

**FILED**

JUL 10 2017

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COA NO. 350541

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

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**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**

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**APPELLANT'S OPENING BRIEF**

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## **I. INTRODUCTION**

Review is requested of the interpretation(s) and/or application(s) of the law(s) and the finding(s) of the fact(s) of the Superior Court. The laws were misinterpreted, misapplied and conflicting findings of fact were made. The Superior Court also abused its discretion denying Petitioner's constitutional right to Due Process pursuant to WA Const Article I, Sec. 3; RAP Rule 10.3.

## **II. ASSIGNMENTS OF ERROR**

1) It was erroneously found that the PR/Trustee did not breach any fiduciary duty(s) by failing to adhere to the Will/Riste Trust's written testament and/or the Revised Code of Washington (Hereinafter, "RCW"). CP, 1-6, Will, Sec. 4.1, 6.1, 7.1 & 10.3.

2) It was erroneously found that the PR did not breach any fiduciary duty(s) by failing to adhere to the intentions of the Decedent. CP 1-6, Will, Sec. 4.1, 6.1 & 7.1.

3) It was erroneously found that the PR did not breach any fiduciary duty(s) by subjecting the Real Property and Land, Business Entity Assets and Buildings (Hereinafter "RPLBEAB," referred to below as the "Shopping Center and Property), to Estate administration as a "Probate Asset," all the while the Plaintiff(s) civil action asserts wrongdoing and deserves adequate estate protection by the court.

4) It was erroneously found that the PR did not breach any fiduciary duty(s) by failing to transfer the RPLBEAB to the Riste Trust.

5) It was erroneously found that the PR/Trustee did not breach any

fiduciary duty's when he mislead/failed to provide crucial information to the beneficiary or the Court regarding his legal right/need and/or the Court's jurisdiction to order the sale of the RPLBEAB.

6) It was erroneously found that the PR did not breach any fiduciary duty(s) by violating the order to sell the RPLBEAB for \$1,415,000 and/or the statutory requirement to confirm the sale.

7) It was erroneously found that the PR/Trustee did not breach any fiduciary duty(s) when he failed to provide an inventory and appraisal, accounting, annual statement and/or tax information in a timely manner.

8) It was erroneously found that the PR/Trustee did not breach any of his fiduciary duty(s) when he mislead and/or provided untruthful and/or deceptive information.

9) It was erroneously found that the Trustee did not breach any fiduciary duty(s) when he failed to advise the beneficiary(s) of their right/need to take legal action(s) to prevent the PR's mismanagement of asset's pledged to the Riste Trust and/or take legal action himself to prevent the unnecessary/illegal loss/misappropriation of Riste Trust assets.

10) It was erroneously found that Petitioner did not have a right to file a petition for removal during administration because it was untimely.

11) It was erroneously found that there was no conflict of interest where the PR and the Trustee were the same individual and the Estate and the Riste Trust had adverse interests, including specifically but not limited

to, a) the validity of the Riste Trust and/or the timely distributions of in kind property (rather than liquidation and distribution), b) the order of distributions of pecuniary bequests, c) the legal requirement to pay Washington State Estate taxes, d) illegal payments made by the PR in the amount of \$14,392, e) the PR's 3.5 year unnecessary delay in the closing the probate without justification, f) the PR's failure to timely file tax returns, g) the PR's failure to timely make payments to the beneficiary(s), h) the PR's failure to provide information requested by the beneficiary(s) to which they were entitled, i) failure to properly advise the beneficiary(s) of the applicable law(s) regarding the administration and/or in responding to the beneficiary(s) questions, j) receipt of truthful and/or accurate information, k) the personal interest(s).

12) It was erroneously found that the PR/Trustee did not breach any fiduciary duty(s) when he failed to disclose his conflicting interests.

13) It was erroneously found that the PR did not breach any fiduciary duty(s) by distributing "bank account deposits" prior to payment of Estate taxes and expenses of administration from those deposits.

14) It was erroneously found that the PR did not breach any fiduciary duty(s) when he paid taxes and/or unauthorized payments in the amount of \$ 14,392 from assets belonging to other beneficiary(s).

15) It was erroneously found that the PR/Trustee did not breach any fiduciary duty(s) by commingling Estate and Riste Trust assets.

16) It was erroneously found that the Trustee did not breach any fiduciary duty(s) when he failed to advise the beneficiary(s) that the PR was commingling and/or take legal action himself to prevent harm.

17) It was erroneously found that the Trustee did not breach any fiduciary duty(s) when he failed to advise the beneficiary(s) that the PR was harming their interests and/or to take legal action himself.

18) It was erroneously found that the PR did not breach any fiduciary duty(s) by failing to expeditiously administer the Estate.

19) It was erroneously found that the PR/Trustee did not breach any fiduciary duty(s) of loyalty, honesty, competence or good faith.

20) It was erroneously found that the PR/Trustee did not breach any fiduciary duty(s) by failing timely file income tax returns.

21) It was erroneously found that the PR/Trustee did not breach any fiduciary duty(s) when he failed to pay the beneficiary(s) in accordance with the terms of the Will/Riste Trust and/or the RCW.

22) It was erroneously found that the PR and/or the Trustee were entitled to all of their fiduciary fees.

23) It was erroneously found that the attorney(s) for the PR/Trustee were entitled to all of their fiduciary fees.

24) It was erroneously found that there was no good cause for removal of the PR/Trustee.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1) Was there a legal requirement mandated by the Decedent's intentions, the Will/Riste Trust or the RCW requiring transfer of the RPLBEAB, into the Riste Trust in kind? In a solvent Estate with the ability to pay all debts and expenses of administration without the necessity for sale? Without exigent/emergency circumstances? In contravention of the interests of the beneficiary(s)? (Assignment(s) of Error, 1-5, 8, 9, 15-19, 22-25)

2) Why wasn't the PR's failure to transfer the RPLBEAB, into the Riste Trust in kind found to be a breach of his fiduciary duty(s)? (Assignment(s) of Error, 1-5, 8, 9, 15-19, 22-25)

3) Was there a legal requirement mandated by the intentions of the Decedent, the terms of the Will/Riste Trust or the RCW which required payment to the beneficiary(s) on a monthly basis of the net income from the RPLBEAB? (Assignment(s) of Error, 1-4, 8, 18, 19, 21, 22- 24)

4) Why wasn't the PR/Trustee's failure to pay the beneficiary(s) the monthly basis of the net income from the RPLBEAB found to be a breach of fiduciary duty(s)? (Assignment(s) of Error, 1-4, 8, 18, 19, 21, 22- 24)

5) Was there a legal requirement mandated by the intentions of the Decedent, the terms of the Will/Riste Trust or the RCW which required investment only in a manner which would provide the maximum income to the beneficiary(s) rather than investing in growth assets as a hedge

against inflation? (Assignment(s) of Error 1, 2, 4, 5, 6-12, 17-19, 22-25)

6) Why wasn't the PR/Trustee's failure to make investments only to provide the maximum income to the beneficiary(s) rather than investing in growth assets as a hedge against inflation found to be a breach of fiduciary duty(s)? (Assignment(s) of Error 1, 2, 4, 5, 6-12, 17-19, 22-25)

7) Was there a legal requirement mandated by the intentions of the Decedent, the terms of the Will/Riste Trust or the RCW, including RCW § 11.12.250, requiring the RPLBEAB, to be a "non probate" asset not subject to administration or WA Estate Taxation? Where the Estate was otherwise solvent with the ability to pay all debts and taxes of administration? (Assignment(s) of Error 1-12, 15-19, 22-25)

8) Why wasn't the PR/Trustee's failure to treat the RPLBEAB, as a "non probate" asset found to be a breach of his fiduciary duty(s)? (Assignment(s) of Error 1-12, 15-19, 22-25)

9) Was there a legal requirement mandated by the intentions of the Decedent, the terms of the Will/Riste Trust or the RCW, requiring the PR/Trustee to provide truthful information? (All Assignment(s) of Error)

10) Why wasn't the PR/Trustee's failure to provide truthful information to the beneficiary(s) found to be a breach of fiduciary duty(s)? (All Assignment(s) of Error)

11) Was there a legal requirement mandated by the intentions of the Decedent, the terms of the Will/Riste Trust and/or the RCW, requiring the

PR/Trustee to provide truthful information to the Yakima Superior Court?  
(Assignment(s) of Error 1-6, 8, 17-19, 22-25)

