [Judy] wouldn't agree to the deal at least with respect to the sale. He allowed that issue between him and his sister over how they were going to wrap that thing up to not benefit the estate to the tune of at least \$85,000. I don't know about this other \$40,000, there could be a few months of it. That would be something else.

If the property had been transferred to the two partners, the two limited partners, within three or four months, it would have been their problem, and all the management fees that goes along with that and all of the other loans associated with it and all of the other payments. None of that would be the estate's problems. I'd give him a pass for a few months. After that, I start to question it.

VRP (5/2/14) 25-26. As to the stalemate between Judy and Steven, the superior court stated:

He could have said, okay, this is it. It is transferred out. Formal dissolution proceedings in the partnership, ... not in the estate. But

because it dragged out because of their dispute, it now becomes an estate responsibility when it shouldn't have been.

As I say, this is easier to spot in retrospect, so I'll give him a few months to sort of figure that out. Once he realized that they were not going to be on the same page about this, then all of those management fees, all of the loans, all of that stuff would have been unnecessary. By instituting those formal proceedings, he might have pushed [Judy] to make a choice for himself too. I think that he offered. That wasn't going anywhere either. I have sympathy for a while, but not for all of this.

My view is that the \$85,000, or most of it anyway, should probably go back to the estate.

VRP (5/2/14) 26-27 (emphasis added). Not dealing with Seven Js sooner and on partnership principles "did advantage [Steven] and it did disadvantage the other heirs of the estate." VRP (5/2/14) 29. The court concluded:

There is still this dispute about the \$85,000. My opinion is that he received that. We should have give[n] him some pass for a few months. It is not a factual analysis. I'm guessing that when everything gets shaken out, maybe it would be fairly attributed back to Mr. Johnson.

As for the \$40,000, I have no clue about that at all. Maybe he should pay the whole thing back. Maybe he shouldn't. We need to split this thing up and finish this thing. That is my opinion. It is not a legal ruling.

VRP (5/2/14) 30.

The beneficiaries proposed that the court replace Steven with a neutral professional to determine what happened and to pursue recovery of the \$127,000 from Steven. VRP (5/2/14) 24, 31. Counsel for the personal representative proposed an alternative plan under which Steven would remain as the personal representative while Mrs. Johnson's accountant, or

some other accountant, reviewed the boxes of documents. VRP (5/2/14) 30-31. Counsel for the personal representative anticipated that such a reviewer would approve the personal representative's actions and "say *everything is good*[" VRP (5/2/14) 31 (emphasis added).

The court agreed that an expert could look into the couple of remaining issues, "give a report to everybody, live with it, and get this thing done. That would do everybody a world of good. It would be nice to get all of this done and wrapped up." VRP (5/2/14) 31. The court did not remove Steven as the personal representative at this time, preferring to await the result of an *independent* expert's review:

I would not necessarily remove [Steven]. In many ways, I think it has been more the way that things have played out. I do think he was wrong about this deal on the Seven J's LLC and/or partnership, and ***I would like to have an independent person look at those issues.***

VRP (5/2/14) 32 (emphasis added).

Counsel for the beneficiaries agreed to the court's plan; counsel for the personal representative had no objections, so long as the beneficiaries did not unilaterally choose the person to conduct the investigation. VRP (5/2/14) 32-33. Following the May 2 hearing, Steven nominated retired Judge Robert H. Peterson "to review and report to the court and the parties regarding the Estate's interest in Seven Js[" CP 1831. The beneficiaries nominated retired Commissioner Eric Watness to serve as special master "to complete an accounting and investigate Steven Johnson's actions as Personal Representative." CP 1820.

In supplemental briefing filed after the May 2 hearing, Steven did not dispute that estate assets were channeled to Seven Js or that he reimbursed himself for money and services loaned to Seven Js; instead he asked the court to “confirm that the Estate’s payments of amounts due for Seven Js was appropriate and that Mr. Johnson properly reimbursed himself from the Estate’s account for some of his costs associated with personally covering Seven Js’ obligations and foregoing management fees.” CP 1888. Steven argued that his actions with respect to Seven Js were justified because he supposedly was working to save the estate from a potential liability on the Seven Js’ loan. Steven’s theory was that a supposed strategy of not giving actual notice to the bank, coupled with his “investment” of \$127,000 of estate money in the partnership, caused the bank to delay filing its creditor claim until it was too late. CP 1876, 1880-88.

Steven argued that if he had “*provided Union Bank with actual notice of Mrs. Johnson’s death **it is certain** that Union Bank would have filed a timely claim against the Estate[.]*” CP 1883 (italics in original; bold added). However, counsel for the personal representative had to retract the assertion that Steven strategically withheld providing actual notice, upon being reminded that *they* had in fact given the bank actual notice in March 2011, well within the claim period. CP 1899-1901, 1932. Moreover, as previously stated, although the bank then declared the Seven Js’ loan in default in April 2011, the bank *failed* to get its creditor claim in on time. CP 701.

- D. On May 23, 2014, the superior court found that Steven had a conflict of interest and that he had breached his fiduciary duties to the estate and its beneficiaries. The court appointed Commissioner Watness as special master, to investigate and report on several issues pertaining to whether Steven should be removed as personal representative and what actions the court should take to address Steven's actions.**

The parties returned to court on May 23 to finalize the order on the accounting and removal motions. VRP (5/23/14) 36-37. The court now found that “Steven Johnson had no authority to incur obligations on behalf of Seven Js[,]” that he had a “conflict of interest in making personal loans to Seven Js following the Decedent’s death and attempting to recover those loans from the Estate[,]” that he “inadequately managed Seven Js as personal representative of the Estate[;]” and that he “*breached his fiduciary duties* to the Estate and its Beneficiaries as a result of his conflicts of interest [and] self-dealing.” CP 1937-38. The court revoked Steven’s nonintervention powers and allowed the beneficiaries to renew their motion to remove Steven as personal representative following filing of the special master report. CP 1939.

The court explained its interlineations to the order proposed by the beneficiaries. The court did not find that the estate had no liability for contributions to Seven Js after the decedent’s death, but only because there could have been a “window of time when it may have been appropriate for parties to contribute to this thing, and that might have implied some obligation on the part of the estate to do so as well.” VRP (5/23/14) 38; CP 1937. The court further found that “it may well have been that Mr. Johnson paid more of the estate assets of Seven Js than he should have,

but I'm not necessarily thinking that all of them were wrong, so I'm going to strike number 10 as well." VRP (5/23/14) 38; CP 1937.

The court selected former Commissioner Watness to serve as the special master and to investigate the following: (1) whether the promissory notes payable to Steven in relation to Seven Js were authorized by Seven Js; (2) whether the estate had an obligation to repay any alleged loans from Steven to Seven Js, given that the "Estate was not a general partner at the time of Steven Johnson's alleged loans to Seven Js and the Estate did not guarantee any loans from Steven Johnson to Seven Js[,]" and (3) whether and the amount of such funds to be reimbursed by Steven to the Estate given his conflict of interest in the payment of \$85,096.09 from the estate to himself. CP 1937; *see also* VRP (5/23/14) 39 (the court ruled that last item was "in large part, what I wanted the special master to do"). The court's May 23 order gave detailed instructions to the special master:

The Special Master shall [1] prepare a complete Estate accounting to the Court, and shall report to the Court regarding [2] the propriety of Steven Johnson's activities as personal representative, including but not limited to Steven Johnson's operation of Seven Js, [3] an itemization and description of funds paid directly or indirectly in relation to Seven Js, [4] an itemization and description of funds paid directly or indirectly to Steven Johnson personally, [5] a discussion of whether attorney fees paid by the Estate were proper Estate expenses or were incurred for Steven Johnson's personal benefit only, and whether administrator fees charged by Seven Js are appropriate and reasonable. The Special Master shall [6] further recommend the amount of funds to be repaid to the Estate by Steven Johnson related to his misuse or waste of Estate assets.

CP 1940.

The court found the attorney fees incurred by the beneficiaries in bringing the motion for removal “were necessary and did provide a benefit to the estate[]” and that they were “incurred as a result of Steven Johnson’s breach of fiduciary duties and mismanagement of the estate” and therefore awarded attorney fees of \$48,511.15 to the beneficiaries to be paid by Steven. VRP (5/23/14) 40; CP 1938. The order awarded fees incurred through May 23, 2014, and provided for fees incurred in responding to requests from the special master in an amount to be approved at the hearing on the special master’s report. CP 1940-41.⁹

E. Steven moved for reconsideration but did not object to the special master’s role; in fact, he wanted the court to defer ruling on the substantive issues resolved on May 23 until after the special master issued his report.

