

No. 72643-9-1

**IN THE COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON**

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COURT OF APPEALS
DIVISION ONE
JAN 11 2011
KJ

BEVERLY YOUNG, BLAKE BOATMAN, BRADLEY BOATMAN,
BRENT BOATMAN, and WILLIAM BOATMAN,

Appellants

v.

BRIAN BOATMAN, individually and as Attorney-in-Fact for Bojilina
H. Boatman; and THE ESTATE OF BOJILINA H. BOATMAN,

Respondents

APPELLANTS' OPENING BRIEF

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ORIGINAL

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I. INTRODUCTION

Appellants are five of the six beneficiaries of the Bojilna H. Boatman Estate (the “Estate”). Primarily through a review of financial documents produced by Respondents, Appellants learned that, while acting as Decedent Bojilina H. Boatman’s (“Bojilina”) attorney-in-fact, Respondent Brian Boatman (“Brian”) appropriated approximately **\$226,000-\$349,000** of Bojilina’s assets. Through their petition filed under the Trust and Estate Dispute Resolution Act (“TEDRA”), Appellants sought return these assets to the Estate, among other remedies.

Despite ruling, at the TEDRA Initial Hearing, that Appellants had submitted sufficient evidence to withstand summary judgment on their conversion and breach of fiduciary duty claims, the trial court dismissed the Petition. The court specifically ruled that Appellants lacked standing to pursue these claims and had failed to establish that Brian should be removed as personal representative.¹

Fundamentally, this case is about affording practical and effective remedies to estate beneficiaries and heirs, who like Appellants, seek recovery from individuals who serve as both

¹ CP 946-954 (the “Order”).

Decedent's attorney-in-fact and estate personal representatives, for misappropriation of decedents assets and other misconduct while serving as attorney-in-fact. By denying standing to these estate beneficiaries, the trial court effectively foreclosed any practical redress to these Appellants, and by extension all other similarly situated estate beneficiaries and heirs, for self-dealing and conversion of a principles assets by an attorney-in-fact who later serves as estate personal representative. For the reasons set forth below, the trial court's dismissal of Appellants' TEDRA Petition should be reversed and remanded so that Appellants appropriately may pursue their substantive claims.

II. ASSIGNMENTS OF ERROR

A. General Assignment of Error

1. The Trial Court Erred in entering the Order dismissing Appellants' Petition to Establish Conversion, Breach of Fiduciary Duties, for an Accounting and Damages and to Revoke Letters Testamentary (the "Petition").

B. Specific Assignment of Error

2. The trial court erred in ruling, through Paragraph 02 of the Order, that Appellants had no standing to demand an

accounting from Respondent Brian for the period he served as decedent's attorney-in-fact.

3. The trial court erred in ruling, through Paragraph 03 of the Order, that the Appellants had no standing to demand discovery from Brian, relating to any bank accounts or funds owned by Brian or decedent during decedent's lifetime.

4. The trial court erred in ruling, through Paragraph 04 of the Order, that the Appellants had no standing to bring any action for damages on behalf of the Estate.

5. The trial court erred in ruling, through Paragraph 05 of the Order, that the Appellants have no standing to bring their own claim or any claims on behalf of the Estate for any conversion or breach of fiduciary duty owed to Bojilina arising out of her power of attorney.

6. The trial court erred, through Paragraph 06 of the Order, in failing to remove Brian as the personal representative of the Estate.

7. The trial court erred, through Paragraph 07 of the Order, in dismissing the Petition.

C. Issues Presented

1. Do estate beneficiaries have standing to pursue recovery against an individual who currently serves as personal representative of an estate for conversion of the decedent's assets and breach of fiduciary duty while he served as decedent's attorney-in-fact? (Assignments of Error 1-5, 7).

2. Do estate beneficiaries have standing to pursue claims, on behalf of the estate, against an individual who currently serves as personal representative of an estate for conversion of the decedent's assets and breach of fiduciary duty while he served as decedent's attorney-in-fact? (Assignments of Error 1-5, 7).

3. Should a personal representative be removed where substantial evidence has been presented that, while serving as decedent's attorney-in-fact, the personal representative appropriated and converted substantial assets of decedent and paid his own creditor's claim without satisfying the requirements and procedures set forth in RCW 11.40.140? (Assignments of Error 1, 6).

4. Are Appellants entitled to an award of attorneys' fees incurred with respect to this appeal?

III. STATEMENT OF THE CASE

A. Background

Bojilina appointed Brian as her attorney-in-fact through a power of attorney dated October 3, 2005. By the fall of 2006, the effects of dementia were such that Bojilina could no longer live alone. Until the beginning of April 2007, primary care for Bojilina was split between Appellant Blake Boatman (“Blake”), and his wife, DeLisa Boatman (“DeLisa”), and on the one hand, and Brian, on the other, with Bojilina staying overnight at Blake’s and DeLisa’s. Brian took over primary responsibility for Bojilina’s care in April 2007 and continued in that capacity until January 2013, when Hospice assumed that role.²

Bojilina’s Will provided for the distribution of the residue of her estate in equal shares to each of her six living children, Appellants Beverly Young, Blake Boatman, Bradley Boatman, Brent Boatman, William Boatman, and the Respondent, Brian. It appointed Brian as Personal Representative,³ and Letters Testamentary were issued to Brian on June 7, 2013.

² CP 308-309, 313-314, 317-318, 320, 322-323, 325.

³ CP 14-18.

On September 5, 2013, the Estate issued its Inventory and Appraisement (the “Inventory”). It showed probate assets of **only \$44,636.23**.⁴

While Brian served as Bojilina’s attorney-in-fact, Appellants were given no access to the status of Bojilina’s assets and finances. Thus, until Appellants received the Inventory in early September 2013, they were not in a position to reasonably evaluate Brian’s fulfillment of his fiduciary duties to Bojilina with respect to the management and expenditure of her assets.⁵

Given the dramatic difference between Appellants’ understanding of Bojilina’s assets at the time Brian took over as attorney-in-fact and the meager **\$44,636.23** remaining, as evidenced by the Inventory, they filed the Petition on December 20, 2013. It sought an accounting from Brian and revocation of his Letters Testamentary, as well as recovery for Bojilina’s assets appropriated by Brian on theories of conversion and breach of fiduciary duty.⁶

⁴ CP 25-27.

⁵ CP 305-308, 308, 311, 313, 315-316, 317, 319, 312, 322, 324-426.

⁶ CP 5-17. Consistent with RCW 11.96A.100(9), Paragraph 39 of the Petition requested the entry of a procedural order establishing pertinent discovery

B. Factual Basis for Appellants' Claims

Evidence in the record supported the conclusion that Bojilina's aggregate assets for the period of January 1, 2006 through her death totaled approximately \$633,000.⁷ Financial documents produced by Respondents additionally showed that Brian spent Bojilina's funds freely on himself or on items primarily for his benefit. A non-exhaustive summary of these transactions showed a potential appropriation of Bojilina's funds totaling **\$403,864.27**, broken down as follows⁸:

Payment of Brian's Chipper	\$131,720.00
Subaru Payments	\$ 15,176.00
Electronics	\$ 27,888.87
Furniture and Appliances	\$ 3,635.37
Recreational Equipment	\$ 4,510.82
Renovations to Brian's	\$ 13,848.05
Groceries	\$ 18,194.33
Alcohol Purchases	\$ 21,089.50
Restaurant Expenses to	\$ 2,486.46
Payments of Brian's Utilities	\$ 5,408.00
Whatcom Hills Waldorf	\$ 35,522.91
Vacations/Car Rentals	\$ 2,280.00
Cash Transfers	\$ 3,203.96
	\$ 78,000.00

deadlines and consolidating this matter into the Probate at the Initial Hearing. CP 11.

⁷ CP 92-94, 322-323. This figure may be subject to upward revision based on the subsequent production by the Estate or Brian of documents relating to Bojilina's finances for the year 2005, which were the subject of a document production request served by Appellants.

⁸ CP 330-795. Appellants conceded below that the \$428,864.27 figure they initially asserted below overstated the cash line item by \$25,000. The table set forth above reflects this downward correction.

CD and ACH Withdraws	\$ 35,400.00
Estate Check to Brain for care creditors claim	\$ 5,500.00
TOTAL	\$403,864.27

Even if one assumes that some portion of the “groceries” item should be allocated for Bojilina’s food consumption, evidence in the records supported the conclusion that any such allocation should not exceed \$7,030.⁹ Based on their preliminary examination of financial documents provided by Respondent, Appellants thus asserted a colorable claim of **\$396,834.72** for payments from Bojilina’s funds made directly to Brian, clearly for his benefit or associated with expenditures for which inadequate accounting has been provided.

Moreover, if one further assumes, for the sake of argument, that Brian might have been entitled to some offset as compensation for Bojilina’s care, Appellants submitted evidence that any such credit should be limited to between \$47,396¹⁰ and \$170,000.¹¹ Thus,

⁹ Indeed some evidence supports the conclusion that Bojilina’s food consumption over the relevant 68 months would not exceed \$4,080 (68 x 60) CP 308, 311. Others evidence confirmed Bojilina’s frugal nature. CP 305-306, 310-311, 313, 315, 317, 321, 322, 325. Moreover, because three to five individuals regularly consumed meals in Brian’s household, a 1/3 allocation of grocery expenses to Bojilina is generous, resulting in a reduction of \$7,029.83. CP 319, 324. With this reduction, Brian’s unauthorized or questionable transfers total \$396,834.72.

¹⁰ This sum is derived by assuming that Brian should be paid at the same rate as he compensated Blake and DeLisa for providing approximately 35% of Bojilina’s care from October 2006 through the end of 2007, \$343 per month (CP 318, 325)

even with above offsets, resulting misappropriations ranging from **\$226,834.72 to \$349,438.72.**

C. Procedural Posture

In response to the Petition, Respondents filed motions to dismiss resting on several bases, including the argument that Appellants lacked standing to pursue to their claims against Brian.¹² At the initial hearing, the trial court properly ruled that Respondents' motion should be treated as pleadings seeking entry of summary judgment under CR 56.¹³ Applying that CR 56 standard, the court further ruled, from the bench, that Appellants had submitted sufficient evidence to withstand summary judgment on all of their substantive claims and took the issues of Appellants' standing to assert those claims and revocation of letters testamentary under consideration.¹⁴

multiplied by the 68 months during which Brian provided primary care, April 2007 through December 2012.