12) Why wasn't the PR/Trustee's failure to provide truthful information to the Yakima Superior Court found to be a breach of his fiduciary duty(s)? (Assignment(s) of Error 1-6, 8, 17-19, 22-25)

13) Did the Yakima Superior Court have jurisdiction to order a sale of the RPLBEAB? Where the Estate was solvent with the ability to pay all debts of administration? (Assignment(s) of Error 1-10, 17-19, 22-25)

14) Why wasn't the PR/Trustee's action(s) in bringing forth a Petition and obtaining an Order of the Yakima Superior Court for sale of the RPLBEAB, which was outside of the Court's jurisdiction not found to be a breach of fiduciary duty(s)? (Assignment(s) of Error 1-10, 17-19, 22-25)

15) Did the PR/Trustee have any legal basis for selling the RPLBEAB? In a solvent Estate with the ability to pay all debts/taxes of administration without the need for sale? (Assignment(s) of Error 1-12, 17-19, 22-25)

16) Why wasn't the PR/Trustee's sale of the RPLBEAB found to be a breach of fiduciary duty(s)? (Assignment(s) of Error 1-12, 17-19, 22-25)

17) Was there a legal requirement mandated by the intentions of the Decedent, the terms of the Will/Riste Trust or the RCW, which required dissemination of all relevant information to the beneficiary(s) regarding the sale of the RPLBEAB so that they could make an informed decision regarding objecting in court to the Petition for a Court Order Authorizing

the sale, specifically including but not limited to, a) the environmental assessment, b) appraisals, c) relevant tax returns, d) the return on investment, e) the return on investment on assets to be purchased from the proceeds for comparison, f) all relevant legal authority regarding any objections, g) an accurate legal assessment regarding the priority between the Decedent's intentions and the PR/Trustee's duty to diversify and/or the prudent investor rule? (Assignment(s) of Error 1-13, 17-19, 22-25)

18) Why wasn't the PR/Trustee's failure to provide all required and/or relevant information (a-f) regarding the sale of the RPLBEAB found to be a breach of fiduciary duty(s)? (Assignment(s) of Error 1-13, 17-19, 22-25)

19) Was there a legal requirement mandated by the intentions of the Decedent, the terms of the Will/Riste Trust or the RCW, which required the beneficiary to be provided an Inventory and Appraisement, Accounting, Annual Statement and/or tax information in a timely manner upon request? (Assignment(s) of Error 1, 2, 7-11, 14- 21, 24)

20) Why wasn't the PR/Trustee's failure to provide an Inventory and Appraisement, Accounting, Annual Statement and/or tax information in a timely manner upon request found to be a breach of fiduciary duty(s)? (Assignment(s) of Error 1, 2, 7-11, 14- 21, 24)

21) Was there a legal requirement mandated by the intentions of the Decedent, the terms of the Will/Riste Trust or the RCW, requiring the PR/Trustee to not provide misleading information to the beneficiary(s)?

(All Assignment(s) of Error)

22) Why wasn't the PR/Trustee's providing misleading information a breach of fiduciary duty(s)? (All Assignment(s) of Error)

23) Was there a legal requirement mandated by the intentions of the Decedent, the terms of the Will/Riste Trust or the RCW, requiring the Trustee to take all legal actions to prevent harm to the Riste Trust including filing an action against the PR? (All Assignment(s) of Error)

24) Why wasn't the Trustee's failure to take all legal actions to prevent harm to the Riste Trust found to be a breach of fiduciary duty(s)? (All Assignment(s) of Error)

25) Does a beneficiary have a right to file a "Petition for Removal" at any time during administration? (Assignment(s) of Error 1,2, 5, 10)

26) Why did the court find that the "Petition for Removal" was untimely? (Assignment(s) of Error 5, 10)

27) Was there a conflict of interest between the PR and the Trustee where the Estate and Riste Trust both had adverse interests in the same assets, in the method and timing of the distribution of bequests, in the obligation/right to pay \$14, 392, in the payment of Estate taxes and/or other expenses of administration? (All Assignment(s) of Error)

28) Why did the court fail to find a conflict of interest between the PR of and the Trustee where both the Estate and the Riste Trust had adverse interests? (All Assignment(s) of Error)

29) Should the court remove a PR and/or a Trustee where a conflict of interest has or will result in harm, where the fiduciary has breached fiduciary duty(s), where ill will is shown? (All Assignment(s) of Error)

30) How did the court justify non removal? (All Assignment(s) of Error)

31) Was there a legal requirement mandated by the intentions of the Decedent, the terms of the Will/Riste Trust or the RCW which required disclosure of a conflict of interest? (All Assignment(s) of Error)

32) Why wasn't the failure to disclose a conflict of interest found to be a breach of fiduciary duty(s)? (All Assignment(s) of Error)

33) Was there a legal requirement mandated by the intentions of the Decedent, the terms of the Will/Riste Trust or the RCW which prohibited commingling Estate assets?(Assignment(s) of Error 1, 2-17, 19, 20, 22-24)

34) Why wasn't the PR/Trustee's commingling found to be a breach of fiduciary duty(s)? (Assignment(s) of Error 1,2, 13-17, 19, 20, 22-24)

35) Was there a legal requirement mandated by the intentions of the Decedent, the terms of the Will/Riste Trust or the RCW requiring disclosure upon discovery to the beneficiary(s) of the PR's commingling of Estate and/or Trust assets? (Assignment(s) of Error 1,2, 12-18-19, 22-24)

36) Why wasn't the failure to inform the beneficiary(s) upon discovery of the commingling of Estate and/or Trust assets found to be a breach of fiduciary duty(s)? (Assignment(s) of Error 1,2, 12-18-19, 22-24)

37) Was there a legal requirement mandated by the intentions of the Decedent, the terms of the Will/Riste Trust or the RCW which required expeditious administration? (All Assignments of Error )

38) Why wasn't the failure to administer expeditiously found to be a breach of fiduciary duty(s)? (All Assignments of Error)

39) Was there a legal requirement mandated by the intentions of the Decedent, the terms of the Will/Riste Trust or the RCW requiring timely filing of Estate/Riste Trust tax returns? (Assignment(s) of Error 1,2, 20)

40) Why wasn't the failure to timely file Estate/Riste Trust tax returns found to be a breach of fiduciary duty(s)? (Assignment(s) of Error 1,2, 20)

41) Did the court abuse its discretion when it found that the PR/Trustee and/or his attorney were entitled to all fiduciary fees where the court made erroneous interpretation(s) and/or applications of the law(s) and/or erroneous findings of fact? (All Assignment(s) of Error)

42) Did the court abuse its discretion in failing to remove the PR/Trustee? (All Assignment(s) of Error)

43) Was there a legal requirement mandated by the intentions of the Decedent, the terms of the Will/Riste Trust or the RCW which required the PR/Trustee to abide by the requirements of the RCW, including but not limited to the confirmation to the court of the court ordered sale? (Assignment(s) of Error 1,2, 6, 25)

44) Why wasn't the PR failure to abide by the intentions of the

Decedent, the terms of the Will/Riste Trust or the RCW including but not limited to the confirmation to the court of the sale found to be a breach of fiduciary duty(s)? (Assignment(s) of Error 1, 2, 6, 25)

#### **IV. STATEMENT OF THE CASE**

A Petition for Removal of the PR and the Trustee both of which were the same individual, Baker Boyer Bank, was filed. CP 142-264. The Estate of Dan McAnally (Hereinafter "Estate") included a will (Hereinafter, "Will") which left an in kind gift of the RPLBEAB to the Riste Trust. CP 1-6. Removal was requested due to, a) a conflict(s) of interest, b) breaches of the law(s) and/or fiduciary duty(s) including the duty(s) of loyalty, good faith, competence and honesty, c) violations of the written testament and/or Decedent's intentions and d) because the fiduciary(s) had personal interests. The court erroneously denied all factual evidence and legal arguments with one fell swoop, "[t]here was no breach of fiduciary duty... I'm not finding that the underlying action is supported...the underlying arguments I think are not sufficient. I'm going to deny the request and it looks like this estate is going to close." CP 628-629, ln 15, 20-26, 1-5.