Steven moved for reconsideration of “only three issues” decided in the May 23 order -- breach of fiduciary duty; the source of payment for any award of attorney fees in the beneficiaries’ favor, and the amount of those fees -- *expressly declining* to seek reconsideration of the order appointing the special master. CP 1944 and 1944 n.1.¹⁰ Instead, Steven argued that the superior court should have reserved ruling on the three

⁹ This attorney fee award was later reduced to a judgment against Steven C. Johnson and the marital community comprised of Steven and Gail Johnson, husband and wife, on October 3, 2014. CP 2185. As discussed more fully in Section II.H, that judgment would later be amended to award the beneficiaries fees incurred during the course of the subsequent proceedings leading up to the trial court’s ultimate decision to remove Steven as personal representative and to order reimbursement.

¹⁰ Steven stated that he was not seeking “reconsideration of any other of the court’s rulings contained in its May 23, 2014 order, including the ruling . . . appointing Commissioner Watness as special master.” CP 1944 n.1.

issues until the special master completed his investigation and issued his report. CP 1944. Steven made clear that he wanted the superior court to wait because he expected the special master would absolve him: “the special master could likely conclude that the Beneficiaries are not entitled to the relief that they request[]” and that there was a “reasonable prospect of the special master’s determination in favor of Mr. Johnson . . .” CP 1954. Steven made clear that he understood the scope of the special master’s task, CP 1946-47, and contemplated that the superior court would make rulings based on the special master’s report:

[A]fter the special master completes his investigation and reports to the court, this court could reasonably order that the Estate should cover the attorney fees and costs of all parties to this litigation[.]

CP 1955.

Counsel for the personal representative affirmed that Commissioner Watness would resolve some of the issues on which the superior court had reserved ruling and further affirmed “[t]hat *is perfectly fine* because that is a forum in which -- a controlled forum which, I suppose, is akin to a fact-finding procedure or some mechanism by which there can be an analytical consideration of all of this voluminous material to determine what benefit to the estate the acts of Mr. Johnson have presented as well as any harm should there be any. *That part was just fine*[.]” VRP (6/13/14) 49-50 (emphasis added).

The superior court noted that Steven had no objection to the appointment of the special master:

Mr. Johnson concedes that the appointment of former Commissioner Watness is a good thing. It is nice to feel that I got an attaboy for doing a good job. That would not have happened but for the actions of the beneficiaries here.

VRP (6/13/14) 61. The superior court entered an order denying the motion for reconsideration on June 13, 2014, and denied the beneficiaries' request for attorney fees incurred in responding to the motion for reconsideration. CP 1995-96.

F. Steven did not object either to the role of the special master or the procedures employed by the special master at any time during the special master's investigation. Instead, he participated in the investigation, through the efforts of counsel representing him as personal representative.

During a July 25, 2014 status conference in the middle of the special master's investigation, Steven reported that he was cooperating with the process:

Mr. Watness is deeply entrenched in the mission with which he was charged. We will be moving on with that. Substantial time has been expended both by Ms. McLeod [Steven's counsel] and Ms. Merrill [the beneficiaries' counsel] in working through that process, and that is well underway. I don't think there is anything else to report on that score at this juncture, and *we will leave it to Commissioner Watness on that.*

VRP (7/25/14) 69 (emphasis added). In an August 27, 2014 letter, counsel for the personal representative proposed deferring resolution of an issue involving partial distributions on the basis that the special master review was ongoing. CP 2085. Counsel for the personal representative expressed the expectation that the special master's report would conclude the probate: "Commissioner Watness's review is proceeding apace and, after

he reports to the court, the probate matter is likely to conclude[.]” CP 2085.

There was no suggestion that the special master review was improper. There was no motion from the personal representative to have a court reporter present during the meetings with the special master, no request from Steven to make a record of the documents and testimony considered by the special master during the investigation, nor any motion from Steven regarding evidentiary standards.

The special master issued an interim report on August 29, 2014. CP 2031. He reported that he met with counsel for the parties to outline the project and receive financial documents and pleadings; that he interviewed the principal parties; that the parties were given notice of the meetings and had an opportunity to participate. CP 2032. The special master requested additional time to complete his report for two reasons: first, he recommended that a forensic accountant be retained to examine Forest Park Estates (for reasons unrelated to this appeal);¹¹ and second, he needed additional time to review additional documents produced by the personal representative. CP 2032-33. He requested instructions from the court on additional time, a forensic accounting of Forest Park Estates, and tax forms from Steven and Gail provided. CP 2033. Commissioner

¹¹ That request for forensic accounting related to funds that were missing from the Forest Park Estates account due to unauthorized withdrawals by Dawn Murphy, the bookkeeper, and daughter of Gail Johnson. CP 2035. Steven and Gail agreed that a forensic accounting of Forest Park Estates was warranted. CP 2036. Gail apparently paid back the money taken from Forest Park Estates. VRP (10/3/14) 101.

Watness concluded that there “does not appear to be a basis for forensic accounting of the Seven Js’ Partnership accounts[.]” because the question of whether and to what extent the estate has a claim for reimbursement could be answered by a review of existing bank records. CP 2033.

Commissioner Watness filed his second interim report on September 17, 2014 (without the court having ruled on his earlier request for instructions). The report was labeled an interim report *only* because it did not take into account a forensic accounting of Forest Park Estates and because Gail and Steven Johnson had not provided the requested tax returns. CP 2040-41. Commissioner Watness recommended that Steven and Gail Johnson, as a marital community, reimburse the estate in the following amounts: \$57,171.56 for unauthorized transfers from the estate to Seven Js and the Department of Labor and Industries after the partnership was dissolved; \$85,096.050 for unauthorized withdrawals Steven paid from the estate account directly to Steven and Gail Johnson in December 2012; \$4,000 in unsubstantiated expenditures from the Seven Js account; \$2,925 as attorney fees paid out of the estate to Mark Roberts, attorney at law; prejudgment interest; attorney fees incurred by the beneficiaries after May 23, 2014; \$9,306.50 in attorney fees incurred by the firm of Davies Pearson allocated to this investigation and service that benefitted Steven through the end of 2013; \$21,337.23 as special master fees. CP 2042-43. The special master explained the basis for those recommendations in a detailed report. CP 2039-64.

On September 24, 2014, Steven requested that the special master make the following corrections: remove Gail Johnson as the respondent in the caption and strike recommendations imposing liability on Gail and the marital community of Steve and Gail Johnson, CP 2115, 2119; trim down the attorney fee recommendations, CP 2116-17; and, as to Seven Js, reach the conclusion that Steven's good faith belief that he was protecting the estate from potential liability justified his actions under "equitable principles." CP 2115-19. Steven made no claim that the special master's findings with regard to the Seven J's transactions were incorrect or unsupported by the documents and explanation provided.

G. Only when it was apparent that the special master was not going to clear Steven did Steven argue that the superior court could not implement the relief recommended by the special master without an evidentiary hearing.

The beneficiaries moved for an order confirming and adopting the special master's recommendations on September 25, 2014 (before the special master addressed Steven's request for reconsideration). CP 2065. While Steven argued that the special master should first rule on his request for correction and reconsideration, he also objected for the first time to the role and authority of the special master. CP 2095. During the October 3 hearing, Steven requested clarification as to Commissioner Watness's role and authority and also requested evidentiary proceedings with cross-examination. VRP (10/3/14) 92, 98. The beneficiaries responded that there was no such objection when the special master was appointed. VRP (10/3/14) 104.

Before the hearing on the special master's recommended findings, Steven took another opportunity to plead his case, filing a declaration that set forth his justification for the actions he took respect to Seven Js. CP 2125-46. The superior court responded:

I know how this argument works there. I have some sympathy from his point of view, but I also understand the legal issue and the argument and the way the facts actually sort of happened to turn out in that particular instance and why Commissioner Watness would make the decision he did.

Ms. Caulkins: Except that we are seeking a fact-finding hearing. We are seeking an evidentiary proceeding.

Court: The facts aren't going to be any different.

Ms. Caulkins: I don't know that. I don't agree with that.

Court: We can take the report and say --

Ms. Caulkins: I don't know if he's a referee.

Court: Well, I haven't heard anybody dispute the essential nature of the facts.

VRP (10/3/14) 108-09. The superior court remarked that "there's no dispute that [Steven] paid this money [to Seven Js] and that he paid it back to himself[.]" *and his lawyer agreed*: "[t]here's no dispute that he paid that money[.]" VRP (10/3/14) 113.

The superior court again pressed Steven's lawyer for the factual dispute that would be resolved in an evidentiary hearing. VRP (10/3/14) 114 ("I'm not hearing much in the way of disputed facts."). Counsel demurred: "That's not the province of this argument on, you know, 20

minutes or 15 minutes a side.” VRP (10/3/14) 114. The superior court replied:

I understand, but that’s sort of the nature of what the Special Master is supposed to do, sort of cut through this thing to find facts that matter and look at this thing. Then, if there was something wrong about that, you’d have an opportunity to say, hey, he’s just flat wrong about this.

