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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

THE COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

IN RE THE MATTER OF THE ESTATE OF DAN MCANALLY
AND THE RISTE TRUST

Darrell Riste,
the beneficiary of the Estate and the Riste Trust,

Appellant/Petitioner

v.

Baker Boyer Bank,
the Personal Representative of the Estate of Dan McAnally and
the Trustee of the Riste Trust

Appellee/Respondent

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Contrary to the Respondent(s) assertions this Appeal does not arise solely from a “Final Account and Petition for Distribution” which they erroneously alleged to concern only a Personal Representative and not a Trustee. (RB 4) Appellant(s) Petition below was a Petition to Remove **BOTH** the Personal Representative of the Estate of Dan McAnally and the Trustee of the Riste Trust. (CP 142-264) As such, there were two fiduciaries who’s actions were challenged by the Appellant(s) and two sets of fiduciary responsibilities which were at issue in the Superior Court’s ruling. (CP 142-264, 591-638) A Personal Representative has fiduciary obligation(s) to the Estate and/or the beneficiaries of the Estate. The beneficiaries of the Estate of Dan McAnally included in pertinent part Darrell Riste and the Trustee of the “purported” Riste Trust. The Trustee of the “purported” Riste Trust owned a fiduciary duty to administer the Riste Trust in accordance with the terms of the Riste Trust, in accordance with law and in the **SOLE** interests of the beneficiary(s) of the Riste Trust.

Contrary to the Respondent’s arguments in Brief (RB 26-27), the Riste Trust was invalid because it was not set forth by a written instrument other than a will and could not therefore be the lawful recipient of the purported testamentary gift to the Trustee of the Riste Trust as set forth by the Will in Section 6, “the residuary clause”. (CP 142-264) The purported gift to the Trustee of the Riste Trust failed to comply with the requirements set forth by the legislature within RCW 11.12.250. In order to effectuate a lawful testamentary gift by the Decedent’s Will to the Trustee of the Riste Trust the legislature required the Riste Trust to be set forth in a written instrument separate from a will. (RCW 11.12.250) Respondent’s and the Court below argued/admitted/found that the Riste Trust was not a separate written instrument from a will. (CP 1-638) As

such, a gift to the Trustee of the Riste Trust was not lawfully created by the Will. The failure of this purported gift causes the Riste Trust to be invalid due to a lack of funding. A valid Trust in the state of Washington cannot be created without any corpus or a lawful designation of corpus. (RCW 11.98.008, CP 635) The Superior Court erroneously found that a gift by a will to a trust did not require compliance with RCW 11.12.250. (CP 594 In 19-20, 602 In 11-13, 609)

The Personal Representative of the Estate of Dan McAnally and the Trustee of the Riste Trust have conflicting interest(s) which require removal. The court erroneously found that there was no conflict of interest(s) without making any findings regarding the Appellant(s) legal and factual allegations. (CP 142-264, 602 In 14-15, 609, AOB 34-40) The fiduciary(s) have duty(s) to two separate and distinct legal entities with separate and distinct beneficiaries. (Id.) The fiduciary(s) have both conflicting and/or impermissible personal interests. (Id.) For instance, the Personal Representative had a duty to challenge the validity of the Riste Trust which should not have legally been permitted to receive a gift of realty worth over \$1,700,000 because the Personal Representative's duty(s) are to the Estate and the Estate Beneficiary(s) not to the beneficiary(s) of the Riste Trust. (Id.) The PR had a fiduciary duty to take all viable legal measures to ensure that the Estate beneficiary(s) received what was lawfully devised which included denial of the gift to the Riste Trust and hence distribution to Darrell Riste outright. (Id.) Contrary to the PR's fiduciary duty(s), the Trustee of the Riste Trust had a competing interest in proving the Riste Trust valid because he owed a duty to the beneficiary(s) of the Riste Trust which included beneficiary(s) other than Darrell Riste. (Id.) If Baker Boyer Bank would have declined to act as either the PR or the Trustee of the Riste trust it would have been incumbent upon any other

fiduciary to challenge the gift and/or challenge denial of the gift as the case may be. However, Baker Boyer Bank acted in conflicting fiduciary capacities and failed to seek instruction from the court upon the validity of the Riste Trust or inform the beneficiary(s) of the potential invalidity of the Riste Trust. (Id.) It was alleged below that Baker Boyer Bank had a personal interest in the yearly Trustee fees that they would earn if the Riste Trust was valid (approximately \$20,000 per year for more than 60 years). (Id.) No findings were made by the Superior Court on this matter. (CP 591-638) Baker Boyer Bank was both the PR and the Trustee and breached their fiduciary duty(s) of loyalty, honesty, diligence, competence and/or good faith when they refused to disclose the invalidity to the beneficiary(s), withdraw as the fiduciary and/or challenge the validity of the Riste Trust. (Id.) Likewise, the PR had a duty to administer the Estate in an expeditious manner which was subverted by Baker Boyer Bank's personal interest in quelling the known objections of the beneficiary(s) to the sale of the RPLBEAB while still an asset of the Estate and unencumbered by the statutory requirements for "Non Routine" transactions which would be imposed upon the Trustee of the Riste Trust under RCW 11.100.140 as soon as it was transferred. (Id.) Baker Boyer Bank breached its fiduciary duty(s) by acting in this manner to sell the RPLBEAB while an asset of the Estate in order to avoid the statutory requirements of full disclosure imposed upon a Trustee by RCW 11.100.140. (Id.) The PR/Trustee and the Superior Court erroneously argued/found that since RCW 11.100.140 did not apply to a PR that there were no other independently applicable fiduciary duty(s) which required the PR to provide the Estate beneficiary(s) information necessary to protect their interests and to also close the Estate in an expeditious manner where a sale of the RPLBEAB was not necessary to pay debts or taxes of administration. (CP 591-638) The Superior Court's reasoning if it is allowed to