The Assignments of Error and the Issues Pertaining to the Assignments of Error are included in Petitioner's civil complaint seeking monetary damages, Case # 16-2-02459-39 which is ongoing. **The Petitioner's are not requesting the Appeals Court to decide the merits of these**

**Assignments of Error and/or Issues.** Remand is requested for a proper interpretation(s) and/or application of the law(s) and/or finding(s) of fact, “a trial court must have valid grounds supported by the record to [deny] remov[al] [of] a personal representative. An appellate court will uphold challenged findings of fact that are supported by substantial evidence. ‘Substantial evidence’ is evidence ‘sufficient to persuade a rational, fair-minded person of the truth of the finding.’” *In re Estate of Lowe*, 191 Wn.App. 216, 229 (2015), Citing, *In re Estate of Jones*, 152 Wn.2d 1 (2004). The trial court's interpretations and/or applications of the law(s) and factual findings are unsupported by the evidence. CP 628 ln 15-19. The record is re-pleat with uncontradicted evidence and indisputable legal argument(s) of the conflict(s), breaches of fiduciary duty(s) and violation(s) of the law(s). Removal should have been granted where there was a civil action pending against the PR/Trustee for acts committed during administration in order to place the Estate/Riste Trust in a protective status and prevent any possibility of further injuries until the civil matter was concluded. The ill will between the beneficiary(s) and the PR/Trustee justifies removal in and of itself. CP 628-629, 632-638. The Petitioner’s civil complaint contains allegations of both civil and possibly criminal acts which the PR/Trustee committed during administration.

When the Issues pertaining to the Assignments of Error are considered it is clear that the trial court erroneously found that, a) there

was no breach of fiduciary duty(s), b) the decedent's intentions were followed, c) no laws were violated, d) there was no conflict of interest, e) the fiduciary(s) did not act with a personal interest, f) the fiduciary(s) and/or their attorney's were entitled to all of their requested fees and/or g) the request for removal was unwarranted. The Assignments of Error constitute an Estate protection, court intervention or a removal of PR/Trustee an interim PR/Trustee and, so that adjudication at bar does not get prejudiced where beneficiary(s) rightful pleadings in accusing the wrongdoer are presently at bar.

Judicial decision making where fraud, breach of fiduciary responsibility(s) and deception becomes pronounced at bar requires a court to uphold the state laws in all aspects. Thereupon, until proven otherwise through determination and trial even if those orders of court are temporary, so that adequate protection of the beneficiary(s) and the Deceased's Estate are protected.

#### **V. ARGUMENT**

There are erroneous interpretation(s) and/or applications of the law(s) to the undisputed facts which should be reviewed de novo. *Kommavongsa v. Haskell*, 149 Wn.2d 288, 295 (2003). The trial court also made erroneous finding(s). *Thorndike v. Hesperian Orchards*, 54 Wn.2d 570 (1959). The trial court has also abused its discretion,

[j]udicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. *State ex rel. Clark v. Hogan*, 49 Wn.2d 457 (1956). Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *MacKay v. MacKay*, 55 Wn.2d 344 (1959); *State ex rel. Nielsen v. Superior Court*, 7 Wn.2d 562 (1941).

*State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26 (1971). Where the trial court fails to make sufficient findings to allow for review on appeal the Court of Appeals "may independently review," or "remand". *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 808 (2009), Citing, *In re Firestorm 1991*, 129 Wn.2d 130, 135 (1996), Citing, *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222 (1992).

There weren't any findings made regarding the breaches of fiduciary duty(s) or conflict(s) of interest only fleeting references. CP 142-264, 621 ln 6-9, 622 ln 1-4, 628 ln 15-19, 635. The court erroneously dismissed the breaches of fiduciary duty arguments as an untimely objection, "[h]is objections are untimely. Mr. Riste's opportunity to object to the sale, or to object to the conduct of the PR relating to the sale was in July of 2014". CP 635. Similarly, the trial court refused to hear make findings on the alleged of conflict(s) of interest, "I'm not finding a conflict of interest in this." CP 628, ln 14-15.

Where the court did make findings it made the following errors, in

relation to the sale of the realty; a) that the PR/Trustee was a non intervention PR/Trustee and therefore not prohibited from selling the gift of in kind property by RCW § 11.04.250 because RCW § 11.68.090 provided authority for him to do so; b) the PR properly noticed the court hearing in which he sought authority to sell; c) the PR/Trustee had a duty to diversify. CP 609. In regards to sections a & c the court failed to address the allegation(s) that the Decedent's intent, the Will/Riste Trust or other sections of the RCW required the RPLBEAB to be distributed in kind overriding the duty to diversify under RCW § 11.68.090. CP 151 ln 2-22, 152 ln 24-28, 153 ln 7-16, 155 ln 3-11, 142-264; 163-165; 166 ln 23-27, 167-169; RCW § 11.12.230; RCW § 11.97.010; RCW § 11.97.020; RCW § 11.97.900; RCW § 11.98.072; RCW § 11.98.078. In regards to section b) the court erroneously found that proper notice was provided of the impending sale even though uncontradicted evidence showed that the PR/Trustee deceived and/or failed to provide crucial information prior to the hearing. CP 142-264. Further, the court erroneously found that proper notice was provided where un-controverted evidence proved that the PR/Trustee deceived the beneficiary(s) regarding their legal right to participate in the management of the property and/or their right to object to the sale in a court of law, including threats that the beneficiary(s) would be required to personally pay the legal fees if they objected. CP 142-264.

## **VI. SPECIFIC ARGUMENTS FOR ASSIGNMENT OF ERROR**

1) It was erroneously found that the PR/Trustee did not breach any fiduciary duty(s) by failing to adhere to the Will/Riste Trust's written testament and/or the RCW. CP 1-6, Will, Sec. 4.1, 6.1, 7.1 & 10.3

### **i) THE RCW REQUIRED DISTRIBUTION IN KIND**

The RCW prohibited the sale of assets pledged in kind if the Estate was solvent and able to pay all debts, expenses and taxes of administration without the 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.” emphasis added, ((RCW § 11.04.250; *Bickford v. Stewart*, 55 Wash. 278 (1909); *Dennis v. Godfrey*, 122 Wash. 207 (1922), modified, (1923); *North Pacific Mortg. Co. v. Sieler*, 146 Wash. 530 (1928); *Lynch v. McNulta*, 168 Wash. 397 (1932); *In re Binge's Estate*, 5 Wn.2d 446 (1940); See also, (*Demaris v. Barker*, 33 Wash. 200, (1903) - executor could not sell estate's real property, without court order); Will, Sec. 4.2 & Sec. 6; RCW § 11.12.230; RCW § 11.48.010; RCW § 11.48.020; RCW § 11.56.030; RCW § 11.97.010; RCW § 11.97.020; RCW § 11.97.900; RCW § 11.98.078; RCW § 11.100.010; RCW § 11.100.047; RCW § 11.100.060; RCW § 11.100.050; RCW § 11.100.140; CP 150-151, 152 ln 24 -154 ln 23, 159 ln 18-22, 160 ln 21-164 ln 16, 166 ln 23 - 169 ln 25, 157 ln 6-22, specifically, (*English-McCaffery Logging Co. v. Clowe*, 29 Wash. 721 (1902) - Indicating, court is without

jurisdiction to order sale of realty where title has vested in devisees under nonintervention will; ““The estate being solvent, upon a showing of that fact it passes from under the immediate jurisdiction of the court, and the court would have no jurisdiction to enter an order of sale,’ ‘Nor could it assume jurisdiction unless there was a showing of ‘failure to execute the trust faithfully’””) (*In re estate of Megrath*, 142 Wash. 324, 327 (1927) citing, *English-McCaffery Logging Co. v. Clowe*, 29 Wash. 721 (1902) and *Guye v. Guye*, 63 Wash. 340 (1911))

There was uncontradicted evidence that the PR/Trustee sold the RPLBEAB during the administration of a solvent Estate with the ability to pay all debts, expenses and taxes of administration. *Id.*; CP 608. The PR/Trustee's "Petition for Order for Authorizing Sale of Real Estate Property," failed to indicate any need to sell in order to pay debts, expenses and taxes of administration and was thus unauthorized by the RCW and a breach of his fiduciary duty(s). CP 121-131.