¹¹ This figure is derived by multiplying the \$2,500 per month rate, to which the siblings agreed and Brian acknowledged paying, by 68. CP 307, 309, 311, 314, 318, 312, 323, 326.

¹² CP157-72, 208-222, 185-202.

¹³ CP 958-959.

¹⁴ CP 1001.

Ultimately, the trial court issued an opinion documented in the Order, ruling that: 1) Appellants had no standing to pursue their claims either on behalf of the Estate or individually in their own right; 2) Appellants had not provided sufficient evidence to warrant removal of Brian as personal representative; and 3) the Petition was dismissed.¹⁵ Appellants timely filed their Notice of Appeal on October 31, 2014.¹⁶

IV. ARGUMENT

A. Standard of Review

Where, as here, the trial court makes a legal determination that a party lacks standing, this Court conducts a *de novo* review of that ruling.¹⁷ *De novo* review also is employed, where, as here, a court reaches a determination based on summary judgment procedures set forth in CR 56.¹⁸

¹⁵ CP 946-54.

¹⁶ CP 9.

¹⁷ *Knight v. City of Yelm*, 173 Wn. 2d 325, 336, 340, 267 P.3d 973 (2011); *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 822, 965 P.2d 636 (1998).

¹⁸ See, e.g., *Tanner Electric Cooperative v. Puget Sound Power & Light, Co.*, 128 Wn. 2d 656, 668, 911 P.2d 1301 (1996); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 811, 828 P.2d 549 (1992).

The standard of review differs with respect to determinations whether or not to remove a personal representative. Such trial court decisions are reviewed to determine whether the removal decision rested on adequate findings, supported by the record, setting forth permissible grounds on which to base the decision.¹⁹

B. Appellants' Have Standing to Pursue Their Claim Against Brian.

Generally, a party is accorded standing through a simple showing that he or she has a stake, or real interest in, the subject matter of the lawsuit.²⁰ Consistent with this standard, Petitioners have a real, present and substantial interest in assuring that the assets pilfered from their mother's estate are returned for ultimate distribution to them as estate beneficiaries. Nothing is intangential or theoretical about these claims.²¹

¹⁹ See, e.g., *In re: Estate of Jones v. Jones*, 152 Wn. 2d 1, 8, 93 P.3d 147 (2004); *Estate of Beard v. Newman*, 60 Wn. 2d 127, 132, 372 P.2d 530 (1962); *Estate of Ardell*, 96 Wn. App. 708, 718, 980 P.2d 771 (1999).

²⁰ *Walker v. Munro*, 124 Wn. 2d 402, 879 P.2d 920 (1994) [standing denied on citizen suit seeking to challenge initiative establishing 2/3 legislative majority to raise taxes]; *Postema v. Snohomish County*, 83 Wn. App. 574, 922 P.2d 176 (1996) [citizen lacked standing to challenge Growth Management Act]; *Primark, Inc. v. Burien Gardens Assoc.*, 63 Wn. App. 900, 907, 823 P.2d 1116 (1992).

²¹ This is a far-cry from the general run of standing cases where citizens seek to establish sufficient individualized stake in the outcome of litigation seeking to challenge a legislative or governmental action. See e.g., *Walker*; *Postema*.

Probably because estate beneficiaries or heirs have such an obvious interest or stake in pursuing relief such as that asserted in this Petition, few Washington cases have addressed standing in this context. The only two cases that have been identified by counsel as applicable support Petitioners' standing to assert their claims.

In *Drain v. Wilson*,²² for example, the Washington Supreme Court approved an attorneys' fee award to heirs of an estate for successfully pursuing a claim against the personal representative to include as an estate asset the right to payment on a note executed personally by the personal representative prior to decedent's death. In affirming an attorney's fee award to the heirs, the Court validated the underlying claim and fee award as an equitable trust and lien pursued on behalf of the estate and its beneficiaries:

[T]here can be no question about the good faith of the heirs and their attorneys, nor that the institution of those proceedings enriched the estate to the extent of \$26,250 The claim here asserted is in the nature of an equitable lien upon the trust fund created after Drain's death....²³

²² 117 Wn. 34, 200 P. 581 (1921) ("Drain").

²³ 117 Wn. at 39.

Estate beneficiaries in *In re: Estate of Wheeler v. Monheimer*²⁴ similarly were allowed to pursue a claim against the personal representative to recover estate assets improperly transferred to the personal representative prior to the decedent's death. Just as beneficiaries and heirs in *Drain* and *Wheeler* were permitted to proceed personally against the personal representative to recover estate assets based on actions taken prior to decedent's death, Petitioners have standing to pursue comparable recovery in this case.

In addition, various TEDRA provisions support Appellants' standing to assert their claims in this matter. For example, RCW 11.96A.080 provides, in pertinent part that:

[A]ny party may have a judicial proceeding for the declaration of rights or legal relations with respect to any matter as defined by RCW 11.96A.030; [or] the resolution of any other case or controversy that arises under the Revised Code of Washington....

Pertinent provisions of RCW 11.96A.030 correspondingly state that:

- (2) "Matter" includes any issue, question or dispute involving:
 - (a) The determination of any class of... devisees, legatees, heirs, next of kin, or other persons interested in an estate, or with respect to any other asset or property interest passing at death;

²⁴ 71 Wn.2d 789, 431 P.2d 608 (1967) ("*Wheeler*").

(b) The direction of a personal representative...to do or abstain from doing any act in a fiduciary capacity;

(c) The determination of any questions arising in the administration of an estate...or with respect to any other asset or property interest passing at death, that may include, without limitation, question relating to: ... (ii) a change of personal representative...; (iv) an accounting from a personal representative....

[****]

(5) “Party” or “parties” means each of the following persons who has an interest in the subject of the particular proceeding....:

[****]

(e) A beneficiary, including devisees, [and] legatees....

[Emphasis added]

Thus, as estate beneficiaries, Appellants are specifically recognized “parties” under TEDRA . As such, they are entitled to pursue any “matter” recognized in RCW 11.96A.030(2)(a), (b), and (c). TEDRA, accordingly, contemplates that Appellants are “parties” who are accorded standing to bring claims such as those asserted in the Petition.

Appellants’ standing also is buttress by their assertion of breach of fiduciary duty against Brian in his capacity as personal representative, as well as attorney-in-fact.²⁵ A personal representative’s fiduciary duties include the pursuit of legitimate

²⁵ CP 10-11.

claims to recover and marshal all assets properly owed to the Estate. Estate beneficiaries, such as Appellants, correspondingly, must have standing to pursue claims against a personal representative, such Brian, for failing to take actions necessary to recover Estate assets appropriated by that person.²⁶ Thus, aside from having standing to assert claims for breach of Brian's fiduciary duty as attorney-in-fact, Appellants also have standing by virtue of their claim resting on Brian's breach of fiduciary duty as the personal representative.

Appellants' rights additionally are supported by decisions from other jurisdictions granting standing to comparably situated plaintiffs. In *Siegel v. Novak*,²⁷ for example, two trust beneficiaries, (the "Siegel"), whose interests vested upon their trustor, mother's death, were accorded standing to seek recovery from their sister, Novak, for inappropriate transfers of trust assets for Novak's benefit while she served as their mother's attorney-in-fact. The Florida Court of Appeals, applying New York law, held that these

²⁶ See, e.g., *In re Estate of Jones*, 152 Wn. 2d 1, 93 P.3d 147 (2004)[estate beneficiaries entitled to pursue claims against personal representative for breach of fiduciary duties for misuse and appropriation of estate assets]; *Drain, Wheeler*.

²⁷ 920 So.2d 89 (Fla. App. 2006)("Siegel"); *aff'd by, Siegel v. JP Morgan Chase Bank*, 71 So.3d 935 (Fla. App. 2011).

trust beneficiaries had standing to pursue these claims, opining that:

According to Novak ..., the Siegels may not address their concerns in either the trust accounting or the probate proceeding. This result is contrary to our sense of justice – a trustee should not be able to violate its fiduciary duty and authorize withdrawals contrary to the provisions of the trust, and yet escape responsibility because the settlor did not discover the transgressions during her lifetime. With an interest in the corpus of the trust after the death of their mother, the Siegels have standing to challenge the disbursements; they have alleged a concrete and immediate injury, caused by Novak ..., which could be redressed by the circuit court. Without this remedy, wrongdoing concealed from a settlor during her lifetime would be rewarded.²⁸

Similarly, the Kentucky Supreme Court has held that an heir has standing to seek recovery from the estate administrator for the inappropriate transfer of decedent's assets to the administrator while serving as decedent's attorney-in-fact. The court specifically observed that:

The Court of Appeals' error was in its conclusion that appellants had only an expectancy in the estate of their father. This is simply inaccurate. By virtue of Mr. Priestley's intestate death, appellants were his heirs at law and their rights were far greater than an expectancy.²⁹

²⁸ 920 So.2d at 96.

²⁹ *Priestley v. Priestley*, 949 S.W.2d 594,598 (1997) ("*Priestley*"); See also *Brooks v. Bank of Wisconsin Dells*, 161 Wis.2d 39, 467 N.W.2d 187

Sound public policy, as articulated in *Novak* and *Priestley*, also supports permitting estate beneficiaries and heirs to pursue such claims. If standing were erected as a barrier, no practical private civil enforcement of an attorney-in-fact's fiduciary duties would exist in the common circumstance where the same individual is appointed as both attorney-in-fact and personal representative. Perversely, this would operate as a "get out of jail free card" for all of those, such as Brian, who are inclined to, or have, appropriated the assets of an elderly, incompetent principal. If allowed to stand, the trial court's ruling would encourage comparable incidents of financial elder abuse.

Accordingly, the trial court erred in denying Appellants standing to assert their claims against Brian for actions performed while serving as Bojilina's attorney-in-fact. Appellants' standing extends to all of their substantive claims, as well as their claim for an accounting and right to pursue discovery against Brian, personally, and the Estate.

(1991)[Payable on death account beneficiaries have standing to assert claims against decedent's attorney-in-fact for misappropriation of decedent's assets].