stand, creates an unconstitutional rule of law that no fiduciary duty(s) are owed to a beneficiary where the PR has been granted non intervention powers. (Id.) Contrary, to the Superior Court's findings a PR is still required to act with honesty, good faith, diligence, competence, integrity and in the interests of the beneficiary(s) regardless of any exemptions for "Non Routine" transactions provided by RCW 11.100.140(8). (CP 142-264, 591-638, AOB 1-48) Contrary, to the Respondent's arguments (RB 13) there are fiduciary duty(s) applicable to a PR (honesty, good faith, diligence, competence, integrity) for which they are not exempt unlike those exempted under RCW 11.100.140(8). (Id.) Likewise, there were also competing interests regarding the Trustee's duty to comply with mandatory monthly income payments to the beneficiaries as specified by the controlling instrument which were not being made despite there being an overabundance of funds available to make the required payments and a Trust Bank Account set up for that purpose. (CP 204, 210, 249-264) Likewise, the PR/Trustee was not authorized to distribute any funds from the Estate into the Riste Trust until he received an order of the Court closing the Probate but the PR/Trustee clearly distributed prematurely and/or commingled the Estate and Riste Trust assets. (See CP 204, 210, 249-264)

In addition to Respondent(s) erroneous legal arguments below the Respondent(s) have inappropriately and in violation of law raised facts and/or legal arguments not raised below in an impermissible attempt to persuade this court to rule on an improper basis. (RB 9-28) Specifically, the Respondent(s) have raised for the first time arguments in the following paragraphs of their Brief: C through I, K through M. (RB 9-28; see CP 1-638) Respondent(s) have also made untruthful statements to this court and should be held in contempt or otherwise reprimanded/sanctioned for such knowing fabrications. (See below Sec.

II) Respondent(s) have also inappropriately served copies of their Brief upon Appellant(s) former attorney's. (RB 29)

**II. UNTRUTHFUL FACTUAL STATEMENTS MADE BY THE
RESPONDENT(S) WITHIN THEIR BRIEF AND/OR FACTUAL
STATEMENTS IMPERMISSIBLY MADE FOR THE FIRST TIME ON
APPEAL**

The Respondent(s) again indicate (RB 4, 19) as they did below (CP 410 In 15-19) that a creditor's claim was filed by Fred Wickholm in the amount of \$14,392 but no such claim is included in the certified records of the court. (CP 1-638, 619 In 6-12) Respondent misinforms this Court that Appellant(s) have a case pending before the Yakima Superior Court as of September 11, 2017. (RB 2) Respondent(s) erroneously indicate that the Riste Trust was never a party to the Superior Court proceedings and should not be a party to this appeal. (RB 4, 9) Respondent(s) misinforms this Court that the record includes evidence that the RPLBEAB sale was subject to a "Level 1 environmental assessment" while a review of the record indicates only a "feasibility contingency" was disclosed to the Superior Court and/or the beneficiary by the Respondent(s). (RB 5, 6) Appellant(s) were the party who obtained the Environmental Assessment and presented it to the court not the Respondent(s). (CP 229-246) Respondent(s) erroneously state that Samuel R. Walker was not admitted Pro Hac Vice at the time he filed his Notice of Appearance in the Superior Court. (RB 8, see CP 138-139)

III. DISCUSSION

A. THE WILL SECTION 6.1 PURPORTS TO GIFT A RESIDUARY GIFT OF REALTY TO THE TRUSTEE OF THE PURPORTED RISTE TRUST BUT FAILS TO COMPLY WITH THE STATUTORY REQUIREMENTS OF RCW 11.12.250 FOR A VALID GIFT TO A TRUST AND CONSEQUENTLY THE RISTE TRUST COULD NOT LAWFULLY BE FUNDED RENDERING THE RISTE TRUST INVALID AS A MATTER OF LAW

The pertinent section of the Decedent's Will is Paragraph 6, Section 6.1,

6. DISPOSITION OF RESIDUE:

6.1. I give the residue of my estate to the trustee of the RISTE TRUST to be held, administered and distributed as provided therein.

(CP 2) The purported residuary gift is specified as a gift to the Trustee of the Riste Trust. (Id.) However, the legislature imposed restrictions upon gifts by Will which were not imposed upon inter vivos gifts, namely, that the Trust be evidenced by a written instrument other than a Will,

A gift may be made by a will to a trustee of a trust executed by any trustor or testator... if (1) the trust is identified in the testator's will and (2) its terms are evidenced either (a) **in a written instrument other than a will**, executed by the trustor prior to or concurrently with the execution of the testator's will or

(RCW § 11.12.250) As such, the purported gift by the Will/Riste Trust which is a single written instrument does not comply with the statutory requirements and fails to make a lawful gift of the RPLBEAB to the Trustee of the Riste Trust. (CP 2, 1-638, AOB 1-48) As such, the requirements for creation of a valid trust in the State of Washington imposed by the legislature are not met because there was no lawful "transfer of property" to the Trustee of the Riste Trust,

[a] trust may be created by:(1) Transfer of property to another person as trustee during the trustor's lifetime or by will or other disposition taking effect upon the trustor's death...