VRP (10/3/14) 114. The superior court then stated:

And then I do think that the Special Master’s report would operate essentially as a kind of laying out of the facts of the case, and if that would justify summary judgment, then that could justify summary judgment. To the extent that somebody has a challenge to those facts, then we potentially could have an evidentiary hearing or we could present it on the basis of affidavits. I don’t know. But, I do expect that we want to expedite this. The whole idea of this process is to try to cut the bleeding of the expense of this thing so there’s money left over for the beneficiaries[.]

* * * *

I don’t think this is about credibility. There’s almost nothing about credibility.

VRP (10/3/14) 118-19. The issue was straightforward for the superior court: “I mean, he was spending money when he wasn’t authorized to do it as a matter of law.” VRP (10/3/14) 120.

The court deferred ruling on the issue until the special master could rule on the request for reconsideration. VRP (10/3/14) 115. The court entered an order to that effect and entered a judgment that the attorney fees incurred through May 23 in the amount of \$48,511.15 be paid by Steven Johnson and the marital community of Steve and Gail Johnson. CP 2182-83; CP 2185.

H. Steven had the opportunity to make his case for an equitable exception and could not explain why he should have been afforded an evidentiary hearing or the difference a hearing would have made.

On October 7, 2014, the special master addressed Steven's request for reconsideration, including his argument that he should not be punished for his attempts to mitigate potential liability for the estate related to Seven Js. CP 2192-93. Although the special master found that Steven did not explain what law authorized or required him to use the estate funds to continue marina operations under the dissolved partnership, the special master *left it to the superior court to decide whether* Steven had a duty to make the transfers during the 24 month period before the expiration of all potential creditor claims, in which case at least \$31,000 or as much as \$41,000 might be excused. CP 2193. The special master made no changes to the second interim report, other than to amend the caption. CP 2189-94.

After the special master issued his corrected report, the beneficiaries renewed their motion for an order confirming the special master's recommendations. CP 2197. Steven *did not* accept the special master's invitation to convince the superior court that he had a duty to fund the Seven Js partnership during the 24 month creditor claim period. CP 2214-22. Instead, Steven requested that the superior court reserve ruling pending an evidentiary hearing with witnesses subject to cross-examination, CP 2220, although his lawyer could not identify what such a hearing would accomplish where she was "reasonably satisfied with the

special master doing the job as, I guess, Ms. Merrill envisions it except to the extent, I think, there is some kind of genuine disputed fact, **and I'm not sure what that is here at the moment.**" VRP (11/7/14) 142 (emphasis added).

The court reviewed the special master's reports and found that his recommendations were:

...not inconsistent with what I understood the facts to be from the original filings that we had here. Really, **there is nothing different after doing all of that than what we thought at the beginning of all of this.** At some point, it is like, if there was some dispute of fact, as I say, I'd be sympathetic with all of this. All I'm really hearing is that, *in equity*, one might have done something different by Mr. Johnson with respect to the conundrum he faced with the Union Bank issue.

* * * *

It wasn't my sense that I'm delegating my decision-making. What I did do, I think, is, to develop whatever the facts were. To the extent that they were contested, I would say that you are probably right to having a trial.

VRP (11/7/14) 147-49 (emphasis added). The court continued by asking counsel for the personal representative: "What fact are you going to tell me that is different? . . . I haven't seen anything that says, this is what is different[.]" VRP (11/7/14) 152-53. Counsel for the personal representative did not have an answer: "If this is brought before the court in a proper manner, that's what we'll provide." VRP (11/7/14) 152-53. The superior court was not satisfied: "***This has been your opportunity to do all of that.***" VRP (11/7/14) 153 (emphasis added).¹²

¹² The court later summed up his position:

(Footnote continued next page)

The superior court entered an order on November 7 confirming and adopting the special master's recommendations, making findings, removing Steven as personal representative,¹³ and entering two judgments. CP 2237-44. The first judgment was for \$90,438.95, amending the original \$48,511.15 attorney fee judgment from October 3, 2014, to include an additional \$35,891.80 in attorney fees and costs incurred by the beneficiaries through October 3, 2014, \$1,686.00 in attorney fees and costs incurred by the beneficiaries between October 4 and October 20, 2014, and \$4,350 in estimated attorney fees and costs incurred through the date of the hearing. CP 2230-33. The second judgment was for \$179,836.89, CP 2234-36, reflecting \$57,171.56 in unauthorized transfers made to and on behalf of Seven Js from the estate's account, \$85,096.60 in unauthorized withdrawals Steven paid from the estate to his and Gail's joint account, \$4,000 in unsubstantiated expenditures from the Seven Js account; \$2,925 paid from the estate to Mark Roberts for advice that benefitted Steven personally, \$9,306.50 in attorney fees incurred by Davies Pearson that benefitted Steven personally, and \$21,337.23 as special master fees. CP 2242-43.

...I said, well, you know, if there was something somewhere in all of this where you can point out a genuine issue of material fact or an error of law that Commissioner Watness made as our special master, I'm all in for having a hearing about that, if you will. I haven't heard that still. I'm looking at all this stuff, and really it is a matter of opinion to some extent about to what extent Mr. Johnson is right, wrong, or indifferent, I suppose in terms of how the parties[] view the facts. ***The facts themselves are pretty well clear, not really in dispute.***

VRP (12/19/14) 186 (emphasis added).

¹³ Steven was subsequently replaced by Guardianship Services of Seattle. CP 2308.

The attorney fee judgment of \$90,438.95 was ultimately entered against Steven C. Johnson and the marital community comprised of Steven C. Johnson and Gail Johnson, husband and wife, on December 29, 2014. CP 2309-11. The judgment for \$179,836.89 was ultimately entered against Steven C. Johnson and the marital community comprised of Steven C. Johnson and Gail Johnson, husband and wife. CP 2312-14.¹⁴ Steven appealed from the December 29, 2014 judgments and associated order. CP 2316-17.

III. ARGUMENT

- A. The superior court’s findings should be reviewed under the substantial evidence standard of review, and its decisions regarding whether to remove the personal representative and to order restitutionary and other relief should be reviewed solely for an abuse of discretion.**

In *Foster v. Gilliam*, a case overlooked by Steven, the Court of Appeals held that the substantial evidence standard is appropriate in probate proceedings where the court took no testimony and based its decisions entirely on declarations and other written documents. 165 Wn. App. 33, 54, 268 P.3d 945 (2011), citing *Dolan v. King County*, 172 Wn.2d 299, 310-11, 258 P.3d 20 (2011). While acknowledging that Washington courts have applied a “de novo standard [of review] in the context of a purely written record where the trial court makes no

¹⁴ As discussed more fully in Section III.F, the judgment summary of the \$179,836.89 judgment erroneously states that the judgment is against Steven and Gail Johnson individually, as well as the Johnson marital community; the Respondents will not object to a motion brought under CR 60 to correct this scrivener error.

determination of witness credibility[,]” the Court of Appeals followed the Washington Supreme Court’s 2011 decision in *Dolan*, which clarified that the substantial evidence standard is more appropriate where there is a sizeable and complex record and the need to resolve conflicting assertions. *Foster*, 165 Wn. App. at 54, citing *Dolan*, 172 Wn.2d at 311. *Accord City of Bellevue v. Pine Forest Props., Inc.*, 185 Wn. App. 244, 263-64, 340 P.3d 938 (2014), *rev. denied*, 355 P.3d 1152 (2015).

The deference rationale supporting the substantial evidence standard of review is not limited to credibility determinations but is also grounded in the fact-finding expertise of the superior courts and in the conservation of judicial resources. As the United States Supreme Court observed in *Anderson v. City of Bessemer City*, 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) (cited with approval by the Washington Supreme Court in *Dolan*):

The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge’s position to make determinations of credibility. The trial judge’s major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge’s efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be “the ‘main event’ ... rather than a ‘tryout on the road.’”

Anderson, 470 U.S. at 574-75, quoting *Wainwright v. Sykes*, 433 U.S. 72, 90, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).¹⁵

In *Foster*, the superior court, sitting in equity, found that the declarations submitted established that a trustee breached his fiduciary duties and was personally liable for making the trust whole. The superior court made these findings after denying a request for oral testimony under TEDRA. The superior court also considered the report from a special administrator, assigned to conduct discovery and report to the court on the status of the probate estate. The court of appeals reviewed the findings under the substantial evidence standard because of the extensive documentary record. *Foster*, 165 Wn. App. at 54. This Court should likewise review the findings of the superior court under the substantial evidence standard in light of *Foster*, and *Pine Forest Properties*, and *Dolan*.¹⁶

¹⁵ *Anderson* expressly rejected the theory of de novo review found in Judge Jerome Frank's opinion for the Second Circuit in *Orvis v. Higgins*, 180 F.2d 537 (2d Cir. 1950) – a theory strikingly similar to the view expressed from time to time by some Washington appellate courts, that deference to a trial court's factual findings is unwarranted on a purely paper record lacking a dispute over the credibility of a witness. The reasons for *Anderson*'s rejection (quoted above) are equally applicable to the reasoning of the Washington cases suggesting that deference to a trial court's factual determinations is only called for if credibility is involved.