**ii) THE TERMS OF THE WILL AND/OR RISTE TRUST  
REQUIRED DISTRIBUTION IN KIND**

The written testament required the RPLBEAB, to be distributed in kind. Will, Sec. 4.2 & 6.1; RCW § 11.12.230; RCW § 11.48.020; RCW § 11.04.250; RCW § 11.12.250; CP 150 ln 23-26, 157 ln 1-22, 158 ln 2-4, 7-8, 160 ln 21-27, 161 ln 8-28, 162 ln 1-28, 163 ln 15 -165 ln 15, 166 ln 23-27, 167 ln 1 - 168 ln 18. The Will/Riste Trust did not provide any

written authorization for the PR/Trustee to sell the RPLBEAB. *Id.*

**iii) THE RCW DOES NOT AUTHORIZE PAYMENT OF NON OBLIGATORY DEBTS AND/OR TAXES**

The RCW prohibited the PR's payments of \$14,392 without legal claim and payment of Washington Estate Taxes. CP 181; 148 ln 7-13, 152 ln 5-9, 159 ln 10-22. The PR made payments in the amount of \$14,392 where no creditor's claim was filed (although the PR alleged otherwise) and \$48,787 for taxes. CP 593 ln 8, 462, 410 ln 15-19. The PR was not required to pay taxes on "non probate" assets. See, RCW § 11.12.250.

**iv) THE TERMS OF THE WILL/RISTE TRUST ALLOWED ONLY PAYMENTS FOR LEGALLY OBLIGATED DEBTS, EXPENSES OF ADMINISTRATION AND TAXES**

The Will specified only that the PR was authorized to pay obligatory debts and that the residue of the estate was to be distributed. CP 2, 5, 144 ln 10-15, 145 ln 21-28, 146 ln 1-2, 148 ln 7-13, 152 ln 5-11, 181. The PR's payment of \$14,392 and \$47,787 were prohibited. *Id.*

**v) THE RCW AND THE WRITTEN INSTRUCTIONS OF THE WILL/RISTE TRUST BOTH REQUIRED THE PR/TRUSTEE TO RETAIN THE RPLBEAB UNLESS INVESTMENT IN AN ASSET WITH A HIGHER RETURN COULD BE OBTAINED**

The Will/Riste Trust included written instruction which required the RPLBEAB to be maintained as an income producing asset without regard

to inflation unless other assets would generated a higher income stream, “invest in assets in a manner which will provide the maximum income to the trust beneficiary(s) rather than investing in growth assets as a hedge against inflation.” Riste Trust, Sec. 10.2; RCW § 11.12.230; RCW § 11.100.060; RCW § 11.56.030; RCW § 11.97.010; RCW § 11.97.020; RCW § 11.98.078; RCW § 11.100.010; RCW § 11.100.140; RCW § 11.100.047; CP 151 ln 17-19, 162 ln 15-18, 163-165, 169 ln 8-16, 173-264. The PR sold the RPLBEAB valued at \$1,100,000 which earned \$ 9,791.82 per month (annual income \$119,662, annual return on investment 10.878%) and invested the proceeds in his own financial products resulting in a lower annual return on investment (less than 4%). CP 109, ln 20-22. Even under the PR's hypothetical (and ridiculous) catastrophic approach (annual income of \$119,662 less \$50,000 annual depreciation allocation) the RPLBEAB, would still have produced a higher ROI (6.33%) than the new investments. CP 127, ln 1-7, 164. It was erroneously found the PR/Trustee did not violate the Will/Riste Trust's written instructions or the RCW because RCW § 11.68.090 does not usurp the written testament and/or other sections of the RCW. CP 635.

**vi) THE RCW AND THE WRITTEN INSTRUCTIONS OF THE WILL/RISTE TRUST REQUIRED INCOME PAYMENTS TO THE BENEFICIARY(S) ON A MONTHLY BASIS**

The Riste Trust included written instruction which as applied under the

RCW required payments to the beneficiary(s) of income on a monthly basis. Will, Sec. 7.1; RCW § 11.104A.050; RCW § 11.104A.070; CP 168 In 19-22. Undisputed evidence showed that the Trustee failed to comply. CP 142-148; CP 168 In 19-22, 189, 192-193, 198, 210, 249-261. During the 3.5 year administration only three payments were made. *Id.*

2) It was erroneously found that the PR did not breach any fiduciary duty(s) by failing to adhere to the intentions of the Decedent. CP 1-6, Will, Sec. 4.1, 6.1 & 7.1.

The Decedent's intentions must be followed above all,

When called upon to construe a will, the paramount duty of the court is to give effect to the testator's intent. *In re Estate of Riemcke*, 80 Wn.2d 722, 728 (1972). Such intention must, if possible, be ascertained from the language of the will itself and the will must be considered in its entirety and effect must be given every part thereof. *In re Estate of Douglas*, 65 Wn.2d 495, 499 (1965); *Elder v. Seattle First Nat'l Bank*, 33 Wn.2d 275, 278 (1949).

*In re Estate of Bergau*, 103 Wn.2d 431, 435-36 (1985).

The four corners of the Will/Riste Trust indicate intent. RCW § 11.12.230; RCW § 11.48.020; RCW § 11.56.030; RCW § 11.97.010; RCW § 11.97.020; RCW § 11.97.900; RCW § 11.98.078; RCW § 11.100.010; RCW § 11.100.060; RCW § 11.100.050; RCW § 11.100.140; RCW § 11.98.072; CP 142-264. The Decedent intended the transfer of the RPLBEAB, into the Riste Trust in kind and thereafter management **WITHOUT** regard for diversification and/or inflation, "I give the residue

of my estate to the trustee of the Riste Trust to be held, administered and distributed as provided therein,” “[t]he Trustee shall pay to my friend, [], during his lifetime, all of the net income...,” “which will provide the maximum income to the trust beneficiary(s) rather than investing in growth assets as a hedge against inflation.” *Id.*; Will, Sec. 6.1, 7.1-7.2.4, 10.3, respectively; See also, RCW § 11.12.250.

The PR/Trustee deceptively contravened the wishes of the Decedent for his own gain and/or so that he could invest in assets in which he preferred to manage even though less productive. The PR/Trustee stated to the court and the beneficiary(s) that his purposes for the sale were 1) diversification and 2) to avoid conflicts in apportionment of principal and income, “[t]he personal representative believes that it is necessary to sell the shopping center to comply with its fiduciary duty(s) of diversification and to avoid conflicts between the income and principal interests resulting from a lack of adequate funds to full pay for capital improvements from principal” CP 91 ln 6-10; 144 ln 16-28, 145 ln 1-4, 146 ln 21-28, 147, 148 ln 1-7, 153-155, 157 12-22, 158 ln 2-4, 160 ln 21 - 163 ln 15, 164 ln 15-28, 165-169, 173-264. The PR's “Petition for Order for Authorizing the Sale of Real Estate Property” and eventual sale was prohibited for the purposes specified. *Id.*

Further, diversification was not required, “[s]ubject to the provisions of RCW § 11.100.060 and any express provisions in the trust...,” “...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.” *Id.*; Respectively, RCW § 11.100.047; RCW § 11.100.060. The PR/Trustee deceived the beneficiary(s) and the Court into believing that his duty to diversify was controlling. *Id.* In return for the beneficiary(s) confronting him, the PR/Trustee intentionally deceived the beneficiary(s) regarding his requirement to sell by, a) withholding the environmental assessment and appraisal reports b) providing false values of the realty c) providing an inaccurate assessment of the ROI, d) failing fraudulently inflating the risks of not selling, e) providing deceptive information regarding the need to re-mediate the contamination, f) providing deceptive information regarding the inability to obtain adequate insurance against catastrophic loss, g) providing incorrect depreciation rates for the buildings, h) providing deceptive information regarding conflicts between principal and income allocation and i) providing false information regarding payment for attorney’s fees upon unsuccessful objection to the sale. *Id.*; See specifically, CP 144-148, 185-264, 212-218.

The court erroneously failed to consider the intentions of the Decedent as the controlling factor. The court erroneously found that the PR/Trustee's authority under RCW § 11.68.090 and his duty diversify superceded the Decedent's intent, “Mr. Riste also challenges the P.R.'s right to sell the property by citing RCW § 11.04.250. Mr. Riste's

interpretation is too narrow and is rejected by RCW § 11.68.090 which gives a personal representative with non-intervention power to sell real property without court approval.” CP 635 The Court failed to make any findings regarding PR/Trustee’s violation of the Decedent’s intent.

3) It was erroneously found that the PR did not breach any fiduciary duty(s) by subjecting the RPLBEAB, to Estate administration as a “Probate Asset,” all the while the Plaintiff(s) civil action asserts wrongdoing and deserves adequate estate protection by the court.