(RCW § 11.98.008) The Superior Court erroneously found that the Riste Trust

was valid despite failure to comply with the legislatures requirement for a separate written instrument and erroneously relied upon inapposite case authority's. (CP 591-638) The authority's relied upon by the Superior Court to override RCW 11.12.250 were inapplicable because those cases deal with a trust which was evidenced by a written instrument other than a Will, namely, a life insurance policy held under contract by a third party insurance company or the like,

"There are four elements required to create a testamentary trust: (1) a will evidencing testamentary intent to create a trust, (2) designation of the trust corpus, (3) designation of beneficiaries, and (4) specification of the terms of the trust." All of these elements are present in Decedent's Will, so the Trust is valid.

((CP 609, citing *In re Estate of Collister*, 195 Wn. App. 371, 380-81 (2016), citing *Edwards v. Edwards*, 1 Wn. App. 67, 72 (1969); see also, 594 In 19-20 & 602 In 11-14)) The Superior Court's reliance on *Collister* is misplaced because therein the Testamentary Trust was set forth by a written instrument other than a will, "under the insurance contract" (*In re Estate of Collister*, 195 Wn. App. 371, 382 (2016)) Likewise, the Superior Court's reliance on *Edwards* is misplaced because therein the issue was not whether there was a written instrument other than a will, rather, the issue was contingent future interests, "consistent with previously enunciated principles of future interest in property" (*Edwards v. Edwards*, 1 Wn. App. 67, 75 (1969 Wash.)) The Superior Court's reliance upon these authorities for the proposition that a separate written instrument is not required to make a gift by will to a trust is an erroneous interpretation of the law(s), application of law(s), unsupported by the record and/or an abuse of discretion warranting remand.

**B. EVEN IF THE GIFT TO THE RISTE TRUST WAS NOT
INVALIDATED BY RCW 11.12.250 THE PR WAS PREVENTED FROM
SELLING A RESIDUARY GIFT OF REALTY BY THE DECEDENT'S**

**INTENT, THE RCW AND THE ALWAYS APPLICABLE FIDUCIARY
DUTY(S) OF LOYALTY, COMPETENCE, DILIGENCE AND GOOD
FAITH BECAUSE THESE DUTY(S) APPLIED INDEPENDENTLY OF
RCW 11.100.140**

The Court erroneously failed to find that the PR was prohibited from selling a residuary gift of realty as set forth by the Will and proscribed by Rev. Code Wash. (RCW) § 11.04.250 merely because the PR had “Non Intervention Powers” and without consideration and/or substantial evidence of the Decedent’s intent, the solvency of the Estate, the personal interests of Baker Boyer Bank, the conflicting statutory limitations, the jurisdiction of the court and/or the rights of the beneficiaries to be fully apprised of all pertinent and relevant facts regarding the intend sale, “[o]n intestate’s death, realty vests at once to heirs, subject only to right of administrator to dispose of it to raise money to pay estate’s debts.” (*Bickford v. Stewart*, 55 Wash. 278 (Wash. 1909); *Dennis v. Godfrey*, 122 Wash. 207, 210 (Wash. 1922), modified, 215 P. 71, 1923; *North Pacific Mortg. Co. v. Sieler*, 146 Wash. 530 (Wash. 1928); *Lynch v. McNulta*, 168 Wash. 397 (1932); *In re Binge’s Estate*, 5 Wn.2d 446 (1940), RCW § 11.04.250; CP 609) The Superior Court erroneously relied upon the holding in *Bickford* (CP 609) for the proposition that a PR always and without exception has a right to divest beneficiaries of realty during administration without consideration of the above factors. (Id.) Unlike, the Superior Court’s findings the *Bickford* Court considered the PR’s right to sell realty only after the PR complied with all other pertinent statutory limitations, “... **in the manner provided by statute.**” (*Bickford*, supra at 286, accord *In re Estate of Bloor*, 109 Wash. 554 (Wash. 1920)) The Superior Courts Findings of Fact and Conclusions of Law are devoid of any consideration of the above factors or other statutory limitations as they relate to the sale of the RPLBEAB. (CP 609) Moreover, in *Bickford* unlike here, the PR therein had

diligently attempted to comply with the applicable laws and communicate with interested beneficiaries and was forced to sell the realty to pay existing debts which could not otherwise be paid,

...that he had been unable to find where they [the beneficiaries] were, or to communicate with them; that he had made diligent inquiry to learn where they were, but without success; that the property was nonproductive, and that taxes and special assessments were due and coming due; **that there were no funds to pay the same**; that he had held the property for more than one year and no claim had been made therefor...