C. **The Trial Court Erred in Failing to Remove Brian as Personal Representative.**

With no specific supporting findings, the trial court ruled that: “Petitioners have not provided sufficient evidence to persuade this Court that Brian Boatman should be removed as the Personal Representative in this matter.”³⁰ Because this naked ruling is not based on adequate grounds drawn from the record below, it also should be reversed.

The removal of a personal representative is governed by RCW 11.28.250, reads in pertinent part:

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

[Emphasis added]

³⁰ CP 939.

Brian's actions were more than sufficient to justify removal as personal representative. Among other transgressions, his apparent appropriation of Bojilina's assets constituted waste or mismanagement of estate assets. The purchase of the chipper, his Subaru, furniture, appliances and recreational equipment with Bojilina's funds without including those items in the Inventory also is fraud on the Estate.

Given Appellants' substantial claim that Brian made unauthorized transfers totaling approximately **\$403,000**, leading to resulting damages of at least **\$226,834.72**, Brian has not complied with his fiduciary duty to maximize estate assets by pursuing this claim on behalf of the Estate. Under these circumstances, Brian has an irresolvable conflict of interest between the fiduciary duty of the personal representative to maximize estate assets and his individual interest to avoid personal liability. This conflict alone mandates Brian's removal as personal representative.³¹

³¹ See, e.g., *In re Estate of Jones*, 152 Wn. 2d 1, 11-12, 93 P.3d 147, 152 (2004); *Priestley*, 949 S.W.2d at 598.

Finally, Brian should be removed because he paid himself \$5,500 purportedly for Bojilina's care after her death from Estate funds without complying with RCW 11.40.140 governing the assertion of a creditor's claim by a personal representative.³²

That provision mandates that:

If the personal representative has a claim against the decedent, the personal representative must present the claim in the manner provided in RCW 11.40.070 and petition the court for allowance or rejection. The petition must be filed under RCW 11.96A.080. The section applies whether or not the personal representative is acting under nonintervention powers.

Brian's failure to comply with the safeguards set forth in RCW 11.40.140 provides sufficient basis alone for his removal.

The evidence in the record uniformly supports the conclusions that Brian's conduct warrants removal under both RCW 11.28.250 and 11.40.140. In light of applicable statutes and the fiduciary duties imposed on personal representatives, the trial court erred in declining to remove Brian as personal representative.

³² CP 330 – 331, 335; 748 – 749.

D. Appellants Are Entitled to an Attorneys' Fees Award.

In the event that Appellants prevail on this appeal, they will be entitled to an award of an attorneys' fees award pursuant to RCW 11.96.A.150(1), which reads:

Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

Consistent with RAP 18.1, Appellants are hereby requesting that this Court award Appellants reasonable attorneys' fees incurred in pursuing this appeal.

V. CONCLUSION

As established above, Appellants have standing to pursue their claims against Brain. As a consequence, this Court should reverse the ruling denying Appellants standing to pursue all of their claims against Brian, including discovery warranted under the Civil Rules, and the trial court's dismissal of the Petition. In addition, this

Court should enter an order removing Brian as personal representative and awarding Appellants attorneys' fees incurred in the appeal. Among other things, the resulting remand order should authorize the trial court to appoint a successor personal representative, consolidate the TEDRA action with the probate of the Estate and enter an appropriate scheduling/discovery order.

RESPECTFULLY SUBMITTED this 27th day of February, 2015

BRITAIN & VIS PLLC

BY: 
JAMES E. BRITAIN, WSBA # 6456
Of Attorneys for Appellants Beverly Boatman, Blake Boatman, Bradley Boatman, Brent Boatman, and William Boatman

**APPELLANT'S OPENING BRIEF
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IN THE SUPERIOR COURT OF WASHINGTON FOR WHATCOM COUNTY

BEVERLY YOUNG, BLAKE BOATMAN,
BRADLEY BOATMAN, BRENT BOATMAN
and WILLIAM BOATMAN,

Petitioners,

vs.

BRIAN BOATMAN, individually and as
Attorney-in-Fact for Bojilina H. Boatman;
and THE ESTATE OF BOJILINA H.
BOATMAN,

Respondents.

CAUSE NO: 13-4-00568-2

**ORDER DENYING AND
DISMISSING PETITION TO
ESTABLISH CONVERSION, BREACH
OF FIDUCIARY DUTIES, FOR AN
ACCOUNTING AND DAMAGES AND
TO REVOKE LETTERS
TESTAMENTARY**

**ORDER DENYING AND
DISMISSING PETITION**
Page 1 of 6

SHEPHERD AND ABBOTT
ATTORNEYS AT LAW
2011 YOUNG STREET, SUITE 202
BELLINGHAM, WASHINGTON 98225
TELEPHONE: (360) 733-3773 • FAX: (360) 647-9060
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1 This matter, having come before the Court on Brian Boatman's Motion to
2 dismiss Petitioners' Petition to Establish Conversion, Breach of Fiduciary Duties,
3 for an Accounting, for Damages and to Revoke Letters Testamentary; the
4 Petition having been filed by the siblings of Brian Boatman by and through their
5 attorney, James Britain of Britain & Vis, PLLC; respondent Brian Boatman having
6 opposed the Petition through pleadings, by and through his attorneys, Douglas
7 R. Shepherd of Shepherd and Abbott; the Estate having opposed the Petition, by
8 and through its attorney, Megan Lewis of Barron Smith Daugert; the Court
9 having heard oral argument of counsel and being otherwise fully informed; and
10 the Court having reviewed the pleadings and papers filed herein, and exhibits
11 attached thereto, in support of the motion and against the motion, including but
12 not limited to:

- 13 01. Petition to Establish Conversion, Breach of Fiduciary Duties, For an
14 Accounting and Damages and to Revoke Letters Testamentary, Dkt.
15 #1;
- 16 02. Response and Counterclaim to TEDRA Petition, Dkt. #9;
- 17 03. Affidavit of Megan M. Lewis, Dkt. #10;
- 18 04. Affidavit of Bianca Gordon, Dkt. #11;
- 19 05. Affidavit of Brian Boatman, Dkt. #12;
- 20 06. Memorandum in Support of Response to TEDRA Petition and Request
21 For Decision at Initial Hearing, Dkt. #13;
- 22 07. Declaration of Heather C. Shepherd re: Motion to Dismiss, Dkt. #28;
- 23 08. Respondent Brian Boatman's Motion and Memorandum to Dismiss
24 For Failure to State a Claim on Which Relief can be Granted CR
25 12(b)(6) and Statute of Limitations, Dkt. #29;

**ORDER DENYING AND
DISMISSING PETITION**
Page 2 of 6

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- 1 09. Respondent Brian Boatman's in His Individual Capacity, Amended
- 2 Answer, Affirmative Defenses and Counterclaims, Dkt. #32;
- 3 10. Respondent Brian Boatman's Individual Supplemental Response to
- 4 Petitioners' Petition, Dkt. #33;
- 5 11. Second Declaration of Brian Boatman, Dkt. #34;
- 6 12. Petitioners' Opposition to Respondent Brian Boatman's Separate
- 7 Motion to Dismiss, Dkt. #39;
- 8 13. Memorandum in Support of TEDRA Petition, Dkt. #40;
- 9 14. Declaration of William Boatman in Support of TEDRA Petition, Dkt.
- 10 #41;
- 11 15. Declaration of Brent Boatman in Support of TEDRA Petition, Dkt.
- 12 #42;
- 13 16. Declaration of Bradley Boatman in Support of TEDRA Petition, Dkt.
- 14 #43;
- 15 17. Declaration of Blake Boatman in Support of TEDRA Petition, Dkt.
- 16 #44;
- 17 18. Declaration of Beverly Young in Support of TEDRA Petition, Dkt. #45;
- 18 19. Declaration of Kelly Young, Dkt. #46;
- 19 20. Declaration of Melody A. Love in Support of TEDRA Petition, Dkt.
- 20 #47;
- 21 21. Respondent Brian Boatman's Motion for Leave to File Over Length
- 22 Reply – WCCR 10.3(c), Dkt. #47;
- 23 22. Declaration of Kyle S. Mitchell Re: Petitioners' Accounting, Dkt. #59;
- 24 23. Respondent Brian Boatman's Reply, Dkt. #61;
- 25

**ORDER DENYING AND
DISMISSING PETITION**
Page 3 of 6

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- 1 24. Petitioners' Motion to Strike Declaration of Douglas Shepherd Re:
2 Publications, Dkt. #74;
3 25. Petitioners' Opposition to Respondent Brian Boatman's Motion for
4 Leave to File Over-Length Reply, Dkt. #75;
5 26. Respondent Brian Boatman's Response to Petitioners' Motion to
6 Strike Declaration of Douglas Shepherd, Dkt. #80;
7 27. Respondent's Supplemental Authority, Dkt. #82;
8 28. Petitioners' Reply in Support of Motion to Strike Declaration of
9 Douglas Shepherd re: Publications, Dkt. #84;
10 29. Petitioners Supplemental Memo on Standing, Dkt. #86;
11 30. Boatman's Supplemental Brief Regarding Standing, Dkt. #90; and
12 Other: _____
13 _____
14 _____
15 _____

16 The Court having treated Brian Boatman's motions as motions for
17 summary judgment, NOW THEREFORE IT IS HEREBY ORDERED ADJUDGED AND
18 DECREED that:

19 01. Petitioners have not satisfied the requirements of RCW 11.94.090
20 and RCW 11.94.100 because at the time of the Petition the principal was
21 deceased.

22 02. Petitioners have no standing to demand an accounting from Brian
23 Boatman, from 2005 until their mother's death, while he served as Bojilina
24 Boatman's power-of-attorney.

25

1 03. Petitioners have no standing to demand discovery from Brian
2 Boatman, regarding any bank accounts or funds owned by Brian Boatman or
3 Bojilina Boatman, during Bojilina Boatman's life.

4 04. Petitioners have no standing to bring any action for damages on
5 behalf of the Estate. Any such cause of action belongs, as a matter of law, to
6 the Court appointed Personal Representative.

7 05. Petitioners have no standing to bring their own claims or any claim on
8 behalf of the Estate for any alleged conversion or breach of fiduciary duty owed
9 to Bojilina Boatman under her power-of-attorney.