A gift of real property set forth in a will is vested immediately upon death and should be transferred at the close of administration subject only to the PR’s duty(s) to maintain the integrity of the realty and until payment of taxes and expenses of administration. ((Will, Sec. 4.2 & 6; RCW § 11.12.230; RCW § 11.48.010; RCW § 11.48.020; RCW § 11.56.030; RCW § 11.97.010; RCW § 11.97.020; RCW § 11.97.900; RCW § 11.98.078; RCW § 11.100.010; RCW § 11.100.047; RCW § 11.100.060; RCW § 11.100.050; RCW § 11.100.140, CP 150-151, 152 ln 24 - 154 ln 23, 159 ln 18-22, 160 ln 21 - 164 ln 16, 166 ln 23 - 169 ln 25, 157 ln 6-22, specifically, *English-McCaffery Logging Co. v. Clowe*, 29 Wash. 721 (1902) - Indicating, [c]ourt is without jurisdiction to order sale of realty where title has vested in devisees under nonintervention will; “[t]he estate being solvent, upon a showing of that fact it passes from

under the immediate jurisdiction of the court, and the court would have no jurisdiction to enter an order of sale," "[n]or could it assume jurisdiction unless there was a showing of 'failure to execute the trust faithfully'". (*In re estate of Megrath*, 142 Wash. 324, 327 (1927) citing, *English McCaffery Logging Co. v. Clowe*, 29 Wash. 721 (1902), and *Guye v. Guye*, 63 Wash. 340 (1911))) As such, title was vested in the beneficiary upon death. ( RCW § 11.12.170; RCW § 11.12.250; RCW § 11.04.250; “[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 (1909); *Dennis v. Godfrey*, 122 Wash. 207 (1922), modified, (1923); *North Pacific Mortg. Co. v. Sieler*, 146 Wash. 530 (1928); *Lynch v. McNulta*, 168 Wash. 397 (1932); *In re Binge's Estate*, 5 Wn.2d 446 (1940); See also, *Demaris v. Barker*, 33 Wash. 200, (1903) - executor could not sell estate's real property, without court order.)

Under RCW § 11.12.250 the RPLBEAB, were not subject to probate administration in a solvent Estate with the ability to pay all debts, expenses and taxes of administration without the sale. A non probate transfer is exempt from probate administration and/or Washington Estate Taxation, “[t]his chapter is intended to establish ownership rights to nonprobate assets upon the death of the owner, as between beneficiary(s) and testamentary beneficiary(s).” RCW § 11.11.007; see also RCW §

11.11.003. A nonprobate asset “means a nonprobate asset within the meaning of RCW 11.02.005...” RCW § 11.11.010. A nonprobate asset includes,... “[a] trust of which the person is grantor and that becomes effective or irrevocable only upon the person's death...” RCW § 11.02.005. Since the court found the Riste Trust valid the court should have also found that PR breached his fiduciary duty(s) by subjecting the RPLBEAB to probate administration. Will, Sec. 4.2, 6; RCW § 11.12.230; RCW § 11.48.010; RCW § 11.48.020; RCW § 11.56.030; RCW § 11.97.010; RCW § 11.97.020; RCW § 11.97.900; RCW § 11.98.078; RCW § 11.100.010; RCW § 11.100.047; RCW § 11.100.060; RCW § 11.100.050; RCW § 11.100.140, CP 150-151, 152 ln 24 -154 ln 23, 159 ln 18-22, 160 ln 21 - 164 ln 16, 166 ln 23 - 169 ln 25, 157 ln 6-22.

4) It was erroneously found that the PR did not breach any fiduciary duty(s) by failing to transfer the RPLBEAB to the Riste Trust.

As stated above for arguments 1-3 the PR was prohibited from selling the RPLBEAB, while an asset of the Estate and should have transferred the RPLBEAB in kind. CP 90, ln 13-17, 142-264.

5) It was erroneously found that the PR/Trustee did not breach any fiduciary duty(s) when he mislead/failed to provide crucial information to the beneficiary or the Court regarding his legal right/need and/or the Court's jurisdiction to order the sale of the RPLBEAB.

As stated above for arguments 1- 4 the PR/Trustee had no legal right/justification for bringing a petition for a court order for the sale of the RPLBEAB and the court did not have jurisdiction to order the sale.

**i) THE PR/TRUSTEE MISLEAD AND/OR FAILED TO PROVIDE INFORMATION TO THE BENEFICIARY(S) TO ALLOW THEM AN OPPORTUNITY TO MAKE AN INFORMED DECISION ON OBJECTING TO THE SALE OF THE RPLBEAB**

A PR/Trustee is required to keep the beneficiary(s) informed, “[a] trustee must keep all [] beneficiary(s) of a trust reasonably informed about the administration of the trust and **of the material facts necessary for them to protect their interests.**” CP 142-148, 168 ln 3-8, 169 ln 8-16; RCW § 11.98.072; See also, RCW § 11.100.140.

The PR/Trustee breached his fiduciary duty(s) by failing to provide material facts regarding the management and/or valuation of the RPLBEAB and/or the applicable laws so as to provide an opportunity for informed decision making prior to sale. ((See paragraph 8 below); CP 142-264, specifically, 91, ln 6-10, 173-264))

**ii) THE PR/TRUSTEE MISLEAD THE COURT AS TO THE COURT'S JURISDICTION TO ORDER THE SALE AND THE NOTICE TO THE BENEFICIARY OF THE PETITION FOR SALE**

As stated above in paragraphs 1-5 the PR/Trustee did not have any legal authority and the court did not have any jurisdiction to order the sale

of the in kind gift where the estate was solvent with the ability to pay all debts, expenses and taxes of administration. CP 157 ln 7-22; *English-McCaffery Logging Co. v. Clowe*, 29 Wash. 721 (1902); *In re estate of Megrath*, 142 Wash. 324, 327 (1927).

The PR/Trustee brought his Petition without alleging insolvency and thus without authorization or invoking the court's jurisdiction. (CP 88-120) The PR/Trustee intentionally deceived the court and the beneficiary(s) of his authority and the court's jurisdiction to order the sale. *Id.*

6) It was erroneously found that the PR did not breach any fiduciary duty(s) by violating the order to sell the RPLBEAB for \$1,415,000 and/or the statutory requirement to confirm the sale.

As stated above in paragraphs 1-5 the PR/Trustee was Ordered to sell the RPLBEAB for \$1,415,000 and failed to abide by the Order when he sold it for \$1,100,000. CP 497, 133. The PR/Trustee also failed to confirm the sale with the court, “[t]he personal representative making any sale of real estate... shall within ten days after making such sale file with the clerk of the court his or her return of such sale, the same being duly verified” CP 167-168, ln 1-2, ln 19-28, 426 ; RCW § 11.56.100 & RCW § 11.56.010; RCW § 11.56.050.

7) It was erroneously found that the PR/Trustee did not breach any fiduciary duty(s) when he failed to provide an inventory and appraisal, accounting, annual statement and/or tax information in a timely manner.

The PR was required to provide an inventory and appraisal, “[w]ithin three months after appointment, ..., every personal representative shall make and verify by affidavit a true inventory and appraisal...”

*Nason v. Brown*, 39 Wash. 520 (1905); RCW § 11.44.015; RCW § 11.106.020. The PR did not provide the inventory and appraisal. CP 142-264, Specifically, 142-148, 183, 192-93, 209, 250-264. The PR/Trustee was required to provide tax information in a timely manner. RCW § 11.106.020; CP 142-264, Specifically, 142-148, 183, 192-93, 209, 250-264. Not only did the PR/TRUSTEE fail to provide the required information, rather, he intentionally misinformed the Petitioner by providing incorrect and/or misleading information. *Id.* The PR was required to provide a timely accounting (in this case material information) where that information was necessary to protect the beneficiary(s) interest(s) (here the sale of real property valued at over 1.1 million). RCW § 11.98.072; RCW § 11.100.060; RCW § 11.100.140; CP 142-148, 152 ln 21-25, 153-154, 159 ln 10-18, 263 ln 10-14, 266 ln 4-18, 167 ln 1-7, 168 ln 3-8 & ln 23-28, 169 ln 1-8, 183, 192-93, 209, 250-264. The Trustee was required to provide an annual statement and itemized list of property but did not do so. *Id.*; RCW § 11.106.020. The failure(s) to provide the

information which justified removal. *Id.*; RCW 11.98.072; RCW § 11.100.140, See also, *In re Estate of Jones*, 152 Wn.2d 1 (2004) - “breaches included using estate property for personal use, commingling estate funds, and refusing to disclose information to the beneficiary(s)”.

8) It was erroneously found that the PR/Trustee did not breach any fiduciary duty(s) when he mislead and/or provided untruthful information.