((*Bickford, supra* at 281; *Dennis v. Godfrey, supra* at 211 - "the administrator is entitled only to the possession of the real estate, and to sell the same in the course of administration if there is not sufficient personal property to pay the debts of the decedent."; *Kerns v. Pickett*, 49 Wn.2d 770, 772-773 (1957 Wash.) - the power of executors to manage and control an estate exists for the protection of creditors and for the purpose of paying expenses and other proper charges against the estate; *In re Estate of Verchot*, 4 Wn.2d 574, 582 (1940) - the estate vests immediately upon the death of the ancestor in the heir or devisee entitled thereto, subject only to the rights of creditors.; *Corcoran v. Bell*, 36 Wash. 217 (1904)- alleged heirs were entitled to notice and hearing, where administrator sought to pay out funds derived from realty.)) In this case, the Court's holding does not find that the PR stated any permissible purpose for the sale of the realty which was vested in the beneficiary. (CP 591-638) Additionally, the Court's reasoning that a "specific bequest of realty" as opposed to a "residuary gift" was a requirement to invoke the statutory vesting of title is not supported by any authority, is contrary to over 100 years of Washington Supreme Court decisions and contradicts the plain language of the statute, "...his or her title shall vest immediately in his or her heirs or devisees..." (RCW § 11.04.250)

As such, it does not follow that the PR had authority or that the court had jurisdiction to sell realty vested in a residual beneficiary where the Estate was shown to be solvent and with the ability to pay all debts and expenses of administration without the need for the sale. (CP 609) In this situation the PR was required to expeditiously close the Estate and transfer title to the beneficiary as there was no benefit to the Estate or need to sell the realty. (CP 1-638) Apparently, the Respondent and the Superior Court erroneously found that a Non Intervention PR (RCW § 11.68.090) is not required to comply with other statutory limitations on a PR's right to sell vested property or prior case authority, specifically, RCW § 11.04.250 and the cases cited above. (CP 609) Appellant(s) argued below and within his Opening Brief that a Non Intervention PR's authority to sell vested realty is limited by the statutory restrictions imposed by RCW § 11.04.250 and the cited authorities. (CP 142-264, AOB 1-48) The Respondent(s) and the Superior Court's failure to address these arguments represents an erroneous interpretation of the law(s), erroneous application of the law(s), a finding without substance and/or an abuse of discretion which requires remand. (Id.)

Similarly, both the Superior Court and the Respondent(s) have failed to reconcile the limitations which were specifically set forth under RCW § 11.68.090 to prohibit contravention of statutory limits on a PR's right to sell realty, "[a]ny personal representative acting under nonintervention powers may ... sell,... and otherwise have the same powers... **subject to the same limitations of liability, that a trustee has under chapters 11.98, 11.100, and 11.102 RCW** with regard to the assets of the estate, both real and personal..." (RCW § 11.68.090) Chapter 11.100 provides several statutory limitations on the PR's right to sell realty, 1) The limitations of the controlling instrument (RCW 11.100.010), 2) The purpose

of the Riste Trust (RCW 11.100.020), 3) The fiduciary duty to the beneficiary (RCW 11.100.45) and 4) The authority to hold realty without the requirement to diversify as set forth by RCW 11.100.047 and authorized by RCW 11.100.060,

1) THE LIMITATIONS OF THE CONTROLLING INSTRUMENT (RCW 11.100.010)

Any corporation, association, or person handling or investing trust funds as a fiduciary shall be governed in the handling and investment of such funds as in this chapter specified. A fiduciary who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with requirements of this chapter. **The specific requirements of this chapter may be expanded, restricted, eliminated, or otherwise altered by provisions of the controlling instrument.**

(RCW § 11.100.010, see also RCW § 11.100.050)

The Riste Trust (if valid), limited the PR/Trustee's Non Intervention powers within Section 10.3 by specifying the **ONLY** permissible purpose for selling PRELAB,

I direct that the trustee invest in assets in a manner which will provide the maximum income to the trust beneficiaries rather than investing in growth assets as a hedge against inflation. I hereby direct that the trustee shall be indemnified by the trust and held harmless from any liability as a result of investing in this manner.

(CP 5) The Superior Court fails to address and/or explain how the limitations of the Will/Riste Trust were complied with. (CP 591-638) In fact the Superior Court does not indicate that it considered the controlling instrument at all in rendering its decision. (Id.) Failure to consider the arguments raised by the Appellant(s) that the controlling instrument restricted the PR/Trustee's sale for the purpose specified by the PR/Trustee is erroneous and/or an abuse of discretion which requires remand. (CP 142-264, AOB 1-48) The PR/Trustee stated in his "Petition For Order For Authorizing Sale Of Real Estate Property" and in all other

pleadings below that his purposes for selling the RPLBEAB were for diversification and to prevent a conflict between principal and income,

The Personal Representative believes that it is necessary to sell the shopping center to comply with its fiduciary duties of diversification and to avoid conflicts between the income and principal interests resulting from lack of adequate funds to fully pay for capital improvements from principal

(CP 91 ln 6-9, 113 ln 3-10, 115 ln 9-12) Nowhere in the PR/Trustee's pleadings does he allege that he is selling the RPLBEAB to invest in assets with a higher income stream as per the requirements set forth by the controlling instrument, Will/Riste Trust Section 10.3. (CP 5) The PR/Trustee's sale violated the limitations of the controlling instrument which were by statute controlling over any other duty. (RCW § 11.100.010) As such, the Superior Court's findings that the PR/Trustee's "Non Intervention" powers authorized the sale without consideration of the controlling instrument are erroneous and/or represent a manifest abuse of discretion. (CP 591-638) In fact, the controlling instrument specifically obviates the PR/Trustee's duty to diversify and provides indemnity for so doing. (CP 5) Clearly, the controlling instrument prevented the PR/Trustee from selling the RPLBEAB for diversification purposes and required the PR/Trustee to sell only where he could invest in assets with a higher income stream. (Id.) The controlling instrument did not provide any exceptions to these specified requirements including any alleged conflict between principal and income allocations set forth by the PR/Trustee. (CP 91 ln 6-9, 113 ln 3-10, 115 ln 9-12, 591-638) The Superior Court's failure to consider the controlling instrument is an erroneous interpretation of the law(s), application of the law(s) and/or a decision which is unsupported by the evidence and/or an abuse of discretion requiring remand.