10 06. Petitioners have not provided sufficient evidence to persuade this
11 Court that Brian Boatman should be removed as the Personal Representative in
12 this matter.

13 07. Petitioners' Petition to Establish Conversion, Breach of Fiduciary
14 Duties, for an Accounting and Damages, and to Revoke Letters Testamentary is
15 hereby DENIED in its entirety. Provided, however, the dismissal of the Petition in
16 its entirety is without prejudice as to the request that Brian Boatman be removed
17 as the personal representative in this matter.

18 08. Costs and attorney fees, if any, are to be addressed by separate
19 motion(s).

20
21 DONE IN OPEN COURT THIS 23 day of October 2014.

22
23 

24 _____
HONORABLE MICHAEL E. RICKERT

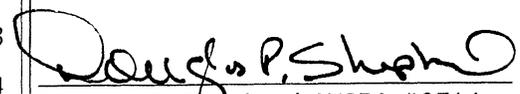
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**ORDER DENYING AND
DISMISSING PETITION**
Page 5 of 6

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APP 005

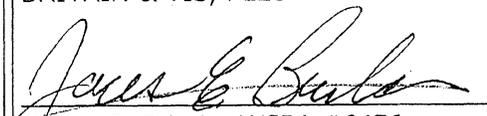
1 Presented by: *Notice of Presentation Waived; approved for*
2 SHEPHERD and ABBOTT *entry*

3 
4 Douglas R. Shepherd, WSBA #9514
5 Attorney for Respondent Brian Boatman

6 Copy received; Approved for Entry; Notice of Presentation Waived:
7 BARRON SMITH DAUGERT

8
9 See attached
10 Megan M. Lewis, WSBA #38916
11 Attorneys for the Estate of Bojilina H. Boatman

12 Copy received; Approved for Entry; Notice of Presentation Waived:
13 BRITAIN & VIS, PLLC

14 
15 James E. Britain, WSBA #6456
16 Attorneys for Petitioners

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4 _____
5 Douglas R. Shepherd, WSBA #9514
6 Attorney for Respondent Brian Boatman

7 Copy received; Approved for Entry; Notice of Presentation Waived:
8 BARRON SMITH DAUGERT

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10 _____
11 Megan M. Lewis, WSBA #38916
12 Attorneys for the Estate of Bojilina H. Boatman

13 Copy received; Approved for Entry; Notice of Presentation Waived:
14 BRITAIN & VIS, PLLC

15 _____
16 James E. Britain, WSBA #6456
17 Attorneys for Petitioners

RCW 11.28.250

Revocation of letters — Causes.

Whenever the court has reason to believe that any personal representative has wasted, embezzled, or mismanaged, or is about to waste, or embezzle the property of the estate committed to his or her charge, or has committed, or is about to commit a fraud upon the estate, or is incompetent to act, or is permanently removed from the state, or has wrongfully neglected the estate, or has neglected to perform any acts as such personal representative, or for any other cause or reason which to the court appears necessary, it shall have power and authority, after notice and hearing to revoke such letters. The manner of the notice and of the service of the same and of the time of hearing shall be wholly in the discretion of the court, and if the court for any such reasons revokes such letters the powers of such personal representative shall at once cease, and it shall be the duty of the court to immediately appoint some other personal representative, as in this title provided.

[2010 c 8 § 2020; 1965 c 145 § 11.28.250. Prior: 1917 c 156 § 74; RRS § 1444; prior: Code 1881 § 1414; 1863 p 218 § 112; 1860 p 186 § 114.]

Notes:

Absentee estates, removal of trustee: RCW 11.80.060.

Accounting on revocation of letters: RCW 11.28.290.

Cancellation of letters of administration: RCW 11.28.160.

Effect on compensation of personal representative who fails to discharge duties: RCW 11.48.210.

Notice to creditors when personal representative removed -- Limit tolled by vacancy: RCW 11.40.150.

Revocation of letters

by discovery of will: RCW 11.28.150.

upon conviction of crime or becoming of unsound mind: RCW 11.36.010.

Successor personal representative: RCW 11.28.280.

RCW 11.40.070

Claims — Form — Manner of presentation — Waiver of defects.

(1) The claimant, the claimant's attorney, or the claimant's agent shall sign the claim and include in the claim the following information:

- (a) The name and address of the claimant;
- (b) The name, address, if different from that of the claimant, and nature of authority of an agent signing the claim on behalf of the claimant;
- (c) A statement of the facts or circumstances constituting the basis of the claim;
- (d) The amount of the claim; and
- (e) If the claim is secured, unliquidated, contingent, or not yet due, the nature of the security, the nature of the uncertainty, or the date when it will become due.

Failure to describe correctly the information in (c), (d), or (e) of this subsection, if the failure is not substantially misleading, does not invalidate the claim.

(2) A claim does not need to be supported by affidavit.

(3) A claim must be presented within the time limits set forth in RCW 11.40.051 by: (a) Serving on or mailing to, by regular first-class mail, the personal representative or the personal representative's attorney a copy of the signed claim; and (b) filing the original of the signed claim with the court in which probate proceedings were commenced. A claim is deemed presented upon the later of the date of postmark or service on the personal representative, or the personal representative's attorney, and filing with the court.

(4) Notwithstanding any other provision of this chapter, if a claimant makes a written demand for payment within the time limits set forth in RCW 11.40.051, the personal representative may waive formal defects and elect to treat the demand as a claim properly filed under this chapter if: (a) The claim was due; (b) the amount paid is the amount of indebtedness over and above all payments and offsets; (c) the estate is solvent; and (d) the payment is made in good faith. Nothing in this chapter limits application of the doctrines of waiver, estoppel, or detrimental claims or any other equitable principle.

[2005 c 97 § 7; 1997 c 252 § 13; 1965 c 145 § 11.40.070. Prior: 1917 c 156 § 113; RRS § 1483; prior: Code 1881 § 1473; 1854 p 281 § 85.]

Notes:

Application -- 1997 c 252 §§ 1-73: See note following RCW 11.02.005.

RCW 11.40.140

Claim of personal representative — Presentation and petition — Filing.

If the personal representative has a claim against the decedent, the personal representative must present the claim in the manner provided in RCW 11.40.070 and petition the court for allowance or rejection. The petition must be filed under RCW 11.96A.080. This section applies whether or not the personal representative is acting under nonintervention powers.

[1999 c 42 § 608; 1997 c 252 § 21; 1965 c 145 § 11.40.140. Prior: 1917 c 156 § 120; RRS § 1490; prior: Code 1881 § 1482; 1854 p 283 § 94.]

Notes:

Part headings and captions not law -- Effective date--1999 c 42: See RCW 11.96A.901 and 11.96A.902.

Application -- 1997 c 252 §§ 1-73: See note following RCW 11.02.005.

Request for special notice of proceedings in probate -- Prohibitions: RCW 11.28.240.

RCW 11.96A.030

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Citation" or "cite" and other similar terms, when required of a person interested in the estate or trust or a party to a petition, means to give notice as required under RCW 11.96A.100. "Citation" or "cite" and other similar terms, when required of the court, means to order, as authorized under RCW 11.96A.020 and 11.96A.060, and as authorized by law.

(2) "Matter" includes any issue, question, or dispute involving:

(a) The determination of any class of creditors, devisees, legatees, heirs, next of kin, or other persons interested in an estate, trust, nonprobate asset, or with respect to any other asset or property interest passing at death;

(b) The direction of a personal representative or trustee to do or to abstain from doing any act in a fiduciary capacity;

(c) The determination of any question arising in the administration of an estate or trust, or with respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, that may include, without limitation, questions relating to: (i) The construction of wills, trusts, community property agreements, and other writings; (ii) a change of personal representative or trustee; (iii) a change of the situs of a trust; (iv) an accounting from a personal representative or trustee; or (v) the determination of fees for a personal representative or trustee;

(d) The grant to a personal representative or trustee of any necessary or desirable power not otherwise granted in the governing instrument or given by law;

(e) An action or proceeding under chapter 11.84 RCW;

(f) The amendment, reformation, or conformation of a will or a trust instrument to comply with statutes and regulations of the United States internal revenue service in order to achieve qualification for deductions, elections, and other tax requirements, including the qualification of any gift thereunder for the benefit of a surviving spouse who is not a citizen of the United States for the estate tax marital deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a qualified domestic trust under section 2056A of the internal revenue code, the qualification of any gift thereunder as a qualified conservation easement as permitted by federal law, or the qualification of any gift for the charitable estate tax deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust;

(g) With respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, including joint tenancy property, property subject to a community property agreement, or assets subject to a pay on death or transfer on death designation:

(i) The ascertaining of any class of creditors or others for purposes of chapter 11.18 or 11.42 RCW;

(ii) The ordering of a qualified person, the notice agent, or resident agent, as those terms are defined in chapter 11.42 RCW, or any combination of them, to do or abstain from doing any particular act with respect to a nonprobate asset;

(iii) The ordering of a custodian of any of the decedent's records relating to a nonprobate asset to do or abstain from doing any particular act with respect to those records;

(iv) The determination of any question arising in the administration under chapter 11.18 or 11.42 RCW of a nonprobate asset;

(v) The determination of any questions relating to the abatement, rights of creditors, or other matter relating to the administration, settlement, or final disposition of a nonprobate asset under this title;

(vi) The resolution of any matter referencing this chapter, including a determination of any questions relating to the ownership or distribution of an individual retirement account on the death of the spouse of the account holder as contemplated by RCW 6.15.020(6);

(vii) The resolution of any other matter that could affect the nonprobate asset; and

(h) The reformation of a will or trust to correct a mistake under RCW 11.96A.125.

(3) "Nonprobate assets" has the meaning given in RCW 11.02.005.

(4) "Notice agent" has the meanings given in RCW 11.42.010.