As stated above the PR/Trustee misinformed the beneficiary(s) of the PR/Trustee's fiduciary duty(s) including the A) duty to diversify, B) conflicts of interest between principal and income, C) the impact of the environmental contamination, D) the inability to obtain insurance against catastrophic loss, E) the depreciation rates and need for a large depreciation reserve, F) that the beneficiary(s) were not permitted to participate in the management of trust assets and G) that objecting would result in the beneficiary being personally charged with the PR's fees.

A) There is no duty to diversify without exception and/or where the written testament directs otherwise. CP, 142-264, 169 ln 8-16; RCW § 11.12.230; RCW § 11.48.020; RCW § 11.56.030; RCW § 11.97.010; RCW § 11.97.020; RCW § 11.97.900; RCW § 11.98.078; RCW § 11.100.010; RCW § 11.100.060; RCW § 11.100.050; RCW § 11.100.140; RCW § 11.98.072. The Trustee was required to disclose the lack of a requirement to diversify to the beneficiary(s) and the court and failed to do

so. CP 142-264, 91 ln 6-10. The PR/Trustee's failure to be truthful violated the fiduciary duty(s) of loyalty, honesty, competence, in good faith and/or without personal interest. *Id.*

B) The PR/Trustee misinformed the court and the beneficiary(s) regarding the conflict of interest between principal and income allocation. CP 142-264, 185-189, 201-202, 212-214, 91 ln 6-10. The PR/Trustee fallaciously stated that the RPLBEAB's overall net income would not be enough to cover a hypothetical depreciation reserve of \$50,000 per year. CP 115 ln 13-18. The factual evidence presented at trial indicated that the RPLBEAB earned a net income of (\$9,791.82 per month, \$119,662 annualized). CP 109 ln 21. The PR/Trustee intentionally deceived the beneficiary and the court. CP 185-189, 195-198, 201-203, 212-214.

C) The PR/Trustee misinformed the beneficiary(s) of the decreased property value (from 1.8 to 1.1 million) and/or the need to re-mediate environmental contamination in order to continue operations. CP, 142-264, 194, 215-225. The Petitioner was never provided a copy of the environmental survey which the PR relied upon to reduce the market value of the RPLBEAB by over \$700,000. *Id.* In fact the beneficiary(s) were led to believe that the environmental contamination was so egregious that no business could lawfully be operated without total re-mediation. *Id.* Contrary to those assertions the environmental survey indicated that some contamination existed but no violations of environmental law necessitated

re-mediation and/or discontinuation of business. *Id.* Defendant's hid and/or withheld the environmental assessment from the beneficiary(s) in order to deceive and/or manipulate their acquiescence in the sale. *Id.* The PR/Trustee violated his fiduciary duty(s) of loyalty, honesty and/or good faith. *Id.*

D) The PR/Trustee misinformed the beneficiary(s) and the court regarding the need for a depreciation reserve in the amount of \$50,000 per year. *Id.*; CP 115. Adequate insurance was available negating the need for a costly reserve. *Id.*; specifically, CP 186-187.

9) It was erroneously found that the Trustee did not breach any fiduciary duty(s) when he failed to advise the beneficiary(s) of their right/need to take legal action(s) to prevent the PR's mismanagement of asset's pledged to the Riste Trust and/or take legal action himself to prevent the unnecessary/illegal loss/misappropriation of Riste Trust assets.

The Trustee was aware of all acts of the PR because they were the same individual. The Trustee's fiduciary duty(s) of loyalty, honesty, competence and/or good faith required him to inform the beneficiary of the need to protect their interests and/or to take action himself. CP 142-264; RCW § 11.48.020; RCW § 11.98.070.

10) It was erroneously found that Petitioner did not have a right to

file a petition for removal during administration because it was untimely.

It was erroneously found that the Petition for Removal was an untimely objection to the “Petition for Order for Authorizing sale of Real Estate Property” which occurred in July of 2014. CP 635. There is no limitation within the RCW which prevents the filing of a Petition for Removal during administration. The Superior Court was required to hear the arguments, “[t]he court appointing any personal representative shall have authority for any cause deemed sufficient, to cancel and annul such letters and appoint other personal representatives in the place of those removed.” RCW § 11.28.160; RCW § 11.68.070; RCW § 11.28.250 - “...for any other cause or reason which to the court appears necessary...”; *In re Estate of Jones*, 152 Wn.2d 1 (2004) - “breaches included using estate property for personal use, commingling estate funds, and refusing to disclose information to the beneficiary(s)”. A personal representative has been removed for omitting property from the Inventory & Appraisal, and failing to make distributions in accordance with the terms of the Will. *Estate of Aaberg*, 25 Wn.App. 336 (1980). A personal representative should also be removed where there is a conflict of interest. *Estate of Clawson*, 3 Wn.2d 509 (1940). Petitioner alleged numerous violations of fiduciary duty(s) related to the PR acts in bringing the “Petition for Order for Authorizing sale of Real Estate Property” and/or the actual sale of the RPLBEAB, which the trial court erroneously refused to hear. CP 635.

11) It was erroneously found that there was no conflict of interest where the PR and the Trustee were the same individual and the Estate and the Riste Trust had adverse interests, including specifically but not limited to, a) the validity of the Riste Trust and/or the timely distributions of in kind property, b) the order of distributions of pecuniary bequests, c) the requirement to pay Washington Estate taxes, d) payments made in the amount of \$14,392, e) the 3.5 year delay in closing probate, f) the failure to timely file tax returns, g) the failure to timely make payments to the beneficiary(s), h) the failure to provide material information, i) the failure to properly advise the beneficiary(s) of the applicable law(s), j) the failure to provide truthful or accurate information, k) the personal interest(s).

A personal representative should be removed where there is a conflict of interest which negatively affects the rights of the beneficiary(s) and results and/or may result in harm to the Estate/Trust/beneficiary(s),

where a conflict of interest exists which would contravene the rights of the beneficiary(s) and result in waste of the estate, a potential representative should be disqualified. See *In re Estate of Thomas*, 167 Wash. 127, 133-34 (1932) (holding that where ill will exists which would result in more litigation the court may appoint any suitable person even if that person is outside of the family); *In re Estate of Rohrback*, 152 Or. App. 68, 72, 74 (1998) (holding that where a conflict of interest exists, a person may be removed as a personal representative); *Genins v. Boyd*, 166 Ga. App. 843, 844 (1983) (holding that where a conflict of interest exists, a person may not be appointed as a personal representative).

(Emphasis added) *In re Estate of Jones*, 152 Wn.2d 1 (2004) at 19; *Estate*

of *Clawson*, 3 Wn.2d 509 (1940). A conflict exists when the PR/Trustee does not administer the Estate in the best interests of the beneficiary(s),

[a] personal representative must administer the estate in the best interest of the beneficiary(s). If a representative has a conflict of interest, whether he be appointed or named in a nonintervention will, he will not be able to fulfill his fiduciary duty(s). Therefore, a conflict of interest may disqualify a person from acting as the personal representative.

*In re Estate of Jones*, 152 Wn.2d 1 (2004) at 19; See also, *Trask v. Butler*, 123 Wn.2d 835, 844, (1994) - “[a] conflict of interest arises in estate matters whenever the interest of the personal representative is not harmonious with the interest of a[] [beneficiary].”; See also, *Porter v. Porter*, 107 Wn.2d 43, 55 (1986)- “[r]easonable cause may include conflict of interest between the trustee and the trust beneficiary(s).”; See also, *Westerman v. Cary*, 125 Wn.2d 277, 280 (1994) “conflict of interest exists when a prosecutor's representation of two different public bodies requires the prosecutor to take directly adversarial positions...”. A conflict of interest or a material question of fact regarding the existence of a conflict of interest is a reasonable cause for removal, “[r]easonable cause has been found in situations involving conflict of interest and bad will generated by litigation” *Estate of Ehlers*, 80 Wn.App. 751, 761 (1996).

Ill will existed between the beneficiary(s) and the PR/Trustee resulting in the filing of a civil complaint for damages against both the PR and Trustee. CP 142-264. The egregious level of ill will was evident from

the allegations as set forth therein the Petition for Removal and/or the civil complaint in which damages in excess of 16 million dollars were alleged should have required removal in order to place the Estate/Riste Trust in a protective status and prevent any further potential harm. *Id.*

A) The PR/Trustee had a conflict of interest because the PR and the Trustee had adverse interests in the determination of the validity of the Riste Trust and/or the timely distribution of the valid bequests. (See above) The PR/Trustee should have taken legal action to determine the validity of the Riste Trust and/or the timely distribution of in kind property. RCW § 11.12.250; CP 142-264.