2) THE PURPOSES OF THE RISTE TRUST (RCW 11.100.020)

“A trustee shall invest and manage trust assets as a prudent investor would, **by considering the purposes, terms, distribution requirements, and other circumstances of the trust.**” (RCW § 11.100.020, see also RCW § 11.100.050) The purpose of the Riste Trust was to provide, “maximum income to the trust beneficiaries” and not for long term investment in growth assets. (Will/Riste Trust Sec. 10.3, CP 5) The PR/Trustee’s pleadings below showed that the RPLBEAB earned a monthly income of \$9,791.81 but nowhere in the pleadings did the PR/Trustee indicate that assets with a higher income would be procured with the proceeds from the sale. (CP 91 ln 6-9, 113 ln 3-10, 115 ln 9-12, CP 109 ln 20-22, see also, AOB 20) The PR/Trustee breached his fiduciary duty(s) by selling the RPLBEAB with a historical return on investment of between 8-13% and investing the liquidated funds from the sale of the RPLBEAB into its own financial products to earn only 4% per year, ““You admitted in your letter of October 13, 2013, that if the property is sold and the proceeds invested at current rates, the income ‘will not be very much’. I think 4% would be a fair estimate.”” (CP 164, 169 ln 8-16 including the exhibits and affidavit referenced therein line 16; see, CP 187, 197) The Superior Court does not indicate that it considered the legal arguments and factual evidence presented by the Appellant(s) which required a consideration of the purposes of the Riste Trust and whether or not the PR/Trustee’s sale complied with the purposes specified. (CP 591-638, 142-264, 163-165, AOB 1-48) The Superior Court’s failure to consider the purposes of the Riste Trust is an erroneous interpretation of the law(s), application of the law(s) and/or a decision which is unsupported by the evidence and/or an abuse of discretion requiring remand.

3) THE FIDUCIARY DUTY(S) TO THE BENEFICIARY (RCW 11.100.45)

A “fiduciary shall invest and manage the trust assets **solely** in the interests of the trust beneficiaries” (RCW § 11.100.045, see also RCW § 11.100.050) The PR/Trustee owes to the beneficiaries the highest degree of good faith, care, loyalty, and integrity. ((*Esmieu v. Schrag*, 88 Wn.2d 490, 498 (1977); *Monroe v. Winn*, 16 Wn.2d 497, 508 (1943); see also, *In re Estate of Ehlers*, 80 Wn. App. 751, 757 (1996) Citing, *Estate of Jordan v. Hartford Accident & Indem. Co.*, 120 Wn.2d 490, 502 (1993) - “a trustee is a fiduciary who owes the highest degree of good faith, diligence and undivided loyalty to the beneficiaries.”)) Appellant(s) “Petition For Removal...” was replete with legal argument(s) and factual allegations which incontrovertibly showed the PR/Trustee breached any and/or all of these fiduciary duty(s). (CP 142-264, AOB 1-48) The Superior Court discussed the fiduciary duty’s only in a general manner and erroneously concluded that a “Non Intervention” PR/Trustee was not required to provide the beneficiary(s) any information which was necessary to protect their interests. (CP 142-264, 591-638, 636-637) The Superior Court’s interpretations of law(s) and applications of law(s) to the undisputed facts are erroneous and/or are unsupported by substantial evidence. (Id.) A PR/Trustee is required to provide all relevant and necessary information to afford the beneficiary(s) an opportunity to make an informed and reasoned decision to protect their interests, in this case, on whether or not to object to the PR/Trustee’s sale in court. (CP 142-264, 591-638, 636-637) The PR/Trustee had a fiduciary duty(s) to provide the beneficiary(s) with information that they needed and repeatedly requested so that they could make an informed decision including but not limited to, truthful explanations of both the applicable law(s) regarding the PR/Trustee’s intended sale, real estate appraisals, environmental surveys, relevant factual information regarding the RPLBEAB’s

current and future income potential and the current and future return on investment as compared to the PR/Trustee's intended reinvestment of the sale proceeds,

[t]he trustees, as fiduciaries, owe to the beneficiaries the highest degree of good faith, care, loyalty and integrity. *Monroe v. Winn*, 16 Wn.2d 497 (1943); Bogert, *Trusts and Trustees* § 543 (2d ed. 1960). This duty includes the responsibility to inform the beneficiaries fully of all facts which would aid them in protecting their interests. See *United States v. Bennett*, 57 F. Supp. 670 (E.D. Wash. 1944); 90 C.J.S. *Trusts* § 247 (1955). At the very least, this would require the trustees to notify the beneficiaries of [...] which directly affected the disposition of the trust property. Though the trustees and defending beneficiaries were adversaries [...] the trustees' duty of loyalty and care was at no time suspended

(*Esmieu v. Schrag*, 88 Wn.2d 490, 498 (Wash. 1977); CP 142-264, AOB 1-48).