(5) "Party" or "parties" means each of the following persons who has an interest in the subject of the particular proceeding and whose name and address are known to, or are reasonably ascertainable by, the petitioner:

- (a) The trustor if living;
 - (b) The trustee;
 - (c) The personal representative;
 - (d) An heir;
 - (e) A beneficiary, including devisees, legatees, and trust beneficiaries;
 - (f) The surviving spouse or surviving domestic partner of a decedent with respect to his or her interest in the decedent's property;
 - (g) A guardian ad litem;
 - (h) A creditor;
 - (i) Any other person who has an interest in the subject of the particular proceeding;
 - (j) The attorney general if required under RCW 11.110.120;
 - (k) Any duly appointed and acting legal representative of a party such as a guardian, special representative, or attorney-in-fact;
 - (l) Where applicable, the virtual representative of any person described in this subsection the giving of notice to whom would meet notice requirements as provided in RCW 11.96A.120;
 - (m) Any notice agent, resident agent, or a qualified person, as those terms are defined in chapter 11.42 RCW; and
 - (n) The owner or the personal representative of the estate of the deceased owner of the nonprobate asset that is the subject of the particular proceeding, if the subject of the particular proceeding relates to the beneficiary's liability to a decedent's estate or creditors under RCW 11.18.200.
- (6) "Persons interested in the estate or trust" means the trustor, if living, all persons beneficially interested in the estate or trust, persons holding powers over the trust or estate assets, the attorney general in the case of any charitable trust where the attorney general would be a necessary party to judicial proceedings concerning the trust, and any personal representative or trustee of the estate or trust.
- (7) "Representative" and other similar terms refer to a person who virtually represents another under RCW 11.96A.120.
- (8) "Trustee" means any acting and qualified trustee of the trust.

[2011 c 327 § 5; 2009 c 525 § 20; 2008 c 6 § 927; 2006 c 360 § 10; 2002 c 66 § 2; 1999 c 42 § 104.]

Notes:

Reviser's note: The definitions in this section have been alphabetized pursuant to RCW 1.08.015(2)(k).

Application -- Effective date -- 2011 c 327: See notes following RCW 11.103.020.

Part headings not law -- Severability -- 2008 c 6: See RCW 26.60.900 and 26.60.901.

Clarification of laws -- Enforceability of act -- Severability -- 2006 c 360: See notes following RCW 11.108.070.

RCW 11.96A.080

Persons entitled to judicial proceedings for declaration of rights or legal relations.

(1) Subject to the provisions of RCW 11.96A.260 through 11.96A.320, any party may have a judicial proceeding for the declaration of rights or legal relations with respect to any matter, as defined by RCW 11.96A.030; the resolution of any other case or controversy that arises under the Revised Code of Washington and references judicial proceedings under this title; or the determination of the persons entitled to notice under RCW 11.96A.110 or 11.96A.120.

(2) The provisions of this chapter apply to disputes arising in connection with estates of incapacitated persons unless otherwise covered by chapters 11.88 and 11.92 RCW. The provisions of this chapter shall not supersede, but shall supplement, any otherwise applicable provisions and procedures contained in this title, including without limitation those contained in chapter 11.20, 11.24, 11.28, 11.40, 11.42, or 11.56 RCW. The provisions of this chapter shall not apply to actions for wrongful death under chapter 4.20 RCW.

[1999 c 42 § 301.]

(7) Testimony of witnesses may be by affidavit;

(8) Unless requested otherwise by a party in a petition or answer, the initial hearing must be a hearing on the merits to resolve all issues of fact and all issues of law;

(9) Any party may move the court for an order relating to a procedural matter, including discovery, and for summary judgment, in the original petition, answer, response, or reply, or in a separate motion, or at any other time; and

(10) If the initial hearing is not a hearing on the merits or does not result in a resolution of all issues of fact and all issues of law, the court may enter any order it deems appropriate, which order may (a) resolve such issues as it deems proper, (b) determine the scope of discovery, and (c) set a schedule for further proceedings for the prompt resolution of the matter.

[2001 c 14 § 1; 1999 c 42 § 303.]

RCW 11.96A.150

Costs — Attorneys' fees.

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10).

[2007 c 475 § 5; 1999 c 42 § 308.]

Notes:

Severability -- 2007 c 475: See RCW 11.05A.903.

sentence in sec. 807.01(4): "Interest under this section is in lieu of interest computed under ss 814.04(4) and 815.05(8)." The referenced statutes are the general provisions governing awards of postverdict and post-judgment interest. And while we agree with Lucas that they do indeed apply to persons against whom judgments have been entered, we see the reference to them in sec. 807.01, as doing no more than indicating that the special "offer of settlement" interest provisions of sec. 807.01 are in lieu of, rather than cumulative to, the general interest provisions of the cited statutes.

The purpose of sec. 807.01, Stats., is to encourage the pretrial settlement of cases that would otherwise be an unnecessary drain on judicial time and resources. *White v. General Cas. Co.*, 118 Wis.2d 433, 439, 348 N.W.2d 614, 617 (Ct.App.1984). "The plain language of [secs. 807.01(3) and (4)] indicates that double costs and additional interest are recoverable if an ... offer of settlement ... is rejected ... and [the offering party] is subsequently awarded a [more favorable] judgment." *Id.* at 438, 348 N.W.2d at 617. That is precisely what happened here. The only parties to the action making any claim to the escrowed funds when the settlement offer was made were Lucas and Warren. Each sought a judgment awarding him or her the entire \$150,000; and Warren, after her offer to settle the two countervailing claims was rejected by Lucas, received the judgment she sought—which was, of course, more favorable than the one Lucas had earlier rejected. We see nothing in the language of secs. 807.01(3), (4) and (5), or in the arguments advanced by Lucas, that would cause us to question the trial court's award of costs.

Judgment and order affirmed.



† Petition for Review denied.

161 Wis.2d 39

Margaret K. BROOKS, and Rita Havey,
Plaintiffs-Appellants,

v.

BANK OF WISCONSIN DELLS, and
John Kremer, Defendants-Respon-
dents.†

No. 90-1435.

Court of Appeals of Wisconsin.

Submitted on Briefs Jan. 8, 1991.

Opinion Released Feb. 21, 1991.

Opinion Filed Feb. 21, 1991.

Beneficiaries of payable on death certificate of deposit brought negligence action against bank and officer, who was depositor's attorney-in-fact. The Circuit Court, Columbia County, Earl J. McMahon, J., granted bank's and officer's motions to dismiss, and appeal was taken. The Court of Appeals, Eich, C.J., held that: (1) beneficiaries had standing to sue bank and officer; (2) action was not barred by res judicata or other rules of issue preclusion; and (3) complaint stated cause of action for negligence.

Reversed and remanded.

1. Banks and Banking ⇄154(4)

Statute which regulated multiple party and agency bank accounts did not state legal standard for determining whether beneficiaries under a payable on death certificate of deposit had standing to sue depositor's agent for alleged negligence in maintaining account; definition of "party" contained in statute related only to person who was party to multiple party or agency account. W.S.A. 705.01(6).

2. Judgment ⇄634

"Res judicata" makes final adjudication conclusive in subsequent action between same parties.

See publication Words and Phrases for other judicial constructions and definitions.

3. Judgment ¶713(2), 720

"Estoppel by record" prevents party from relitigating what was actually litigated or what might have been litigated in former proceeding and differs from *res judicata* in that it is record of earlier proceedings, rather than judgment itself, that bars second proceeding.

See publication Words and Phrases for other judicial constructions and definitions.

4. Judgment ¶585(1), 665

Under *res judicata* and estoppel by record, in order for prior proceeding to bar current action, there must be identity of parties and identity of causes of action or claims in two proceedings.

5. Judgment ¶749

Settlement of probate petition filed by beneficiaries of payable on death certificate of deposit with depositor's heirs did not bar action by beneficiaries against bank and bank officer, who was depositor's attorney-in-fact, alleging negligence; bank and officer were not served with probate petition, nor were they mentioned in agreement or order approving it.

6. Negligence ¶14

In some situations, parties injured by negligent provision of professional services may sue professional regardless of privity.

7. Banks and Banking ¶154(5)

Negligence complaint brought by beneficiaries of payable on death certificate of deposit against bank and bank officer, who was depositor's attorney-in-fact, stated claim upon which relief could be granted; payable on death account, which officer liquidated and used to pay depositor's expenses prior to her death was intended directly to benefit beneficiaries and it was foreseeable that if account were changed to unrestricted account, beneficiaries stood to suffer loss.

8. Pretrial Procedure ¶686

Where complaint is challenged for failure to state claim, its allegations are deemed admitted and they are liberally construed in favor of action.

Kim Grimmer and Robert E. Shumaker of Ross & Stevens, S.C., Madison, for plaintiffs-appellants.

William T. Curran of Curran, Hollenbeck & Orton, S.C., Mauston, for defendants-respondents.

Before EICH, C.J., and GARTZKE, P.J., and SUNDBY, J.

EICH, Chief Judge.

Margaret Brooks and Rita Havey appeal from a summary judgment dismissing their complaint against the Bank of Wisconsin Dells and John Kremer, one of its officers. The issues are: (1) whether Brooks and Havey, as beneficiaries of Madeline Stanton's "payable-on-death" (POD) certificate of deposit, have standing to sue Kremer and the bank for Kremer's negligence when, as Stanton's attorney-in-fact, he liquidated the certificate and used the proceeds to pay Stanton's expenses prior to her death; (2) whether the plaintiffs' action is barred by *res judicata* or other rules of issue preclusion because they filed and compromised a claim against Stanton's estate seeking reimbursement for the lost funds; and (3) whether the complaint states a cause of action for negligence against Kremer and the Bank.

We conclude that the plaintiffs had standing to sue, that their claims are not barred, and that their complaint states a cause of action against both defendants. We therefore reverse the judgment.

The facts are not in dispute. In 1978, Madeline Stanton purchased a \$20,000 certificate of deposit from the bank. Kremer, at Stanton's request, inserted language in the certificate providing that upon her death her two nieces, Havey and Brooks, would each receive one-half of the face value of the certificate. Kremer renewed the certificate several times after 1978, using the POD language each time.

In 1982, Stanton executed a power of attorney naming Kremer her attorney-in-fact and authorizing him, among other things, to manage her bank accounts. Pursuant to the power of attorney, Kremer

began paying Stanton's bills and managing her money.