¹⁶ The Respondents are compelled to point out that none of the Washington decisions issued since 1959, which continue to state that trial court findings involving no issue of credibility should be reviewed *de novo*, have addressed how such a standard can be reconciled with the Washington Supreme Court's 1959 landmark decision in *Thorndike v. Hesperian Orchards, Inc.*, in which the Supreme Court held that "the constitution does not authorize this court to substitute its finding for that of the trial court." 54 Wn. 2d 570, 575, 343 P.2d 183 (1959). A *de novo* standard of review necessarily represents the assertion of a right on the part of an appellate court to re-weigh the evidence and to substitute its judgment for the trial court's on matters of fact, which the Supreme Court ruled *constitutionally impermissible* in *Thorndike*.

The decision whether to appoint a special master to assist the court in the investigation of the facts is reviewed for abuse of discretion. *Delany v. Canning*, 84 Wn. App. 498, 507, 929 P.2d 475 (1997); *In re Welfare of Angelo H.*, 124 Wn. App. 578, 588, 102 P.3d 822 (2004). A trial court also has discretion regarding whether to remove a trustee or personal representative. *In re Estate of Beard*, 60 Wn.2d 127, 132, 372 P.2d 530 (1962) (citing *State ex rel. Carlson v. Superior Court*, 47 Wn.2d 429, 287 P.2d 1012 (1955)) (affirming removal of estate trustee) (appellate courts “ordinarily will not interfere” with the exercise of removal power, so long as that exercise is based on a valid ground and supported by the record). More generally, it has long been recognized that a trial court presiding over a probate matter may also exercise its equitable powers, *see Sloan v. West*, 63 Wash. 623, 628, 116 P. 272 (1911), and courts acting in equity have broad authority to fashion remedies in order to do substantial justice to the parties and bring litigation to a close. *See Carpenter v. Folkerts*, 29 Wn. App. 73, 78, 627 P.2d 559 (1981), citing *Esmieu v. Hsieh*, 92 Wn.2d 530, 535, 598 P.2d 1369 (1979).

In addition, this case implicates the legislative grant under TEDRA of broad powers to trial courts, and that grant argues for “significant deference” by appellate courts when reviewing trial court decisions made under the authority of that act. *In re Estate of Fitzgerald*, 172 Wn. App. 437, 447-48, 294 P.3d 720 (2012). This deferential standard of review extends to a trial court’s award of attorney’s fees under the act, which will only be reviewed for an abuse of discretion. *In re Estate of Evans*, 181

Wn. App. 436, 451, 326 P.3d 755 (2014) (citation omitted). In turn, an abuse of discretion may only be found where the trial court's decision rests on untenable or unreasonable grounds. *Id.*

B. The Trust and Estate Dispute Resolution Act, RCW Chapter 11.96A, governs this dispute.

- 1. TEDRA provides the superior court with broad authority to employ the means necessary and appropriate to resolve the disputes over the administration of the estate.**

“The Trust and Estate Dispute Resolution Act [“TEDRA”] gives broad authority to the courts to administer and settle all estate and trust matters.” *Foster*, 165 Wn. App. at 46, citing RCW 11.96A.020 & RCW 11.96A.060. The purpose of TEDRA is to “set forth generally applicable statutory provisions for the resolution of disputes and other matters involving trusts and estates in a single chapter under Title 11 RCW.” RCW 11.96A.010. TEDRA provides superior courts with the “*full and ample power and authority* under [Title 11 RCW] to administer and settle: (a) *All matters concerning* the estates . . . of deceased persons[.]” RCW 11 96A.020(1) (emphasis added). Even in circumstances where RCW Title 11 is “insufficient” with reference to any estate matter, the “court nevertheless has full power and authority to proceed with such administration and settlement in any manner and way that to the court seems right and proper, to the end that the matters be expeditiously administered and settled by the court.” RCW 11.96A.020(2).

Thus, under TEDRA, the superior courts may, in addition to probating a will, appointing personal representatives, and administering estates, “order and cause to be issued all such writs and any other orders as are proper and necessary; and do all other things proper or incident to the exercise of jurisdiction under this section.” RCW 11.96A.040(3).

TEDRA further allows the court to:

...make, issue, and cause to be filed or serve, *any and all manner and kinds of orders*, judgments, citations, notices, summons, and other writs and processes *that might be considered proper or necessary in the exercise of the jurisdiction or powers given or intended to be given by this title*.

RCW 11.96A.060 (emphasis added). In sum, TEDRA provides the superior court with broad authority to administer the estate.

2. **The dispute over removal of Steven as the personal representative and his required reimbursement of the estate falls within the definition of a “matter” subject to RCW Chapter 11.96A, and were in fact litigated -- and properly so -- under TEDRA.**

TEDRA allows “any party” to “have a judicial proceeding for the declaration of rights or legal relations with respect to any matter, as defined by RCW 11.96A.030.” RCW 11.96A.080(1). “Matter” is broadly defined to include an “issue, question, or dispute involving . . . (c) [t]he determination of any question arising in the administration of an estate[.]” RCW 11.96A.030(2). The present proceedings, involving removal of a personal representative and reimbursement of the estate,¹⁷ fall within the

¹⁷ Looking at the individual motions involved in these proceedings, it is clear that *all* came within the superior court’s TEDRA jurisdiction: Steven’s motion for “instructions” came under the superior court’s TEDRA jurisdiction, *see* RCW 11.96A.020(1)(b), as did
(Footnote continued next page)

“any matter” definition from RCW 11.96A.030, which makes this a TEDRA proceeding subject to Chapter 11.96A.

Steven argues that TEDRA was never invoked because RCW 11.96A.090 requires that a “judicial proceedings under this title must be commenced as a new action.” However, the version of RCW 11.96A.090 containing that directive did not apply in March 2013, which is when the superior court regained jurisdiction over the probate by ordering, in response to Steven’s motion for instructions, that “[a]ny sale of an Estate asset to Steven Johnson, Gail Johnson or any related person shall be contingent upon the court’s approval of the proposed sale terms prior to closing[.]” CP 168; *see In Re Estate of Ardell*, 96 Wn. App. 708, 716, 980 P.2d 771 (1999) (court’s jurisdiction over nonintervention probate proceedings invoked when the court is called to examine the administration of the estate). In March 2013 former RCW 11.96A.090 (2000) applied, providing that “[a] judicial proceeding under [Title 11 RCW] may be commenced as a new action *or as an action incidental to* an existing judicial proceeding relating to the same trust or estate or nonprobate asset.” *See* Former RCW 11.96A.090 (2000); Laws of 1999, ch. 42, § 302. The dispute over the valuation of Forest Park Estates was an action incidental to the existing judicial proceeding relating to the same estate; the superior court’s TEDRA jurisdiction therefore was invoked

the motion for an accounting, RCW 11.96A.020(1); the motion to remove the personal representative, RCW 11.96A.030(2)(c)(ii) the motion to approve the accounting, RCW 11.96A.030(2)(c)(iv), the motion to confirm the special master’s report, RCW 11.96A.040(1) & .060, and the attorney fee motions. RCW 11.96A.150.

when it resolved that dispute, and it remained invoked to resolve the disputes that would follow related to the administration of the estate.

Nor does the current RCW 11.96A.090 somehow prevent the court from adjudicating disputes that fall within the superior court's TEDRA jurisdiction, where the clerk – as was done here -- accepts the filings under an existing cause number without requiring payment of an additional filing fee. Where the clerk accepts the filing, the “clerk’s oversight in failing to collect his fee did not deprive the court of jurisdiction.” *See In re Crane’s Estate*, 15 Wn. App. 161, 164, 548 P.2d 585 (1976) (holding that the court had jurisdiction notwithstanding that the county clerk had statutory authority to refuse to file petition to revoke will).

In any event, any error resulting from the failure to file a separate action was harmless where it did not prejudice Steven -- he received notice of the beneficiaries’ motion and had an opportunity to, and did, defend. *See McWhorter v. Bush*, 7 Wn. App. 831, 833, 502 P.2d 1224 (1972) (holding that failure to file separate civil actions with the required filing fees was harmless where the opposing party was not prejudiced by filing of creditor claims in the existing probate). And had a new action been filed, it could have been consolidated with the existing proceedings under RCW 11.96A.090(3), further making any error harmless.