No evidence was admitted below which showed that the PR/Trustee provided any of the necessary information despite numerous requests, with the exception of an Inventory and Appraisement just prior to the court hearing. (CP 1-651)

Specifically, the beneficiary(s) were entitled to all relevant information regarding the valuation of the RPLBEAB which included at a minimum the real estate appraisals, the environmental surveys, the Inventory and Appraisement (in a timely manner), an Accounting, an Annual Statement and a profit and loss statement or some other financial rendition showing the current income and/or the current return on investment as compared to investments which would be purchased with the sale proceeds. (Id.) Despite the beneficiary's crucial need for this information none of it was provided prior to the court hearing in which the court authorized the sale nor was it provided thereafter. (CP 142-264, 591-638, 617-638) As such, Appellant(s) assert that the Superior Court's finding that Constitutional Due Process Notice was provided to the Appellant(s) of the Petition for Sale is erroneous and/or not supported by substantial evidence. (CP

609) In fact, Appellant(s) presented un-controverted evidence that prior to the court hearing the PR/Trustee refused to provide the information and threatened the beneficiary(s) with forced payment of the PR/Trustee's legal fees if they opposed the PR/Trustee's sale in court. (AOB 27-48, CP 147 In 15-28) There is no question that the PR/Trustee failed to fulfill his fiduciary duty(s) of good faith, care, loyalty, diligence and integrity by failing and/or refusing to provide crucial information necessary to allow the beneficiary's an opportunity to make an informed decision on how to protect their interests, especially when the PR/Trustee knew that the beneficiary opposed the sale. (CP 142-264, AOB 27-48) The Superior Court's order fails to consider the fact that the PR/Trustee's duty to administer the Estate is in the sole interests of the beneficiary's and that therefore the PR/Trustee was required by the "highest degree of good faith..." to provide the beneficiary's all of the information which was requested and necessary to protect their interests. (Id., see also, RCW § 11.100.045 and cited authorities above) The Superior Court erroneously failed to consider this issue and instead found that the only pertinent issue was the Appellant(s) failure to initiate a proceeding under RCW 11.68.065 to compel the dissemination of the pertinent information. (CP 610-611) Contrary to the Superior Court's holding, the legislature and the decisions of the Washington Supreme Court and Washington Court of Appeal hold that it is a question of the good faith, honesty, integrity and loyalty of the fiduciary to provide necessary information to allow a beneficiary to protect their interests. (Id., CP 610-611) The acts of the fiduciary were in question below not the acts of the beneficiary. The Superior Court erroneously equates Appellant(s) failure to initiate a court hearing to compel the requested information as negating a fiduciary's duty to provide such information. (Id.) Moreover, the Superior Court fails to consider the harm done to the Appellant(s) in being deprived of

information and the right to make an informed decision on whether or not to object to the sale of the RPLBEAB. (CP 591-638) The record is replete with correspondence to/from the PR/Trustee's attorney to the beneficiary(s) attorney in which the PR/Trustee's attorney misinformed the beneficiary as to the facts, laws and flat out refused to provide any information, none of which was addressed in the Superior Court's findings. (CP 142-264, 591-638, AOB 27-48) Instead the Superior Court makes a blanket statement that the PR/Trustee was not required to provide any information by statute and that regardless of any duty no harm was caused to the beneficiary. (CP 610) This finding is erroneous and/or is a manifest abuse of discretion. The PR/Trustee has a non statutory duty which requires him to provide the beneficiary any and all relevant and pertinent information to allow him to make a reasoned decision on how to protect his interests. (See above) The PR/Trustee knew that the beneficiary did not want the RPLBEAB sold for any reason and systematically refused over the course of 3.5 years to provide the beneficiary any information with which he could evaluate the propriety of the sale or the legal requirements for the sale. (CP 142-264) Instead the PR/Trustee provided misleading and/or incorrect interpretations of the law and the terms of the Will/Riste Trust and eventually threatened the beneficiary with payment of the PR/Trustee's legal fees if he objected in court. (CP 142-148) Ultimately, the beneficiary's acquiescence in the sale was obtained only through breaching the fiduciary duty's owed to him. (CP 142-264) The record below contains numerous documents showing that the PR/Trustee's attorney misinformed the beneficiary that the PR/Trustee's duty to diversify was controlling, superceding the written testament/Decedent's intent and that therefore he was required to sell the RPLBEAB. (CP 142-264) Such is not the law. (See above) The PR/Trustee also made these same incorrect statements of the law to the court revealing his

callous disregard for the law and the rights of the beneficiary. (CP 88-133) As such, the beneficiary's statements below that he was misinformed were true, contrary to commissioner Naught's finding that Darrell Riste was not credible. (CP 610) In addition to the PR/Trustee misinforming both the beneficiary and the court regarding the law the PR/Trustee also was shown to not have ever provided any financial information to the beneficiary regarding the expected returns/income on the RPLBEAB before and after the sale. (CP 142-264) How then was the beneficiary to make an informed decision on the propriety of the sale if the PR/Trustee refused/neglected to provide the requested information for over 3.5 years?? And also provide incorrect interpretations of the law?? That is the question that was before the superior court and for which Appellant asserts was a manifest abuse of discretion in failing to find that the PR/Trustee breached his fiduciary duty(s).