When the POD certificate matured in 1983, Kremer cashed it in and placed the money in Stanton's checking account, from which he paid her living expenses. Upon Stanton's death in 1984, the balance remaining in the checking account—which was then substantially less than \$20,000—passed not to Brooks and Havey, but to Stanton's estate. Brooks and Havey sued, claiming that Kremer, as Stanton's attorney-in-fact, was negligent in failing to carry out her stated intention that the \$20,000 certificate of deposit should pass to them on her death. They sought to impose liability on the bank on *respondeat superior* grounds. The trial court granted Kremer's and the bank's motion to dismiss, concluding that Brooks and Havey lacked standing to sue, that the action was barred because they had filed and compromised a claim against Stanton's estate based on the same documents.

In summary judgment cases, we employ the same analysis as the trial court. *In re Cherokee Park Plat*, 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582 (Ct.App.1983). Where there are no issues of material fact, as is the case here, summary judgment may be an appropriate means of raising and deciding the legal issues. *Smith v. State Farm Fire & Cas. Co.*, 127 Wis.2d 298, 300, 380 N.W.2d 372, 373 (Ct.App. 1985). We decide such issues *de novo*. *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315-17, 401 N.W.2d 816, 820-21 (1987).

[1] Brooks and Havey argue first that the trial court erred in holding that they lack standing to sue for Kremer's negligence. The court grounded its ruling on sec. 705.01(6), Stats. Chapter 705 regulates "multiple party and agency" bank accounts—including POD accounts such as that at issue here. Section 705.01 is the definition section of the chapter and subsection (6), on which the court relied in this case, provides in part as follows:

"Party" means a person who, by the terms of an account, has a present right, subject to request, to payment therefrom

other than as agent. A beneficiary of a P.O.D. account is a party only after the account becomes payable to him [or her] by reason of his [or her] surviving the original payee.

The trial court concluded that "[b]ecause plaintiffs are not . . . 'part[ies]' to this POD account as 'party' is defined in Section 705.01(6) . . . they have no standing to continue this action." We disagree.

Chapter 705, Stats., does not state the legal standard for determining whether Kremer can be held accountable to Brooks and Havey for his negligent failure to carry out Stanton's intentions. It merely defines the term "party" in the context of the statutes dealing with "multiple-party" accounts. That the "party" contemplated in the statutory definition is simply one who is a party to a multi-party or agency account is apparent from a perusal of the rest of the chapter. The sentence immediately following the portion of sec. 705.01(6) quoted above, for example, states that "[a] minor may be a *party to an account* . . ." Section 705.01(1), which defines the term "account," states that all accounts "in which there are 2 or more *parties*," must be evidenced by a writing. Section 705.01(2), which defines the term "agent," states the definition in terms of agency "for all of the *parties* to the account." Section 705.01(4), which defines "joint account," states the definition in terms of "an account . . . payable on request to one or more of 2 or more *parties* . . ." Similar examples are found throughout the chapter.

We conclude, therefore, that the definition of "party" in sec. 705.01(6), Stats., relates only to the person or persons who are parties to a multiple-party or agency account. It has nothing to do with legal standing to sue a depositor's agent for alleged negligence in maintaining a POD account, and the trial court erred when it held to the contrary.

As indicated, the trial court also ruled that Brooks and Havey were precluded from bringing the action because they had made and settled a claim against Stanton's estate for the promised funds.

Brooks and Havey filed a "Petition for Determination of Property Rights" in the probate court in which Stanton's estate was pending. They claimed that their interest in the POD certificate of deposit survived liquidation of the certificate and followed the funds into Stanton's checking account; and they asked the court to impose a constructive trust in their behalf over any funds remaining in the successor account.

Their claim was settled by a stipulation, or "compromise agreement," with Stanton's heirs whereby Brooks and Havey would each receive \$5,179.80 from the checking account, and each of the six heirs would receive \$1,179.80. The trial court, stating its opinion that "[t]he same factual situation was presented" in the probate proceeding as in this case, and noting that the order approving the compromise in that proceeding "ha[d] not been appealed," dismissed the action without further comment. We infer from the court's comments that it believed principles of *res judicata* or other issue-preclusion rules compelled dismissal of Brooks' and Havey's complaint in this action.

[2-4] *Res judicata* makes a final adjudication conclusive in a subsequent action between the same parties. *Landess v. Schmidt*, 115 Wis.2d 186, 191, 340 N.W.2d 213, 215-16 (Ct.App.1983). Estoppel by record, a related doctrine, prevents a party from relitigating what was actually litigated, or what might have been litigated, in a former proceeding. *Acharya v. AFSCME, Counsel 24*, 146 Wis.2d 693, 696, 432 N.W.2d 140, 142 (Ct.App.1988). Estoppel by record differs from *res judicata* in that it is the record of the earlier proceedings, rather than the judgment itself, that bars the second proceeding. *Id.* Both rules require, however, that in order for a prior proceeding to bar the current action there must be an identity of parties and an identity of causes of action or claims in the two proceedings. *Landess*, 115 Wis.2d at 191, 340 N.W.2d at 216.

[5] Kremer, arguing that there is an identity of parties in the probate proceeding and the instant case, focuses on a heading in Brooks' and Havey's probate petition

entitled "The Parties," and the appearance of Kremer's and the bank's names underneath the heading. It is apparent to us, however, that the reference to Kremer and the bank in the petition serves only to identify their connection with the documents on which the petition was based: the POD certificate and the successor checking account. There is no indication in the record that Kremer or the bank were ever served with the petition, that they received notice of the hearing, or appeared in the probate proceedings in any manner. Indeed, the compromise agreement indicates on its face that the settlement was only between the petitioners, Brooks and Havey, and the six Stanton heirs. Neither Kremer nor the bank are mentioned in the agreement or in the order approving it. The simple listing of "parties" in the probate petition does not meet the "identity-of-parties" requirements of the issue-preclusion rules discussed above. As a result, the settlement of Brooks' and Havey's probate petition does not bar this action.

Although the trial court did not rule on the question, Kremer argues on appeal that the action must be dismissed because the complaint fails to state a claim upon which relief may be granted. He maintains that he owed no duty to Brooks and Havey—that his only duties were to Stanton, as her agent—and that, as a result, the plaintiffs' action must fail.

Brooks and Havey disagree. They contend that Kremer breached a duty of care owed to their aunt when he cashed the POD certificate and deposited the funds in an unrestricted account, which he then used to pay bills. They argue that they, as third-party beneficiaries, were harmed by these actions and may sue for his negligence despite their lack of privity with him.

[6] Wisconsin courts have recognized that, in some situations at least, parties injured by the negligent provision of professional services may sue the professional regardless of privity. See *Citizens State Bank v. Timm, Schmidt and Co.*, 113 Wis.2d 376, 377, 335 N.W.2d 361, 362 (1983) (accountant liable to third party for negligence in preparing financial reports for

client with whom third party dealt); *Auric v. Continental Cas. Co.*, 111 Wis.2d 507, 509, 331 N.W.2d 325, 327 (1983) (intended beneficiaries have right of action against attorney for negligently supervising execution of a will); and *Matter of Revocable Trust of McCoy*, 142 Wis.2d 750, 757, 419 N.W.2d 301, 305 (Ct.App.1987) (trustee liable to intended beneficiary for negligent failure to advise settlor that a trust amendment must be in writing).

[7] Whether it is appropriate to impose liability on Kremer for any allegedly negligent acts he committed which caused harm to Brooks and Havey is a question of public policy. *Auric*, 111 Wis.2d at 512, 331 N.W.2d at 328. We conclude that the same policies which led to the recognition of third parties' causes of action for negligence in *Timm*, *Auric* and *McCoy* are applicable to an attorney-in-fact under the circumstances as pled by the plaintiffs in this case.

The *Auric* court considered several factors supporting the extension of liability to third parties:

the extent to which the transaction was intended to affect the plaintiff[s], the foreseeability of harm to [them], the degree of certainty that the plaintiff[s] suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing further harm. *Auric*, 111 Wis.2d at 514, 331 N.W.2d at 329 (citation omitted).

Applying these factors, we conclude that the plaintiffs' complaint states a claim. The POD account was intended to directly benefit Brooks and Havey, and it was foreseeable that if the account were changed to an unrestricted account they stood to suffer a loss. And when just such a change was made, and the successor checking ac-

count was drawn down by Kremer, losses were certain to follow. Finally, we believe that imposing liability for any negligence that may ultimately be assigned to Kremer will help prevent future harm to others similarly situated.

As to the complaint itself, in addition to the facts surrounding the creation of the POD certificate and its liquidation and disbursement by Kremer, it alleges Kremer's knowledge of Stanton's intent that the \$20,000 pass to Brooks and Havey on her death, that he never contacted Stanton when he cashed in the certificate and began spending the funds, and that he never made any attempt to ascertain whether there were other sources of funds available to Stanton which would have allowed the POD account to remain intact.

[8] Where, as here, a complaint is challenged for failure to state a claim, its allegations are deemed admitted and they are liberally construed in favor of the action. *Evans v. Cameron*, 121 Wis.2d 421, 426, 360 N.W.2d 25, 28 (1985). Thus, we will dismiss a claim "only if 'it is quite clear that under no conditions can the plaintiff recover.'" *Id.*, quoting *Morgan v. Pennsylvania General Ins. Co.*, 87 Wis.2d 723, 731, 275 N.W.2d 660, 664 (1979). The plaintiffs' complaint is not subject to dismissal under that test.¹

Judgment reversed and cause remanded for further proceedings.



1. The bank contends that there is no factual basis for holding it liable for Kremer's acts under the doctrine of *respondeat superior*. The plaintiffs' complaint alleges Kremer's status as an employee and officer of the bank and that all of his actions related to the case were performed during his regular working hours and with the intention of benefiting the bank. It also alleges that all of the accounts and certificates with which Kremer worked were the

bank's, and that all of the deposits and withdrawals of which the plaintiffs complain were done during the course and within the scope of Kremer's employment at the bank.

We consider the complaint to state a claim against the bank on *respondeat superior* grounds under Wisconsin's "notice pleading" rules and the rules applicable to our consideration of challenges to the sufficiency of complaints discussed above.

South Central Bell Telephone Co. v. Utility Regulatory Com'n, Ky., 637 S.W.2d 649 (1982), is distinguishable because it involved the power to regulate rates. The present case involves the authority to enforce the other provisions of the statutes. *Public Service Com'n of Kentucky v. Attorney General*, Ky.App., 860 S.W.2d 296 (1993), is not applicable because that decision did not consider the issue of an administrative agency's necessarily implied powers.