Finally, Steven waived any claim of error involving the application of TEDRA when he failed to object (assuming he had any basis to object) to the beneficiaries filing their motions under the same cause number he used in his motion for “instructions” and his later motion for an order

approving the interim report. In sum, this case was litigated -- and properly so -- as a TEDRA matter: by the Respondents' count, chapter 11.96A RCW was cited on no fewer than 45 pages of the clerk's papers.¹⁸

3. The superior court provided Steven with numerous hearings before removing him as personal representative.

Steven complains that he was not afforded a hearing, citing to RCW 11.68.070. *See* Opening Brief at 37-38. RCW 11.68.070, however, does not specify *what kind* of hearing must precede a personal representative's removal, and Steven was afforded the benefit of *a series* of hearings before the trial court ultimately removed him as personal representative. First, the court held hearings on May 2 and May 23, 2014, before deciding to fully revoke Steven's non-intervention powers and postpone the decision on whether to remove Steven to await the outcome of the special master's investigation. Then, following receipt of the special master's report, the court held additional hearings, on October 3

¹⁸ TEDRA provisions were most often cited in the proceedings below as authority related to the award of attorney fees, *see, e.g.*, CP 192 (RCW 11.96A.150 invoked as basis for award of fees) and CP 609 (TEDRA provisions invoked by Steven as basis for not awarding fees). TEDRA provisions were also invoked: as authority to order Steven to provide an accounting, CP 186 (citing RCW 11.96A.060); as authority in support of Steven's motion for an order approving his interim report, CP 1298; as authority for the proposition that the court has subject matter to enter judgment, CP 2151-52 n. 5; by Steven as authority for the proposition that the court may hold a jury trial at its discretion under RCW 11.96A.170, CP 2219; as authority for the appointment of a special master, CP 2229; as authority for the proposition that a probate proceeding is a special proceeding under TEDRA (11.96A.090), CP 2267; and finally as authority for the proposition that a superior court has broad powers to administer and settle estates, CP 2299 (citing 11.96A.020).

and November 7, 2014, before ultimately removing Steven as personal representative.

Steven assumes that he could not be removed as personal representative without an evidentiary hearing, but that is not the law. The superior court was within its discretion to make findings supporting the removal of Steven as the personal representative without hearing oral testimony at those hearings. *See Foster*, 165 Wn. App. at 54-55 (holding that in the probate setting “[i]t is not necessary that the court hear oral testimony in order to make findings”); RCW 11.96A.100(7) (“Testimony of witnesses may be by affidavit”). Moreover, as described more fully in the Counterstatement of the Case (Section II.H), the trial court gave Steven the opportunity to identify what issues of fact warranted an evidentiary hearing, and Steven could not do so – indeed, ultimately *he refused to do so*.¹⁹ In sum, there is no support for Steven’s claim that the superior court did not hold any required hearing before removing him as personal representative.

¹⁹ Here is the final exchange at the final hearing on this point, between the trial court and counsel for the personal representative (previously set forth in Section II.H of this brief): (1) the court: “What fact are you going to tell me that is different? . . . I haven’t seen anything that says, this is what is different[.]” VRP (11/7/14) 152-53; (2) counsel for the personal representative: “If this is brought before the court in a proper manner, that’s what we’ll provide.” VRP (11/7/14) 152-53; the court: “***This has been your opportunity to do all of that.***” VRP (11/7/14) 153 (emphasis added).

C. The superior court did not err by ruling that Steven breached his fiduciary duties and should be removed as personal representative.

1. A personal representative owes a fiduciary duty to the beneficiaries and may be removed for breach of that duty.

A personal representative shall “settle the estate . . . as rapidly and quickly as possible, without sacrifice to the . . . estate.” RCW 11.48.010. While the privileges and powers of a personal representative under a nonintervention will may be altered by the testator, “a personal representative may not be relieved of the duty to act in good faith and with honest judgment.” RCW 11.68.090(2). A personal representative of an estate has a fiduciary relationship with the estate’s beneficiaries and owes a duty to “exercise the utmost good faith and diligence in administering the estate in the best interests of the heirs.” *In re Estate of Larson*, 103 Wn.2d 517, 521, 694 P.2d 1051 (1985); *see also In re Estate of Ehlers*, 80 Wn. App. 751, 761-62, 911 P.2d 1017 (1996) (“personal representatives owe a fiduciary duty to the heirs of the estate and must conform to the law governing trustees.”); *Allard v. Pacific Nat’l Bank*, 99 Wn.2d 394, 403, 663 P.2d 104 (1983) (“The trustee owes to the beneficiaries . . . the highest degree of good faith, care, loyalty and integrity.”). Personal representatives “must refrain from self-dealing, administer the estate *solely* in the interest of the beneficiaries, and uphold their duty of loyalty to the beneficiaries.” *In re Estate of Jones*, 152 Wn. 2d 1, 21, 93 P.3d 147 (2004) (emphasis added). The personal representative’s fiduciary duty includes the responsibility to “inform the beneficiaries fully of all facts

which would aid them in protecting their interests.” *Allard*, 99 Wn.2d at 404. “A conflict of interest arises in estate matters whenever the interest of the personal representative is not harmonious with the interest of an heir.” *Trask v. Butler*, 123 Wn.2d 835, 844, 872 P.2d 1080 (1994).

The statutory grounds for removing a personal representative are well-established:

Whenever the court has reason to believe that any personal representative has wasted, embezzled, or mismanaged, or is about to waste, or embezzle the property of the estate committed to his or her charge, or has committed, or is about to commit a fraud upon the estate, or is incompetent to act, or is permanently removed from the state, or has wrongfully neglected the estate, or has neglected to perform any acts as such personal representative, or for any other cause or reason which to the court appears necessary, it shall have power and authority, after notice and hearing to revoke such letters

RCW 11.28.250. The “principle of removing a personal representative for unfaithful conduct or other grounds has remained constant since at least 1915.” *In re Estate of Jones*, 152 Wn.2d 1, 8 n.1, 93 P.3d 147 (2004). “A court has a ‘wide latitude of discretion’ to remove the trustee, ‘when there is sufficient reason to do so to protect the best interests of the trust and its beneficiaries.’” *In re Estate of Cooper*, 81 Wn. App. 79, 94-95, 913 P.2d 393 (1996), quoting *Schildberg v. Schildberg*, 461 N.W.2d 186, 191 (Iowa 1990); see also *In re Estates of Aaberg*, 25 Wn. App. 336, 339, 607 P.2d 1227 (1980) (the superior court has broad discretion to remove an executor where its grounds are valid and supported by the record), citing *In re Estate of Beard*, 60 Wn.2d 127, 372 P.2d 530 (1962).

2. **Substantial evidence supported the superior court’s May 23 rulings that Steven breached his fiduciary duties and should no longer have nonintervention powers.**
 - (a) **Steven waived any assignment of error to the findings made on May 23 as to whether they are supported by substantial evidence.**

While Steven assigned error to the adverse findings made on May 23, he does not argue that the findings to which he assigned error were unsupported by substantial evidence.

It is well-established that the failure to argue assignments of error to findings of fact waives the assignment of error to those findings. *E.g.*, *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (where an appellant assigns error to a finding of fact but “present[s] no argument in their opening brief the assignment of error is waived” (citation omitted)); *Dickson v. U.S. Fid. & Guar. Co.*, 77 Wn.2d 785, 787, 466 P.2d 515 (1970) (“[W]e do not reach the assignment of error that the trial court was wrong in its finding that Mr. Comfort was an agent of the defendant. Defendant did not argue or discuss this assignment of error in its opening brief; so we consider the assignment abandoned. Contentions may not be presented for the first time in the reply brief.” (citations omitted)). Steven argues there is no record to review for substantial evidence, but that plainly is not correct. The parties submitted extensive declarations and exhibits before the May 23, 2014 hearing -- 1,930 pages of pleadings and declarations -- and the court held a

hearing on that record which itself was reported. Nor does Steven explain why this record is insufficient to support the trial court's May 23 findings.

Steven also argues that the superior court erred when it entered findings on issues the special master was to investigate. TEDRA, however, expressly allows the superior court to make partial resolutions of the issues and to "resolve such issues as it deems proper[.]" RCW 11.96A.100. In any event, as will be demonstrated below, the findings were supported by substantial evidence even before the special master's investigation, the results of which primarily served to confirm the findings made on May 23. *See* VRP (11/7/14) 147-49 (superior court stating that "there is nothing different after doing all of that than what we thought at the beginning of all of this.").

(b) Steven breached his fiduciary duty by using the estate's funds in an unauthorized manner that benefitted his own interests.

After the May 23, 2014 hearing, the superior court made the following findings in support of its order revoking Steven's non-intervention powers:

11. Steven Johnson had no authority to incur obligations on behalf of Seven Js because he was not the general partner, and such actions were improper.

12. Steven Johnson had a conflict of interest in making personal loans to Seven Js following the Decedent's death and attempting to recover those loans from the estate.

* * * *

15. Steven Johnson has a conflict of interest with the Estate in the payment of \$85,096.69 from the Estate to himself in August, 2012.