The PR/Trustee fraudulently procured the Order of the Superior Court authorizing the sale of the PRELAB and eventually sold the PRELAB without ever providing the beneficiary(s) a correct rendition of the applicable laws or the pertinent information necessary to determine the propriety of the sale and an informed opportunity to make a formal objection in the Superior Court. (Id.) As such, the PR/Trustee violated his fiduciary duty(s) and the court's finding that a non intervention trustee was not required by any fiduciary duty(s) to provide information necessary for a beneficiary to protect their interests is erroneous. (CP 591-638, most specifically, 636-637, *Esmieu*, supra) The Superior Court failed to make any findings regarding the un-controverted evidence that the PR/Trustee provided incorrect explanations of the law to the beneficiary(s). (Id.) Specifically, the PR/Trustee incorrectly/fraudulently informed the beneficiary(s) that the PR/Trustee had a duty to diversify and that the duty to diversify superseded the

Decedent's intent, the written instrument and other sections of the Revised Washington Code. (CP 183-189, 194-203, 212-214, 226-227, 617-638, see above) Likewise, the PR/Trustee incorrectly/fraudulently informed the beneficiary(s) that there was a conflict between principal and income which authorized/justified/required the PR/Trustee to sell the PRELAB. (Id.) The court also failed to make any findings regarding the un-controverted proof that the PR/Trustee failed to provide the beneficiary(s) pertinent information specifically but not limited to the real estate appraisal, environmental survey and financial information on the comparable returns on investment. (CP 142-264, most specifically, 182-189, 191-199, 229-246, 617-638)

4) THE AUTHORITY TO HOLD REALTY WITHOUT THE REQUIREMENT TO DIVERSIFY AS SET FORTH BY (RCW 11.100.047) AND AUTHORIZED BY (RCW 11.100.060)

The Superior Court erroneously found that the PR/Trustee did not breach any of his fiduciary duty(s) by misinforming the Superior Court and the beneficiary(s) that he had a mandatory duty to diversify. (CP 91 ln 6-9, 125 ln 3-10, 128 ln 9-12, 591-638) The Superior Court failed to address the Appellant(s) argument that the PR/Trustee misinformed the Superior Court and the beneficiary(s) of the PR/Trustee's mandatory duty to diversify and apparently only considered whether a duty to diversify was a rational basis for a sale of realty, "[t]he P.R. provided a rational basis for the sale in that it wanted to diversify the Trust estate." (CP 165 ln 6 -15, 167-168, 634-635; AOB 18-48) Contrary to Respondent(s) statements to the court and the beneficiary(s) a PR/Trustee does not have a mandatory duty to diversify,

[s]ubject to the provisions of RCW 11.100.060 and any express provisions in the trust instrument to the contrary, a fiduciary shall

diversify the investments of the trust unless the fiduciary reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

[s]ubject to express provisions to the contrary in the trust instrument, any fiduciary may hold and retain any real or personal property received into or acquired by the trust from any source. Except as to trust property acquired for consideration, a fiduciary may hold and retain any such property **without need for diversification as to kinds or amount and whether or not the property is income producing....**

(RCW §§ 11.100.047 & 11.100.060, respectively; see also RCW § 11.100.050; CP 165 ln 6 -15, 167-168, 634-635; AOB 18-48) The PR/Trustee's incorrect statements to the beneficiary(s) unlawfully induced the Appellant(s) to acquiesce in the PR/Trustee's proposed sale of the RPLBEAB ultimately resulting in a lower yearly Return on Investment in contravention of the written instrument and the Decedent's intent. (CP 91 ln 6-9, 125 ln 3-10, 128 ln 9-12, 215-218, 617-638) The PR/Trustee breached his fiduciary duties by misinforming the court and the beneficiary,

The administrator of a decedent's estate is an officer of the court and stands in a fiduciary relationship to those beneficially interested in the estate. In the performance of his fiduciary duties he is obligated to exercise the utmost good faith and to utilize the skill, judgment, and diligence which would be employed by the ordinarily cautious and prudent person in the management of his own trust affairs. [Citing cases.] Concealing the true value of an asset subject to administration, to the detriment of an heir, is clearly a breach of [fiduciary duty]

((*In re Estate of Novolich*, 7 Wn. App. 495, 501-02 (1972)) Likewise, the PR/Trustee's erroneous statements to the Superior Court unlawfully persuaded the Court to issue its' Order authorizing the sale of the RPLBEAB. (CP 88-133)

C. IF THE RISTE TRUST WAS VALID THEN THE RPLBEAB SHOULD HAVE BEEN TREATED AS A NON PROBATE ASSET

Now for the first time on Appeal the Respondent(s) argue that the RPLBEAB was precluded from being considered a Non Probate Asset by statute, "Furthermore, even though the Appellant relies on RCW chapter 11.04, RCW 11.02.005 (10) expressly excludes 'a right or interest passing by descent and distribution under chapter 11.04 RCW' from being a non probate asset." (RB 17-18) Respondent(s) are grasping at straws in a futile attempt to defray responsibilities for their inept performance of their fiduciary responsibilities. The RPLBEAB in question does not pass by descent and distribution pursuant to RCW § 11.04 because the Decedent gifted the RPLBEAB by Will to the Riste Trust (if valid) and as such was not subject to descent and distribution as per Chapter 11.04. (CP 1-6) Respondent(s) argument that the RPLBEAB is excluded from being considered a "Non Probate" asset ie... as property passing by descent and distribution is misplaced, a "'Nonprobate asset' includes, but is not limited to,... [a] trust of which the person is grantor and that becomes effective or irrevocable only upon the person's death... [while a] 'Nonprobate asset does not include: ... a right or interest passing by descent and distribution under chapter 11.04...'" (RCW § 11.02.005) The Riste Trust (if valid) is a trust within the meaning of RCW 11.02.005 which qualifies as a "Non Probate" asset because the "trust of which the [Decedent] is the grantor... beca[me] effective or irrevocable only upon the [Decedent's] death."