The problem presented in this type of case is that service provided by a district is proprietary in nature and it is monopolistic by statutory design and practical requirements. One of the principal functions of the PSC is to provide information, regulation and hopefully protection to the ratepayers and consumers of a service provided by a monopoly enterprise whether that be investor-owned or statutorily created. Here the PSC has not added to its enumerated powers when it employed authority which is by necessity or fair implication required to properly perform its statutory function.

The concern of the majority that a literal and limited behavior is necessary is at variance with the language of KRS 446.080 which states that all statutes of this State shall be liberally construed with a view to promote their objects and carry out the intent of the legislature. The common law rule of strict construction of statute no longer prevails in Kentucky. *Scott v. Curd*, 101 F.Supp. 396 (E.D.Ky.1951). The rules of statutory construction required that all statutes be construed to carry out the intent of the legislature. *Hardin Co. Fiscal Ct. v. Hardin Co. Bd. of Health*, Ky.App., 899 S.W.2d 859 (1995).

I would affirm the decision of the Court of Appeals, the circuit court and the Public Service Commission and permit the refunds.

STUMBO, J., joins in this dissent.



Terry PRIESTLEY and Timothy Priestley, Appellants,

v.

Brenda J. PRIESTLEY, Individually; Brenda J. Priestley, as Guardian of Rodman G. Priestley; and Brenda J. Priestley, as Administratrix of the Estate of Rodman G. Priestley, Deceased, Appellee.

Brenda J. PRIESTLEY, Cross-Appellant,

v.

Terry PRIESTLEY and Timothy Priestley, Cross-Appellees.

Nos. 96-SC-271-DG, 96-SC-803-DG.

Supreme Court of Kentucky.

June 19, 1997.

Rehearing Denied Sept. 4, 1997.

Decedent's heirs brought action against his widow, individually and as administratrix of decedent's estate, alleging that she breached her fiduciary duties as attorney in fact and guardian for decedent and as administratrix of decedent's estate. The Circuit Court, Woodford County, entered jury verdict against widow. Widow appealed. The Court of Appeals reversed. Discretionary review was granted. The Supreme Court, Lambert, J., held that: (1) Court of Appeals did not abuse its discretion in deciding case on issue not raised by parties; (2) failure of judgment to reflect that widow breached any fiduciary duty as administratrix was not fatal flaw; (3) heirs had standing to bring action; and (4) whether widow breached any fiduciary duty was jury question.

Opinion of Court of Appeals reversed.

1. Appeal and Error ⇌ 169

So long as appellate court confines itself to record, no rule of court or constitutional provision prevents it from deciding issue not presented by parties.

2. Appeal and Error ⇨1092

Court of Appeals did not abuse its discretion in deciding action for breach of fiduciary duty on standing issue, which was not raised by parties.

Linda Gosnell, Lynn Rikhoff, Rosenbaum & Rosenbaum, P.S.C., Lexington, for Appellants/Cross-Appellees.

Tom H. Pierce, Amanda L. Fcley, Versailles, for Appellee/Cross-Appellant.

3. Executors and Administrators ⇨453(2)

In heirs' action against decedent's widow for breach of her fiduciary duties as attorney in fact and guardian for decedent and as administratrix for decedent's estate, failure of final judgment against widow to expressly articulate her breach of duties as administratrix was not fatal flaw. KRS 395.510.

LAMBERT, Justice.

Upon a jury verdict, Brenda J. Priestley, appellee/cross-appellant (hereinafter "appellee"), was adjudged to have breached her fiduciary duties with respect to her management of the assets of Rodman G. Priestley. On appeal, the Court of Appeals determined *sua sponte* that the decisive issue was whether appellants/cross appellees (hereinafter "appellants"), the children of Rodman G. Priestley, had standing to assert claims for breach of such fiduciary duties. Answering in the negative, the Court of Appeals reversed the judgment of the trial court and dismissed appellants' claims. We granted discretionary review to consider the question of standing and such other issues as are necessary to resolution of the case.

4. Executors and Administrators ⇨435

While district court exercises supervision and control of guardians, and guardianship statutes are mandatory and to be strictly construed, upon filing a claim against personal representative where acts of mismanagement, fraud or deception are alleged, circuit court has jurisdiction to settle estate and adjudicate all claims associated therewith. KRS 24A.120, 395.510.

Ten years into an apparently happy marriage, Rodman G. Priestley suffered an aneurysm and severe disability. Thereafter, while a patient at Cardinal Hill Hospital, Mr. Priestley suffered a fall which added to his physical disability. While so disabled, guardianship proceedings were begun in the Woodford District Court, but a guardian ad litem appointed for Mr. Priestley suggested that a durable power of attorney be executed whereby his wife, Brenda J. Priestley, appellee herein, would manage his affairs. Such an instrument was executed and the guardianship proceeding was abandoned. Sometime thereafter, Mr. Priestley was hospitalized at the Veteran's Administration Hospital in Lexington where he remained until his death in 1991. Meanwhile, in her capacity as Mr. Priestley's next friend, and on her own behalf, appellee brought suit against Cardinal Hill Hospital claiming, *inter aliu*, medical negligence and loss of consortium. In due course, a settlement agreement was reached between the Priestleys and Cardinal Hill Hospital. To finalize the settlement it was

5. Executors and Administrators ⇨429

Decedent's heirs had standing to bring action against decedent's widow for breach of fiduciary duties as attorney in fact and guardian for decedent and as administratrix for decedent's estate; since decedent died before action was commenced, heirs' interests in estate were far greater than mere expectancy.

6. Principal and Agent ⇨48

Agents must act with utmost good faith.

7. Executors and Administrators ⇨451(2)

Whether decedent's widow breached her fiduciary duties as attorney in fact and guardian for decedent or as administratrix for decedent's estate was jury question.

8. Constitutional Law ⇨46(1, 2)

Appellate court would not decide whether statute holding husband liable for wife's debt was unconstitutional as gender-based classification in violation of Equal Protection Clause, as issue was ill-defined and speculative under facts of case. U.S.C.A. Const. Amend. 14; KRS 404.040.

necessary for appellee to be appointed Mr. Priestley's guardian.

The settlement agreement was "structured" and provided for an equal division of the settlement proceeds between Rodman G. Priestley to compensate for his personal injuries and appellee, Brenda J. Priestley, to compensate for her loss of consortium. The settlement agreement provided for modest near-term payments and postponed the bulk of all payments until well beyond Mr. Priestley's life expectancy. Of the settlement amount allocated to Mr. Priestley, the agreement provided that after his death, any unpaid sums of money would go to his estate. Of the settlement amount allocated to appellee, the agreement provided that at her death, any unpaid sums would go to her children by a prior marriage; this to the exclusion of Mr. Priestley and his children.

As stated hereinabove, a few months after Mr. Priestley suffered the aneurysm, appellee was appointed to serve as his attorney in fact. Pursuant to the authority granted by the power of attorney, appellee transacted several significant items of business for Mr. Priestley and herself. Among other things, she purchased a new automobile with jointly held funds and placed the title exclusively in her name. She also sold a farm the Priestleys had acquired during their marriage and of the \$20,000 realized, placed one-half exclusively in her name and the other one-half in a joint account with her husband. She sold a truck titled in the Priestleys' joint names and placed the proceeds in her name only. In November, 1988, after appellee was appointed Mr. Priestley's guardian, she continued transacting business for him. Representative of this class of transactions was appellee's pre-payment of mortgage payments on jointly owned and survivorship property, her purchase of IRA's for herself with joint funds, and the purchase of an automobile and payment of insurance and taxes thereon. Numerous such transactions were subsequently scrutinized and a substantial number were determined to have constituted a breach of fiduciary duties.

After hearing the evidence and receiving the court's instructions, the jury determined that in many instances appellee had breached

her fiduciary duties as attorney in fact and as guardian. Following the jury verdict with respect to appellee's breach of fiduciary duties pursuant to the power of attorney and the guardianship appointment, excluding all matters relating to the Cardinal Hill settlement, judgment was entered against appellee for the sum of \$43,301.81 plus interest.

With respect also to the Cardinal Hill settlement, the jury determined that appellee had breached her fiduciary duty. It determined that the percentage of the settlement which each party should have received was eighty percent to Rodman G. Priestley for his compensable claims, and twenty percent to Brenda Priestley for her loss of consortium claim. Judgment to this effect was duly entered.

[1, 2] At the outset, we will not long tarry to consider the contention that the Court of Appeals had no right to decide the case on an issue not raised on appeal. So long as an appellate court confines itself to the record (*Montgomery v. Koch*, Ky., 251 S.W.2d 235 (1952)), no rule of court or constitutional provision prevents it from deciding an issue not presented by the parties (*Mitchell v. Hadl*, Ky., 816 S.W.2d 183 (1991)). While it is widely recognized that appellate courts should be reluctant to engage in such a practice, their discretion is broad enough to prevent a conclusion that it has been abused. *Young v. J.B. Hunt Transportation, Inc.*, Ky., 781 S.W.2d 503 (1989). We addressed an analogous situation in *Shraberg v. Shraberg*, Ky., 939 S.W.2d 330 (1997), where a claim was made that the Court of Appeals had abused its discretion in granting a petition for rehearing.

This Court will not undertake to review the Court of Appeals' exercise of its discretion with regard to granting rehearing. Where parties believe the Court of Appeals has erred in granting rehearing, their remedy is to bring the merits of the case to this Court.

Id. at 332. In our view, these authorities fully resolve this issue in appellee's favor. The Court of Appeals did not abuse its discretion in deciding the case on an issue not raised by the parties.

As set forth hereinabove, the Court of Appeals reversed on grounds that appellants lacked standing. It focused on appellants' status as adult children of Rodman G. Priestley and noted that the power of attorney created an agency relationship in which these adult children had no role. It took a similar view with respect to the guardianship. Appellants were dismissed as having a "mere expectancy" and held to lack standing to assert a claim against the fiduciary. By necessary implication from the Court of Appeals' opinion, an attorney in fact acting pursuant to a durable power of attorney is not answerable to any person or entity except the grantor of the power of attorney, one who may well be incompetent.