* * * *

17. Steven Johnson inadequately managed Seven Js as personal representative of the Estate and has been unable to accurately account for Seven Js or the Estate.

18. Steven Johnson breached his fiduciary duties to the Estate and its beneficiaries as a result of his conflicts of interest [and] self-dealing.

CP 1937-38.

Those findings are supported by substantial evidence, including the facts established by findings which have not been challenged in this appeal. For example, Steven admitted in his January and April 2014 declarations that he loaned Seven Js money and services after the death of the general partner and paid himself \$85,096 from the estate as repayment of those loans. CP 701-02; CP 1615-25. Moreover, under the partnership agreement for Seven Js the death of its general partner terminated the partnership, which in turn meant that the partnership's affairs should have been wound up upon Mrs. Johnson's death. CP 1721; CP 1936 (unchallenged findings no. 5 & 6 from the May 23, 2014 order). Yet Steven admitted that he caused the estate to fund Seven Js operations long after the partnership had been dissolved. CP 701-02; CP 1615-25.

Steven's admissions also show his conflict of interest. Steven stood to lose a \$300,000 investment should Seven Js cease operations. CP 702, 1624. Using estate funds to keep the partnership from defaulting on the marina loan bought time for the effort to acquire his sister Judy's

partnership interest, and also meant Steven could continue to collect fees for managing the marina. CP 1616-21. These were obvious benefits to Steven, and just as obviously of no benefit to the estate and the other beneficiaries.

Steven claimed that his use of estate funds to support Seven Js was an “investment” toward mitigating the estate’s potential liability. CP 1876. There was no authority, however, for Seven Js to have issued binding promissory notes to Steven -- the partnership had no mechanism to incur debt or execute the promissory note without its general partner. *See* CP 1723-24, 1726 (providing that the “General Partner shall have the exclusive right and power to manage and operate the Partnership” and providing the general partner with the authority to enter into agreements to borrow money and prohibiting limited partners, such as Steven, from acting on behalf of the partnership). Further, the estate could not have been liable for any post-dissolution debts purportedly incurred by Seven Js because it was not a general partner of Seven Js when the promissory notes issued. Had the claims accrued in Steven’s favor before Mrs. Johnson passed away, he would have had an obligation, as the personal representative, to petition the court for allowance or rejection of the claim. *See* RCW 11.40.140. And had Steven filed a creditor claim against the estate for the money he claimed he was owed on the promissory notes, the claim should have been denied because (as explained) the obligations were not proper estate liabilities. That Steven instead unilaterally honored his

unenforceable “claim” against the estate to his benefit establishes that he breached his fiduciary duty to the estate.²⁰

3. **The special master’s report was consistent with the superior court’s understanding of the facts and provided further evidentiary support for the superior court’s November 7, 2014 findings and decision to remove Steven as the personal representative.**

While the superior court would have been justified in removing Steven as the personal representative after the May 23 hearing, it waited until the special master’s reports confirmed the superior court’s earlier findings. After the special master’s second and corrected reports, and the submission of additional declarations and exhibits by the parties, the superior court entered findings on November 7 that Steven used estate funds to pay for legal services that only benefited him and his wife (CP 2239), that the estate had no obligation to repay the promissory notes from Steven and his wife to Seven Js (CP 2239-40), that Steven went outside of his authority as the personal representative in managing Seven Js (CP 2240), and that Steven personally benefited from services provided by the Davies Pearson law firm. CP 2241.²¹ The superior court once again concluded that Steven breached his fiduciary duties. CP 2242.

²⁰ All of these facts also support the trial court’s related finding that Steven mismanaged estate funds, by the promissory note payments to himself and by his application of estate funds to a partnership he should have dissolved.

²¹ As with the May 23 findings, Steven abandoned any assignment of error to the November 7 findings to the extent Steven claims they were not supported by substantial evidence, because he failed to argue in support of any such claim. *See, e.g., Dickson*, 77 Wn.2d at 787 (failure to argue assignments of error results in abandonment of the issue on appeal).

Accordingly, the superior court removed Steven as the personal representative. CP 2242. The superior court found the issue to be straightforward: “I mean, he was spending money when he wasn’t authorized to do it as a matter of law.” VRP (10/3/14) 120.

The special master’s report, in addition to the other evidence already before the court, supports those findings. Specifically, the special master reported that Steven “transferred funds from the Mildred Johnson probate estate account into the Seven J’s account to keep obligations current.” CP 2050. Steven explained to the special master that the “series of disbursements totaling \$85,096.60 initially recorded on the [estate] ledger as a payment to Seven J’s” was in fact a reimbursement to himself “for loans made by him to Seven J’s as well as payment for delayed management fees.” CP 2050. The special master reported that Steven’s goals for using the estate’s money toward Seven Js did not further the beneficiaries’ interests, and that there were other factors in play besides saving the estate from potential liability on Mrs. Johnson’s personal guarantee. CP 2052-53, 2055, 2192-93. For example, Steven continued making mortgage payments to the bank even after the expiration of the 24 month creditor claim period in November 2011 -- actions which are inconsistent with a motive of mitigating estate liability by preventing the bank from noticing the event of default. CP 2053, 2192-93.

The special master also recommended the following findings for the superior court: that the legal advice Steven received from Mark Roberts, paid out of estate funds, related to Steven’s entitlement to

reimbursement from the estate for his loans to Seven Js, inured to Steven's benefit alone, CP 2053; that Steven failed to adequately document a \$4,000 transaction on November 17, 2012, CP 2056; and that half of the fees paid by the estate to Davies Pearson for professional time spent on the Forest Park Estates and Seven Js issues benefitted Steven personally and not the estate, CP 2061-62, 2191. The special master's reports thus provide additional substantial evidence that fully support the conclusion that Steven should be removed as the personal representative.

4. **Steven failed to preserve any claim of error as to the trial court considering the special master's report as evidence, because Steven did not object to the procedure followed by the special master -- and in fact, endorsed and cooperated with it -- until it became clear that the special master would not absolve him.**

Steven had no objections to the special master's role and duties when he originally thought the special master's investigation would ultimately clear him. *See* VRP (5/2/14) 31. In fact, he requested that the court defer to the results of the special master's investigation in place of its May 23 findings. *See* CP 1954. During the hearing on Steven's motion for reconsideration in part of the May 23 order, counsel for the personal representative stated that the special master's investigation, which counsel described as akin to a fact-finding forum, was "perfectly fine[.]" a position that was not lost on the court: "Mr. Johnson concedes that the appointment of former Commissioner Watness is a good thing." VRP (6/13/14) 49-50,

61.²² Nor did Steven object to the role of the special master during his investigation, either to the court or the special master. *See* VRP (7/25/14) 69; CP 2040 (special master report), 2085 (letter from counsel for the personal representative declining to make a distribution of estate assets until the special master completes his review).

Counsel cannot remain silent as to claimed errors and later, if the determinations are adverse, object on appeal. *See City of Seattle v. Harclan*, 56 Wn.2d 596, 597, 354 P.2d 928 (1960). Here, counsel for the personal representative did more than remain silent: she agreed that the special master’s fact-finding investigation was “perfectly fine.” VRP (6/13/14) 49-50. To the extent there was error in appointing the special master to conduct the tasks outlined by the court, the personal representative invited the error. “Under the invited error doctrine, a party may not set up an error at trial and then complain of it on appeal.” *Grange Ins. Ass’n v. Roberts*, 179 Wn. App. 739, 774, 320 P.3d 77 (2013), *review denied*, 180 Wn. 2d 1026 (2014), citing *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 723, 10 P.3d 380 (2000). “The doctrine applies when a party takes affirmative and voluntary action that induces the trial court to take an action that party later challenges on appeal.” *Id.*

²² Later during that same hearing counsel for the personal representative objected to the trial court having entered findings adverse to Steven without first conducting an evidentiary hearing. *See* VRP (6/13/14) 63. That counsel had moments before praised the special master’s investigation as “akin to a fact-finding procedure or some mechanism by which there can be an analytical consideration of all of this voluminous material to determine what benefit to the estate the acts of Mr. Johnson have presented as well as any harm should there be any”(*id.* at 50) is at odds with Steven’s present objection to the special master procedure itself.

Steven never asked the trial court during the course of the special master's investigation to clarify the special master's role, the procedures the special master was entitled to employ, or the evidentiary standards he was to use -- for the obvious reason that Steven fully understood that role and had no quarrel with the process. Steven expected the special master's report to vindicate his conduct; it was only after the special master's report showed that the special master was not going to support Steven's actions that counsel for the personal representative became agnostic about the special master's role and procedures. Having cooperated with the special master's investigation, the personal representative should not be allowed to undercut the special master's conclusions by such a blatant after-the-fact attack on the manner in which the special master carried out his responsibilities.