Uncontradicted evidence showed that RCW § 11.12.250 required a Trust to be evidenced by a written instrument separate from a will and that the Riste Trust was not a written instrument separate from a will. CP 142-264. If the Riste Trust was invalid under Washington Law then the gift of the RPLBEAB (with a value between 1.1-1.8million) to the Riste Trust failed. RCW § 11.12.250; CP 142-264. If the gift failed the Estate would retain the RPLBEAB and distribute them to the Petitioner. CP 142-264. The PR's fiduciary duty(s) required him to challenge the validity of the Riste Trust. CP 142-264. Adversely, the Trustee of the Riste Trust had a fiduciary duty(s) to ensure that the Riste Trust would be found valid.

Other conflicts included, the Trustee's interest in ensuring timely distribution as "non probate" in kind which conflicted with the PR's

interest in selling the RPLBEAB and payment of Washington Estate taxes,

[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...

CP 150 ln 23-27, 151 ln 8-11, 142-264; RCW § 11.12.250; See also, *In re Estate of Collister*, 195 Wn.App. 371, (2016); RCW Chapter 11.11 Testamentary Disposition of Nonprobate Assets Act; RCW § 11.11.020; RCW § 11.11.070; RCW § 11.11.080. Baker Boyer Bank's interests as the Trustee were clearly antagonistic to its' interests as the PR, "they are antagonistic to [its'] responsibilities as [PR] in conserving the assets of the estate for the benefit of all the creditors as well as the heirs of the estate" *In re Estate of Livingston*, 7 Wn.App. 841, 844 (1972). It was erroneously found that there was no conflict of interest. CP 609.

The PR subjected the RPLBEAB to probate administration as a "probate asset" and also paid Washington Estate taxes based upon their value. The Trustee was required by his fiduciary duty(s) to contest these acts in order to protect the interest of the Riste Trust and/or beneficiary(s). The trial court erroneously found no breach of fiduciary duty(s) for the PR/Trustee's inaction.

B) The PR/Trustee had adverse interests in the order of payment of the Will's bequests which were paid prior to payments for Estate taxes and

expenses of administration. CP 31-38, 150 ln 19-21, 151 ln 23-27, 152 ln 1-5, 155 ln 17-24, 161-162, 166 ln 18-27, 168 ln 9-18, 169 ln 16-20. The Trustee was required to contest the order for payment of the bequests of 30% of bank deposits prior to allocation and payment of the taxes and expenses of administration which resulted in a more than a \$30,000 loss.  
*Id.*

C) The PR and the Trustee had an adverse interest in the requirement of the Estate to pay Washington State Estate taxes based upon the value of the RPLBEAB. If the assets were “non probate” then the Estate would not be required to pay taxes and those funds would be distributed. (See above)

D) The PR and the Trustee also had adverse interest in the payment of non obligatory debts. The PR made payments out of Estate funds of \$14,932 without any legal obligation. CP 142-264, specifically, 148 ln 7-13, 152 ln 5-11. The \$14,932 were assets which belonged to the Riste Trust and for which the Trustee should have took all legal action to stop.  
*Id.*; See also, *In re Marriage of Petrie*, 105 Wn.App. 268, 276 (2001) - “a trustee's commingling of personal funds and assets with the funds and assets of a beneficiary is a breach of fiduciary duty because it creates a conflict of interest.”.

E) The PR failed to expeditiously close the administration of the probate estate for more than 3.5 years. There was no justifiable basis for the PR's exorbitant delay. (See above) The Trustee had a conflicting

interest in the expeditious close of the probate estate.

F & G) The PR failed to timely file all required Estate tax returns and to make timely income payments to the beneficiary(s). CP 142-264. The Trustee had a conflicting interest in ensuring that the PR timely filed all Estate tax returns and made timely income payments to the beneficiary(s). *Id.* The Trustee also had a conflicting interest in ensuring that the beneficiary(s) were provided with timely tax information. *Id.*

H & I) The PR and the Trustee had a conflict of interest in keeping the beneficiary(s) informed. The PR failed to provide the beneficiary(s) material information to allow them to make informed decisions on objecting to the sale of the RPLBEAB in court including but not limited to the failure to provide, i) probate/trust accountings, ii) trust annual statements, iii) accurate presentations of the law(s) pertinent to the management of the Estate/Trust and/or the sale of the RPLBEAB, iv) real estate appraisals, v) environmental surveys containing information regarding the contamination levels. CP 142-264. The Trustee had a legal duty to challenge the acts of the PR in failing to do so. The court should have found PR and the Trustee's interests were adverse and conflicting.

J) The PR and the Trustee had a conflict of interest in providing information regarding the legal right to sell the RPLBEAB. *Id.* The PR deceived the beneficiary(s) by providing them incorrect information regarding their right to participate in the management of the RPLBEAB

and the need/justification for the sale. *Id.* The Trustee had a conflicting interest to ensure that truthful and accurate information was provided. *Id.*

K) Baker Boyer Bank also had an impermissible personal interest in the yearly trustee fees it would earn if the Riste Trust was found valid. *Id.* Baker Boyer Bank was personally interested in selling the RPLBEAB in order to obtain liquid funds which could be used to investment in its own financial products rather than remain as commercial rental realty. CP 142-264, specifically, 147 ln 1-5, 188. Baker Boyer Bank's personal interest was in obtaining an investment of over 1.1 million dollars into their institutions financial products bolstering their bottom line and obtaining extra fees for their financial products in addition to their fiduciary fees. *Id.* Baker Boyer Bank also had a personal interest in removing its self from the situation of being forced to partake in the management of commercial property which they stated they would not do. *Id.* Baker Boyer Bank refused to manage commercial property as required by the written testament. *Id.*

12) It was erroneously found that the PR/Trustee did not breach any fiduciary duty(s) when he failed to disclose his conflicting interests.

The PR/Trustee owed a fiduciary duty to inform the beneficiary of the conflict of interest in having the same individual as the PR and as the Trustee. *Id.* Failure to disclose was a breach of the fiduciary duty(s) of

honesty, competence, loyalty and good faith. *Id.*

13) It was erroneously found that the PR did not breach any fiduciary duty(s) by distributing “bank account deposits” prior to payment of Estate taxes and expenses of administration from those deposits.

The PR made payments to specified beneficiary(s) of 30% of all “bank account deposits” prior to and/or without allocation for taxes and expenses of administration resulting in more than \$30,000 in losses. CP 45 & 77. The PR breached his fiduciary duty(s) of loyalty, competence, honesty and/or good faith.

14) It was erroneously found that the PR did not breach any fiduciary duty(s) when he paid taxes and/or unauthorized payments in the amount of \$ 14,392 from assets belonging to other beneficiary(s).

The PR paid non obligatory taxes based on the value of the RPLBEAB in the amount of \$48,877. CP 462. The PR was not required to pay any Estate taxes on Non Probate property. (See above) Even if the Estate was required to pay Estate taxes on the RPLBEAB, the allocable taxes should have been deducted from the “bank account deposits” prior to distribution not from RPLBEAB sale proceeds. (See above) The PR also paid a non obligatory debt in the amount of \$14,392. CP 181.

15) It was erroneously found that the PR/Trustee did not breach any fiduciary duty(s) by commingling Estate and Riste Trust assets.

The PR paid non obligatory Estate taxes \$48,877 and a payment of \$14,392 which therefore belonged to the beneficiary. The PR also paid pecuniary bequests of 30% of "bank deposits" without first paying Estate taxes and expenses of administration resulting in unauthroized losses to the beneficiary(s). The PR made distributions of Riste Trust income from the Estate without authorization in the Will. CP 210, 249-263. The PR made payment's out of the Estate which he included on a Riste Trust income tax return even though the bank statements showed that all of the assets were held within an Estate bank account, ie... the Riste Trust had not yet been funded. CP 263; *In re Estate of Jones*, 152 Wn.2d 1 (2004) - "breaches included using estate property for personal use, commingling estate funds, and refusing to disclose information to the beneficiary(s)".

16) It was erroneously found that the Trustee did not breach any fiduciary duty(s) when he failed to advise the beneficiary(s) that the PR was commingling and/or take legal action himself to prevent harm.

The Trustee did not advise the beneficiary(s) that the PR was commingling Estate and Riste Trust assets. CP 142-264; See also, RCW 11.98.072. Failure to alert the beneficiary(s) of the commingling and/or initiate legal action himself to prevent was a breach of fiduciary duty(s).