Further, the Respondent(s) argument that the PR/Trustee was required to pay Washington State Estate Taxes as opposed to Federal Estate Taxes is erroneous. (RB 19) Respondent(s) argument is that, 26 USC 2033 mandates that the value of the RPLBEAB be considered in regards to Washington Estate

taxation because the RPLBEAB was an asset of the Decedent at the time of his death. (RB 19) However, ownership can ONLY be determined under Washington State Law, which specifically excludes the RPLBEAB from the Decedent's ownership at the time of his death by the intent of the legislature to exempt such property from Washington State Estate Taxation,

[u]nless the will provides otherwise, the property so given shall not be deemed to be held under a testamentary trust of the testator but shall become a part of the trust to which it is given to be administered and disposed of in accordance with the terms of the instrument establishing the trust, including any amendments, made prior to the death of the testator, and regardless of whether made before or after the execution of the will.

((RCW § 11.12.250; see, 26 U.S.C.S. § 2033, *Wardell v Blum* (1921, CA9 Cal) 276 F 226, 2 AFTR 1549, cert den (1922) 258 US 617, 66 L Ed 793, 42 S Ct 271- Interest of decedent is to be determined by law of state where property is situated.))

D. THE PR/TRUSTEE BREACHED HIS FIDUCIARY DUTY(S) BY COMMINGLING ASSETS OF THE ESTATE WITH ASSETS OF THE RISTE TRUST

As set forth in the Superior Court, the PR/Trustee breached his fiduciary duty(s) commingling the Estate and Riste Trust property. (CP 142-264, 145, 249-264) The Superior Court failed to address the factual evidence set forth showing that the Riste Trust was funded prior to the close of probate and that taxes and expenses were being paid out of those funds. (Id.; CP 591-638) The Superior Court's findings are not supported by the evidence and/or are an abuse of discretion. (Id.)

E. THE PR/TRUSTEE BREACHED HIS FIDUCIARY DUTY(S) TO

**MAKE MONTHLY PAYMENTS TO THE RISTE TRUST
BENEFICIARY(S)**

As set forth in the Superior Court, the PR/Trustee breached his fiduciary duty(s) by failing to make payments of monthly trust income as required by the Will/Riste Trust. (CP 1-5, 142-264, 145, 249-264) The Superior Court failed to address the factual evidence set forth showing that the Riste Trust was funded prior to the close of probate and that the Trustee failed to make the required monthly income payments. (Id.; CP 591-638) The Superior Court's findings are not supported by the evidence and/or are an abuse of discretion. (Id.)

IV. ATTORNEY'S FEES

Appellant(s) request this Court to deny Respondent(s) request for attorney's fees due the fact that the instant matter was only necessary because of the Respondent(s) misdeeds. ((RCW 11.48.210; *In re Estate of Kleinlein*, 59 Wn.2d 111 (Wash. 1961) - If an executor is found to have been of bad faith and not entitled to compensation, his attorneys are likewise not entitled to compensation.; *Price v. Price*, 53 Wn.2d 393 (1959) - Disallowance of administrator's fee is proper where administration was not performed according to law.; see also, *Holmgren v. Norberg*, 189 Wash. 94 (1937)) Appellant(s) request the court to issue an Order granting Costs and/or Appellant(s) Attorney's fees. (Wash. RAP 14.1- 14.6)

**V. REQUEST FOR REMAND TO PREVENT PREJUDICE OF THE
MATTERS WHICH ARE BEING LITIGATED IN THE CIVIL MATTER**

Appellant(s) again reaffirm the request made in their Opening Brief that this Court not decide the merits of the allegations herein and simply remand for

further proceedings in the Yakima Superior Court wherein Removal of the PR/Trustee may be given due consideration as set forth herein Appellant(s) Opening and Reply Brief's. As stated below in the Yakima Superior Court, Appellant(s) have a corresponding civil complaint in which the disparity of relief is so great, the burden of proof differs, the claimants are not identical and issues raised are so intertwined with their civil complaint that Appellant necessarily must ensure that these matters are not decided in order to preserve his rights and also refrain from any possible impairment of the other claimants rights in the civil matter. Appellant(s) and other party(s) are claimants in a civil matter which alleges damages in excess of sixteen million dollars and the issues herein are intertwined with the civil complaint's allegations necessitating a request that this court not decide the merits of the issues herein and simply remand for further proceedings.

VI. CONCLUSION

The Superior Court's judgment/order contains erroneous interpretations of the law(s), applications of law(s) and/or findings of fact which are unsubstantiated by the record. The erroneous interpretations and/or findings require remand because they cause prejudicial harm to the Appellant(s). The Appellant(s) should be awarded Costs and/or Attorney's fees.

Date: October 7, 2017

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**THE COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON**

In Re the Matter of:

COA NO. 350541

The Estate of Dan McAnally

**DECLARATION OF SERVICE
APPELLANT'S REPLY BRIEF**

and

The Riste Trust.

Date: October 9, 2017
Time:
Dept:

DECLARATION OF SERVICE

I, Samuel Walker, hereby declare that on October 9, 2017, I caused copies of the accompanying **APPELLANT'S REPLY BRIEF** to be mailed by First Class United States Mail, postage prepaid, to the following:

- 1) Sean A. Russell, Stokes Lawrence Velikanje Moore & Shore, 120 N. Naches Ave., Yakima WA 98901; AND Erika N. Hartliep, Stokes Lawrence Velikanje Moore & Shore, 120 N. Naches Ave., Yakima WA 98901.
- 2) Kevin L. Holt, WSBA 16672, 7014 W. Okanogau Pl., Kennewick WA 99336

Date: October 9, 2017

Samuel R. Walker
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