5. The special master's appointment conformed to the requirements of ER 706.

ER 706 "authorizes the court to appoint a special master to investigate facts on the court's behalf." 5B WASH. PRAC., EVIDENCE LAW AND PRACTICE § 706.3 (5th ed. 2015), citing *Delany v. Canning*, 84 Wn. App. 498, 929 P.2d 475 (1997); *In re Welfare of Angelo H.*, 124 Wn. App. 578, 588, 102 P.3d 822 (2004) ("ER 706 authorizes a court to appoint an expert both to testify and advise the court on technical matters when the facts presented are not clear to the fact finder."). *Delany* held that the superior court did not abuse its discretion by appointing an accountant to investigate the financial dealings of the parties and reconstruct the

partnerships' finances. 84 Wn. App. at 506. That is analogous to the special master's role here.

To the extent ER 706 is applicable,²³ *In re Cooper* supports the superior court's appointment of the special master. See 81 Wn. App. 79, 913 P.2d 393 (1996). There, the superior court appointed the manager of a bank's trust department as "special master/referee to assist [it] in resolving various disputes that [had] arisen in connection with [the Cooper] estate" and to "review what has transpired in connection with the assets." *Id.* at 85 (alterations in original; quoting from superior court order). The superior court denied a motion for discovery into the basis for the special master's opinions. *Id.* at 85, 95-96. The Court of Appeals found no error in the appointment of the special master or in the reliance on the report to support findings of fact, but held that it was error under ER 706 for the superior court to refuse the motion for discovery into the special master's opinions where the superior court used the report as evidence. *Id.* at 95-96. *Cooper* held that ER 706 and CR 26(b)(5) provide that the parties have the right to depose the expert and call him at trial. *Id.*

²³ Steven included in his belated attack on the special master's appointment and investigative procedure the suggestion that the special master had to be appointed either as a court expert under ER 706 or as a "referee" under RCW Chapter 4.48. VRP (10/3/14) 109-110; CP 2220. In fact, and as previously discussed, the special master was properly appointed under the trial court's broad TEDRA powers. The Respondents nonetheless will address the question of ER 706, if only to demonstrate that the trial court could properly have proceeded under the authority of that rule, as well. The Respondents will not address the "referee" issue, because that statute is plainly inapposite.

at 96 (the special master “was a witness and the trial court should have permitted discovery of his opinions and the reasons for them.”).²⁴

Cooper is applicable to the extent it supports the superior court’s reliance on a special master’s report as evidence in support of findings of fact. *Cooper* does not control the outcome of this case, however, because the personal representative *never moved for discovery* of the special master’s opinions. Thus, *Cooper*’s holding that it was err for the superior court to deny discovery does not apply. Nor was there any occasion for cross-examination in this matter, because (as previously stated) no live witness testimony was required under RCW 11.96A.100(7), which provides that the “[t]estimony of witnesses may be by affidavit.” *Accord Foster*, 165 Wn. App. at 54-55 (holding that it is not necessary in a probate setting “that the court hear oral testimony in order to make findings”). While there was no trial or evidentiary hearing required in this matter, the recommended findings in the special master’s report were open to challenge by the personal representative in opposition to the beneficiaries’ motion to confirm, but the personal representative could muster no such attack on recommended findings nor explain to the superior court what specific factual errors the special master made, if any.

All other requirements of ER 706 were satisfied. There was a hearing before the expert was appointed. The parties submitted

²⁴ The court also held that the error was harmless where the special master’s opinions were fully disclosed and where there was cross-examination at trial related to the subject matter of the special master’s report. *Id.* at 97

nominations for their expert of choice. The superior court made its own selection for special master from the names nominated by the parties. The superior court informed the witness of his duties in writing. CP 1937, 1940. Finally, the special master advised the parties of his findings. In any event, the superior court is provided broad powers under TEDRA to make “any and all manners and kinds of orders . . . that might be considered proper and necessary[.]” RCW 11.96A.060. Accordingly, the superior court did not err by relying on the special master reports, to the extent that Steven did not waive his claim of error by waiting until an adverse decision from the special master before challenging his appointment.

D. The superior court’s findings as to the amounts Steven should reimburse to the estate to make it whole were supported by substantial evidence.

Steven does not challenge a superior court’s authority to order reimbursement to make an estate whole as a result of a breach of fiduciary duty; instead, he faults the trial court for not making an equitable reduction in the amount of money the special master determined would make the estate whole. Opening Brief, at 39-40.

The superior court has the authority to order reimbursement as a make whole remedy for breach of fiduciary duty. *See* RCW 11.96A.020 (providing the court with full and ample power and authority to settle and administer all matters concerning estates in a manner and way that “to the court seems right and proper”); *Gillespie v. Seattle-First Nat. Bank*, 70 Wn. App. 150, 173, 855 P.2d 680 (1993) (make whole remedy arising in

trust context).²⁵ The court may place the estate in the same position as if the personal representative had never breached his fiduciary duties. *See Gillespie*, 70 Wn. App. at 173 (trust case), citing *Allard v. First Interstate Bank of Washington, N.A.*, 112 Wn.2d 145, 152, 768 P.2d 998, amended 773 P.2d 420 (1989); *see also Baker Boyer Nat'l Bank v. Garver*, 43 Wn. App. 673, 686, 719 P.2d 583 (1986) (finding make whole remedy appropriate in breach of trust case).

By the time of the November 7 hearing, the special master's reports confirmed the court's initial understanding of the underlying transactions and provided substantial evidentiary support for the amounts of the reimbursements. The largest issue for the special master was to investigate whether Steven should reimburse the estate for the \$85,096.09 he paid to himself from the estate, and if so, in what amount. CP 1937, 1940; VRP (5/23/14) 39. Among other topics, the special master was assigned to investigate the estate funds paid to Seven Js and the amount of funds overall that should be paid back to the estate. CP 1940.

The special master confirmed that the estate paid \$85,096.09 to Steven in repayment for loans that were not an estate liability and that he should repay that amount to the estate, CP 2050-51, supporting the order for reimbursement in that amount. CP 2239-40, 2243. The special master also confirmed that Steven caused the estate to make \$57,171.56 in

²⁵ The fiduciary duty owed to trusts is the same as the duty owed by personal representatives to the estate, *see In re Estate of Ehlers*, 80 Wn. App. 751, 761-62, 911 P.2d 1017 (1996), meaning that the remedy for breach should also be the same.

unauthorized transfers to Seven Js, CP 2050, and the court ordered reimbursement in that amount. CP 2239, 2242. There was no dispute that those transactions, which Steven considered “investments” on the part of the estate, took place, and the evidence documenting those transaction was before the superior court and described in Steven’s declarations. *See* CP 701-02, 1623, 1876.

As to other issues of reimbursement, none of which Steven specifically challenges on appeal, the special master determined that \$9,306.50 of the attorney fees incurred by the estate through its law firm of Davies Pearsons, and the \$2,925.00 paid to attorney Mark Roberts, benefitted Steven alone and should be reimbursed. CP 2053-54, 2062. *Accord* CP 2243. The special master also found there was an unsubstantiated expenditure of \$4,000 from the Seven Js account that should be reimbursed to the estate. CP 2056. *Accord* CP 2243. Finally, the court’s award of \$21,337.23 as special master fees was supported by the 50 hours of professional time spent by the special master to complete the investigation. *See* CP 2062. *Accord* CP 2243. Although Steven complained that he did not understand the basis for the special master’s authority, he deduced that ER 706 could have been implicated, CP 2219 yet there was no motion to strike the special master’s report. In fact, Steven cited to the favorable provisions from it, waiving any challenge to the superior court’s reliance on the report as substantial evidence to support its findings. CP 2216-17.

There is no basis for Steven's claim that the superior court abused its discretion by deciding against reducing the amount of the award recommended by the special master. As the court saw the issue, there could have been a small window in time, very early in Steven's administration of the estate, where the funding of Seven Js with estate assets might have been appropriate, and the special master's investigation would assist the court in making a determination on that issue. VRP (5/2/14) 26 & (5/23/14) 38; CP 1937. The special master did not find any authorization for the expenditures to the partnership that should have been wound up. CP 2049. The special master also found that Steven's actions were better explained by factors other than his interest in saving the estate from liability, because if saving the estate from liability was his true motivation there still would be no explanation for his continuing to fund Seven Js *after the 24 month creditor claim period had expired*. CP 2053. And if his intent was to continue paying the mortgage until the expiration of the creditor claim to keep the bank from noticing the condition of default, there was no longer any basis for the subterfuge after the bank received actual notice of the condition of default -- from the law firm acting on behalf of the personal representative -- in March 2011, *eight months before the creditor claim period had expired*. CP 1932.