17) It was erroneously found that the Trustee did not breach any fiduciary duty(s) when he failed to advise the beneficiary(s) that the PR was harming their interests and/or to take legal action himself.

The Trustee was required to inform the beneficiary(s) of harm to their interests and/or initiate legal proceedings to prevent loss(es). CP 168 ln 9-18. The Trustee did not do so and the beneficiary(s) were harmed. CP 142-264; See also, *State ex ref. Smith v. Superior Court*, 142 Wash. 300 (1927) - Indicating that the Court will remove an unfaithful executor who participates in a fraudulent conveyance or fails to claim property; RCW § 11.28.250.

18) It was erroneously found that the PR did not breach any fiduciary duty(s) by failing to expeditiously administer the Estate.

The PR did not administer the Estate in an expeditious manner. CP 161; RCW 11.48.010. The PR failed to close the Estate in a reasonable time period (4.5 years) without justification. CP 142-264.

19) It was erroneously found that the PR/Trustee did not breach his fiduciary duty(s) of loyalty, honesty, competence or good faith.

A PR/Trustee must administer the Estate/Trust in the **SOLE** interests of the beneficiary(s). RCW § 11.98.078. The PR/Trustee did not

provide all pertinent information regarding administration and/or provided false/deceptive information, including but not limited to, 1) failure to provide the environmental assessment prior to sale, (CP 142-8, 153 ln 1-8, 154 ln 1-11, 194), 2) providing misleading information regarding the environmental contamination levels (CP 245), 3) providing false information regarding the PR/Trustee's legal right to sell the RPLBEAB (CP 142-264, 88-103), 4) the legal right of the beneficiary(s) to oppose in court the PR/Trustee's sale (CP 142-264), 5) the legal right of the beneficiary(s) to participate in the management of the RPLBEAB (CP 142-264), 6) the PR/Trustee's payment of \$14,392 (CP 142-264, 265 ln 20-24, 210 ln 15-19 ), 7) the filing of a valid creditor's claim in the amount of \$14,392 (one was never filed)(CP, 142-264, 265 ln 20-24, 210 ln 15-19 ), 8) the true ROI of the RPLBEAB, as compared to the ROI on the assets to be purchased with the proceeds (CP 142-264), 9) the requirement to diversify (CP 142-264), 10) the requirement to pay Washington Estate taxes on the value of the RPLBEAB (CP 142-264), 11) the allocation of principal and income (CP 142-264), 12) the inability to obtain adequate insurance for loss (CP 142-264), 13) the funding of the Riste Trust (CP 142-264), 14) the intent of the Decedent (CP 142-264). See, *In re Estate of Jones*, 152 Wn.2d 1 (2004) - "breaches included using estate property for personal use, commingling estate funds, and refusing to disclose information to the beneficiary(s)"; *State ex ref. Smith v. Superior*

*Court*, 142 Wash. 300 (1927) - Indicating that the Court will remove an unfaithful executor who participates in a fraudulent conveyance or fails to claim property; RCW § 11.28.250.

20) It was erroneously found that the PR/Trustee did not breach any fiduciary duty(s) by failing timely file income tax returns.

The PR/Trustee did not timely file any Estate/Riste Trust tax returns with the appropriate governmental agency during administration. CP 249-262, 146 ln 16-20, 166 ln 14-18, 169 ln 3-8, 192-193, 249-262.

21) It was erroneously found that the PR/Trustee did not breach any fiduciary duty(s) when he failed to pay the beneficiary(s) in accordance with the terms of the Will/Riste Trust and/or the RCW.

The PR/Trustee was required by the terms of the Will/Riste Trust to make monthly payments of income to the beneficiary(s). CP 2, 145 ln 4-10, 168 ln 19-22; RCW § 11.98.140; RCW § 11.104A.070. Failing to make income payments to the beneficiary(s) in accordance with the testamentary instructions is a breach of fiduciary duty warranting removal, “a personal representative has been removed for omitting property from the Inventory & Appraisement, and failing to make distributions in accordance with the terms of the will.” *Estates of Aaberg*, 25 Wn.App. 336 (1980). The PR/Trustee failed to abide by the requirements of the

RCW. § 11.97.010 which requires a PR/Trustee to follow the instructions of the Will/Trust above all. The failure of the PR/Trustee to make payments on a monthly basis is a breach of fiduciary duty(s) justifying removal. CP 142-264, specifically, 145 ln 15-20, 250-263.

22) It was erroneously found that the PR and/or the Trustee were entitled to all of their fiduciary fees.

If the court finds that the personal representative has failed to discharge his or her duty(s) as such in any respect, it may deny him or her any compensation whatsoever or may reduce the compensation which would otherwise be allowed. RCW § 11.48.210. An Order fixing representative's compensation is appealable. *Horton v. Barto*, 17 Wash. 675 (1897); *In re Doane's Estate*, 64 Wash. 303 (1911). The trial court's errors in failing to find an breach of fiduciary duty(s) correspondingly resulted in the allowance of the PR/Trustee's fees in totality. Remand for further findings or reversal for lack of substantial evidence should require redetermination of the fiduciary's fees.

23) It was erroneously found that the attorney(s) for the PR/Trustee were entitled to all of their fiduciary fees.

The attorney for the PR/Trustee's fees should also be required to be redetermined upon the lower court's re-determination of the PR/Trustee's fees as set forth in paragraph 22 above.

24) It was erroneously found that there was no good cause for removal of the PR/Trustee.

[w]henver 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 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.

*In re Estate of Lowe*, 191 Wn.App. 216, 228-29, (2015), Citing, *In re Estate of Jones*, 152 Wn.2d 1 (2004) at 10.

The Superior Court has made incorrect interpretations and/or applications of law and incorrect findings of fact unsupported by the record. The PR/Trustee breached fiduciary duty(s), had an impermissible conflict of interest and impermissible personal interest which required removal to protect the Estate/Riste Trust from any potetial for harm.

## **VII. CONCLUSION**

Remand is necessary due to the trial court's erroneous interpretations, applications and findings. Petitioner's right to due process has been violated. The trial court's failure to find any breaches of fiduciary duty(s) and/or conflict(s) of interest is an abuse of discretion. The trial

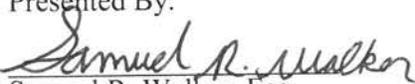
court failed make findings regarding the Decedent's intention which was controlling. The Appeals Court should remand for re-determination of the law, application of the law and findings of fact.

Date: July 6, 2017

Respectfully submitted,

  
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**FILED**

JUL 10 2017

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**THE SUPERIOR COURT  
OF THE STATE OF WASHINGTON  
YAKIMA COUNTY**

In Re the Matter of:

**CASE No. 12-4-00514-8**

The Estate of Dan McAnally

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

and

The Riste Trust.

Date: July 6, 2017  
Time:  
Dept:

**DECLARATION OF SERVICE**

I, Samuel Walker, hereby declare that on July 6, 2017, I caused copies of the accompanying **APPELLANT'S OPENING 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.

2) Erika N. Hartliep, Stokes Lawrence Velikanje Moore & Shore, 120 N. Naches Ave., Yakima WA 98901.

Date: July 6, 2017

*Samuel R. Walker*  
Samuel R. Walker, Attorney for Plaintiff(s),  
Darrell Riste, Tyler Riste & Cathy Riste

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**FILED**

JUL 10 2017

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:

**COA NO. 350541**

The Estate of Dan McAnally

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

and

The Riste Trust.

Date: July 6, 2017

Time:

Dept:

**DECLARATION OF SERVICE**

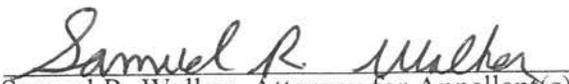
I, Samuel Walker, hereby declare that on July 6, 2017, I caused copies of the accompanying **APPELLANT'S OPENING BRIEF** to be mailed by First Class United States Mail, postage prepaid, to the following:

1) Sean A. Russell, Stokes Lawrence Velikanje Moore & Shore, 120 N. Naches Ave., Yakima WA 98901.

2) Erika N. Hartliep, Stokes Lawrence Velikanje Moore & Shore, 120 N. Naches Ave., Yakima WA 98901.

3) Kevin L. Holt, WSBA 16672, 7014 W. Okanogan Pl., Kennewick WA 99336

Date: July 6, 2017

  
Samuel R. Walker, Attorney for Appellant(s)