Steven protested to the special master in his request for reconsideration that his actions were intended to benefit the estate by mitigating the estate's potential liability from Mrs. Johnson's personal guaranty for the bank's loan to Seven Js. CP 2118-19. The special master

responded that Steven’s strategy for dealing with the bank did contribute to the bank’s “inexplicable failure” to make a creditor claim before November 9, 2012. CP 2192. However, that did not provide authority for Steven to incur and honor obligations to himself on behalf of a partnership that should have been wound up long before those obligations were incurred. As the special master found, Steven failed to explain “what law authorized or required him as the Personal Representative to use probate Estate funds to continue Marina operations under the partnership. He asserts that he relied on advice of legal counsel . . . but he has not demonstrated what authority existed for that advice.” CP 2193. At the very least, and as the special master found, Steven should have sought the court’s instruction, with notice to the beneficiaries, for a plan to keep Seven Js from default. CP 2193.

Moreover, the special master ultimately *deferred to the superior court* to decide whether Steven had a duty to make the transfers during the 24 month period before the expiration of all potential creditor claims, in which case at least \$31,000 or as much as \$41,000 of the amount transferred from the estate might be excused from reimbursement. CP 2193. This fact alone conclusively rebuts any suggestion that the court improperly delegated its role to the special master, and shows that the special master did not overstep his bounds in explaining the results of his investigation and making recommended findings.

The fundamental problem for Steven was not his subjection by the court to an improper process, but his chronic inability to offer a legally

compelling justification for his actions. While Steven repeatedly insisted that his use of estate funds were justified under the circumstances, CP 2125-46, he never provided the court with the authority that could have supported his *ultra vires* use of the estate funds or that would have entitled him to an offset against the recommended amount of reimbursement. Steven was not denied due process -- he had the opportunity to explain his actions, an opportunity he took full advantage of by filing a supplemental declaration as part of his October 1 response to the special master report. CP 2127-46.²⁶ He could also have filed a declaration with the court responding to the special master's October 16 clarifications and explaining what law authorized or required him to use estate funds to continue marina operations under the Seven Js partnership, but he did not do so -- presumably because he had no support for such a response. In sum, the superior court acted within its discretion as a court sitting in equity, when it refused to provide an equitable exception to Steven's otherwise unauthorized use of estate funds.

E. The superior court did not err in awarding or determining the amount of attorney fees to award to the beneficiaries.

The fees incurred by the beneficiaries in removing Steven and obtaining reimbursement for the estate did benefit the estate. The amounts

²⁶ Oddly, Steven in this submission repeated his assertion that the bank was "certain" to have filed a creditor claim had it been given actual notice, CP 2134, even though that argument rests on the false premise that no notice was given, and Steven's lawyers had previously admitted in open court that their billing records showed they did in fact give notice to the bank in March 2011. See VRP (5/23/14) 42-43; CP 1931-33.

were supported by the billing records. There is no basis to conclude the court abused its discretion in determining the amount of the award.

The original attorney fee award in the amount of \$48,511.15 was reduced to a judgment on October 3, 2014. CP 2185. That judgment would later be amended on November 7, 2014, to include the following additional attorney fees: \$35,891.80 in fees incurred by the beneficiaries through October 3, 2014; \$1,686.00 in fees incurred by the beneficiaries between October 4, 2014, and October 20, 2014; and estimated attorney fees through the date of the hearing in the amount of \$4,350, for a total of \$90,438.95. CP 2232. *See also* CP 2241-43.

RCW 11.96A.150(1) provides the basis for the fee awards to the beneficiaries. It states that the superior court may, in its discretion, “order costs, including reasonable attorneys’ fees, to be awarded to any party . . . [f]rom any party to the proceedings . . . in such amount and in such manner as the court determines to be equitable.” “In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.” RCW 11.96A.150(1). As has been shown, TEDRA applied generally to this matter, but even if it did not generally apply, RCW 11.96A.150(2) provides that the fees provision of TEDRA applies to “all proceedings” governed by RCW Title 11. In addition, RCW 11.68.070 provides for reasonable attorney fees to “be awarded as the court determines[.]” where

the court restricts the powers of the personal representative “in any manner[.]”

In re Estate of Jones provides that the personal representative/beneficiary of a will may be ordered to pay the other beneficiaries’ attorney fees personally where “the litigation was necessitated by his multiple breaches of fiduciary duty” to those beneficiaries. 152 Wn.2d 1, 20–21, 93 P.3d 147 (2004); *see also Gillespie*, 70 Wn. App. at 177–78 (even absent bad faith or self-dealing, attorney fees equitably assessed against the trustee where, but for its breach of fiduciary duty, the beneficiaries would not have needed to incur the fees). There can be no reasonable dispute about the authority of the trial court to have awarded fees where Steven’s breach of fiduciary duties caused the beneficiaries to incur attorney fees in removing the personal representative and seeking reimbursement to the estate and where the actions of the beneficiaries provided a benefit to the estate.

Further, the amounts awarded were reasonable, especially where RCW 11.96A.150(1) provides the superior court with the broad authority to award fees in such amount “as the court determines to be equitable.” The beneficiaries’ requests for the attorney fees they incurred as a result of Steven’s breaches of fiduciary duty provided the superior court with substantial evidence, including declarations and billing records, in support of the fee awards. *See* CP 779-81, 1907-12, 1981-85,²⁷ 2077-93, as

²⁷ This fee request, relating to the motion for reconsideration of the May 23 order, was denied. CP 1996.

amended at CP 2155-74, 2211-2213. In sum, the trial court did not abuse its discretion, either as to its decision as to whether to award fees or in its decision as to the amount of fees to be awarded.

F. The superior court did not err in entering a judgment against Steven and the marital community.

The attorney fee judgment of \$90,438.95 was ultimately entered against Steven C. Johnson and the marital community comprised of Steven C. Johnson and Gail Johnson, husband and wife on December 29, 2014. CP 2309-11 (attorney fee award). A second judgment for \$179,836.89, embodying the reimbursement award and special master's fees, was ultimately entered against Steven C. Johnson and the marital community comprised of Steven C. Johnson and Gail Johnson, husband and wife. CP 2312-14 (reimbursement award and special master fees).

The trial court was well within its authority, under basic principles of community property law, to enter a judgment against the Johnson marital community, as well as Steven Johnson individually. *See La Framboise v. Schmidt*, 42 Wn.2d 198, 200, 254 P.2d 485 (1953) (holding that the form of the pleadings are “not determinative of the nature of the action, since an action against a married man is presumed to be against the community, and the wife need not be joined separately or independently, since she is represented in the action through her husband”). Under *La Framboise*, the community is liable for the torts of a spouse where the act constituting the wrong “results or is intended to result in a benefit to the community[.]” 42 Wn.2d at 200. As the trial court found, the marital

community benefitted from Steven's breach of fiduciary duty as personal representative. *See* CP 995-1004, 1275-83 (showing that Steve and Gail Johnson funded the marina operated by Seven Js and that the related promissory notes repaid by the estate were issued to Steven and Gail Johnson). *Accord* CP 2305 (trial court findings).²⁸

Steven also argues that Gail Johnson should not have been held individually liable. *See* Opening Brief at 49. The beneficiaries' successful motion for reconsideration asked only that the judgments be amended so that they would be against Steven and the marital community. Supp CP 2374-2382 (motion for reconsideration). The judgment summary of the amended reimbursement judgment, although not the amended judgment itself, erroneously states that this judgment is against Steven, the marital community, *and Gail Johnson individually*. CP 2312. The Respondents would not oppose a motion under CR 60 to amend this judgment summary to conform to the language of the amended judgment.

G. This Court should award the beneficiaries their fees on appeal under RAP 18.1.

There is no basis for awarding Steven his attorney fees under RAP 18.1 if he does not prevail on appeal. And if he does prevail on appeal, there is no equitable basis for awarding him his fees on appeal where the matter is remanded to the trial court for further proceedings. Any award

²⁸ *La Framboise* also held that the community is liable where the acts constituting the wrong were committed in the management of community property. 48 Wn.2d at 400. Here, the breach of fiduciary duty was committed by Steven in the management of the community funds "loaned" to Seven Js.

of attorney fees in the event of such a remand should be reserved upon the ultimate determination of the issues, with consideration given to whether Steven's appeal provided any benefit to the estate.

RCW 11.96A.150(1) provides the basis for this Court to award the beneficiaries their costs, including reasonable attorney fees, incurred on appeal in such an amount "as the court determines to be equitable." The "court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved." *Id.* Here, the actions of the beneficiaries on appeal benefit the estate, by seeking to uphold the removal of a personal representative who breached his fiduciary duties to the estate, and the attendant award of reimbursement owing to the estate.

IV. CONCLUSION

This Court should affirm the decisions of the trial court, and award the beneficiaries their fees on appeal.

Respectfully submitted this 12th day of October, 2015.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 12th day of October, 2015.



Patti Saiden, Legal Assistant

CARNEY BADLEY SPELLMAN

October 12, 2015 - 10:34 AM

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