Appellants' claims were brought one year after the intestate death of Rodman G. Priestley. Their claims were brought against appellee, Brenda J. Priestley, individually, as the decedent's guardian, and as administratrix of the decedent's estate. It was averred that appellee engaged in various acts of misconduct in each of her three fiduciary capacities, and in particular, appellants claimed that as administratrix of the decedent's estate, appellee failed to pursue claims on behalf of the estate against herself for breach of fiduciary duties as the decedent's *inter vivos* fiduciary. As such, they claim appellee's failure to discharge her duties as administratrix of the estate resulted in lesser sums being available for distribution to the decedent's heirs at law.

[3] For her response, appellee states that the judgment fails to reflect that she breached any fiduciary duty as administratrix. As such, she concludes that appellant's claims against her as guardian and as attorney in fact must also fail because KRS 395.510 permits claims against her only as administratrix. Our review of the statute and decisions interpreting it fails to reveal such a limitation.

[4] In *Lee v. Porter*, Ky.App., 598 S.W.2d 465 (1980), KRS 395.510 was broadly interpreted to authorize claims against the personal representative of an estate for mismanagement, fraud, deception, or the like. In so holding, the Court followed *Myers v. State Bank & Trust Co.*, Ky., 307 S.W.2d 933

(1957), which involved the claim of a legatee against an executor for mismanagement, neglect and breach of fiduciary duty pursuant to KRS 395.510(1). Herein, appellants' claims are entirely consistent with statutory language and the relevant decisions. The decedent died intestate and appellants are his heirs at law. Their claims were brought against the decedent's administratrix asserting that she breached duties as a testamentary fiduciary by failing to recover for benefit of the estate sums which she herself had wasted or improperly diverted during her tenure as *inter vivos* fiduciary. Unlike appellee, we discern no fatal flaw by the absence of a judgment which declared that she defaulted as testamentary fiduciary. The determination that appellee breached *inter vivos* fiduciary duties is sufficient if sustained by the evidence and otherwise. While the district court exercises supervision and control of guardians (KRS Chapter 387), and while the guardianship statutes are mandatory and to be strictly construed (*Rice v. Floyd*, Ky., 768 S.W.2d 57 (1989)), upon the filing of a claim pursuant to KRS 395.510 where acts of mismanagement, fraud or deception are alleged, the circuit court has jurisdiction to settle the estate and adjudicate all claims associated therewith. KRS 24A.120.

Even though KRS 387.210 confers exclusive jurisdiction upon the district court to appoint, remove and require accounting of committees and provides further for appeal to the circuit court from such acts or failure to act there appears to be no power to entertain actions involving such a fiduciary where mismanagement, fraud or deception is involved. Neither does there appear any authority to surcharge accounts or assess damages. Since the case at bar seeks the relief last mentioned based upon mismanagement of the estate by the committee, then the appellant had no alternative but to commence this action in the circuit court since the district court was without statutory power to render the judgment sought.

Lee v. Porter, 598 S.W.2d at 468.

In the circumstances which prevailed here, appellee's interests were hopelessly in con-

flict. *Morris v. Brien*, Ky.App., 712 S.W.2d 347 (1986); *Howd v. Clay*, Ky., 312 Ky. 508, 228 S.W.2d 437 (1950); and *Price's Adm'r v. Price*, 291 Ky. 211, 163 S.W.2d 463 (1942). While it was her duty as administratrix to marshal the assets of the estate and collect sums which might have been due the decedent for benefit of the estate (KRS 395.195), it was in her personal interest to ignore her own possible defalcation. In such circumstances we are not persuaded by appellee's technical argument that the final judgment is flawed for failure to expressly articulate her breach of duties as administratrix. In our view, this question was sufficiently answered when the jury returned a verdict and the court entered judgment requiring appellee to repay substantial sums to the decedent's estate and requiring reformation of the agreement by which the Cardinal Hill litigation was settled.

[5] The Court of Appeals erred in its conclusion that appellants lacked standing. The cases of *Burkhart v. Community Medical Center*, Ky., 432 S.W.2d 433 (1968), and *Winn v. First Bank of Irvington*, Ky.App., 581 S.W.2d 21 (1978), upon which the Court of Appeals relied, while containing sound legal principles, are far from dispositive of the standing question here. The Court of Appeals' error was in its conclusion that appellants had only an expectancy in the estate of their father. This is simply inaccurate. By virtue of Mr. Priestley's intestate death, appellants were his heirs at law and their rights were far greater than an expectancy. As such, *Ellis v. Ellis*, Ky., 752 S.W.2d 781 (1988), is distinguishable. In *HealthAmerica Corp. of Kentucky v. Humana Health Plan, Inc.*, Ky., 697 S.W.2d 946 (1985), we said that standing required "a judicially recognized interest in the subject matter of the suit," a requirement easily satisfied here. See also *Louisville v. Stock Yards Bank & Trust*, Ky., 843 S.W.2d 327 (1992), for the view that no "precise standard" to determine whether a party has standing has been formulated and "that the issue must be decided on the facts of each case." *Id.* at 329.

Inasmuch as this litigation was commenced after the decedent's death and after the appointment of a personal representative, we

need not decide whether an expectant heir or other interested person may be heard when it appears that an attorney in fact, pursuant to a KRS 386.093 durable power of attorney, is engaging in waste, fraud or mismanagement.

On cross-appeal, appellee contends that she should have had a directed verdict and that her alleged breach of fiduciary duties should not have been submitted to the jury. No claim of error has been made concerning the instructions. She argues, without authority, that a subjective standard should have been applied to her decisions with respect to her husband's property: "What would the ward himself have done with his property?"

[6] In our view, the proper standard of conduct is set forth in *Deaton v. Hale*, Ky., 592 S.W.2d 127 (1979), which requires of an agent the utmost good faith. See also *Dunn v. Kramer*, 306 Ky. 377, 208 S.W.2d 41 (1948). The guardianship statute, KRS 387.600, is highly particularized and requires detailed reporting and review by the court. Our decisions and the statutes are far more consistent with the concept of limited discretion in the fiduciary than with broader discretion as claimed by appellee. This was the view of the trial court in its ruling on the motion for directed verdict.

This is a case in which Mrs. Priestley is alleged to have breached certain fiduciary duties to Mr. Priestley, her husband. It's a case where Mrs. Priestley acted as a fiduciary to one with whom she shared a marital relationship. That notwithstanding, according to the Court's understanding of the law, Mrs. Priestley's fiduciary duty to Mr. Priestley is not as a matter of law lessened by virtue of the marital relationship, although this Court recognizes that Mrs. Priestley's defense to this case will largely be based upon her setting forth that in view of the marital relationship she enjoyed with Mr. Priestley, the fashion in which she conducted his affairs was acceptable in context of that particular relationship. But, nevertheless, this Court believes that it must, in evaluating the Defendant's motion for a directed verdict, emphasize the fiduciary aspects of their re-

lationship, or rather than other aspects of the marital relationship.

[7] The trial court then ruled on each item of expenditure and after ruling for appellee on the question of necessities per KRS 404.040, overruled her motion for directed verdict in all other respects. It is unnecessary to separately discuss each of the transactions claimed to have been in breach of appellee's fiduciary duties. We simply say that we are unpersuaded that the trial court erred in its ruling on any part of the directed verdict motion.

In the trial court, appellants asserted that KRS 404.040 was unconstitutional as a gender-based classification in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. They relied upon *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1977), and *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 100 S.Ct. 1540, 64 L.Ed.2d 107 (1980), and other decisions which have invalidated gender-based classification statutes. The factual predicate of appellants' claim in this regard arises from the trial court's determination that certain expenditures made by appellee during the period she served as the decedent's fiduciary were for the purchase of "necessaries" and thus were not improper expenditures.

[8] We will refrain from deciding this important constitutional issue in this case. The items in question are bills and expenses generally associated with operating a household, making home repairs, and paying insurance premiums. Appellants' interest is, at best, only indirect as the benefit to them would be merely enhancement of the decedent's estate. While the trial court characterized the expenses as "necessaries" for benefit of appellee, there is significant ambiguity associated with such expenditures in that they were largely for maintenance of the family household.

Courts are not required to decide constitutional questions whenever a party makes the suggestion. Constitutional adjudication should be reserved for those cases in which the issue is well-defined and advanced by parties substantially affected by the contro-

versy. The constitutional question here would be more appropriately asserted by a husband or wife adversely affected by the statute than by children whose inheritance is only modestly affected thereby.

On this issue, we will follow the doctrine of self-restraint articulated in *Craig v. Boren, supra*, which is designed to minimize unwarranted intervention into controversies where the applicable constitutional questions are ill-defined and speculative. Accordingly, we decline to decide the constitutionality of KRS 404.040.

For the foregoing reasons, the opinion of the Court of Appeals is reversed and the final judgment of the Woodford Circuit Court is reinstated.

All concur.



Danny WOODWARD, Appellant,

v.

COMMONWEALTH of Kentucky,
Appellee.

No. 96-SC-380-DG.

Supreme Court of Kentucky.

June 19, 1997.

As Modified on Denial of Rehearing
Sept. 4, 1997.

County judge executive was convicted in the Hopkins District Court, Robert F. Soder, J., of malfeasance in office and reprisal against a public employee. Judge filed appeal in the circuit court. The Commonwealth moved to dismiss appeal, claiming that the Court of Appeals, not circuit court, had jurisdiction. The Court of Appeals held that circuit court was appropriate court to hear matter. Judge moved for discretionary review. The Supreme Court, Stephens, C.J., held that the Supreme Court, not the Court

It is also noteworthy that Florida courts have recognized that, except in extreme circumstances, a parent has the obligation to encourage a positive relationship between the minor child and the other parent. See *Schutz v. Schutz*, 581 So.2d 1290 (Fla.1991); *Marcus v. Marcus*, 902 So.2d 259 (Fla. 4th DCA 2005); *Levy v. Levy*, 861 So.2d 1211 (Fla. 3d DCA 2003); see also § 61.13(3)(a), Fla. Stat. (2010) (demonstrated capacity and disposition of parent to facilitate and encourage close and continuing parent-child relationship is factor for court to consider in determination of time-sharing schedule). Yet, in this case, the mother was compelled to give testimony in the presence of her minor child—even where her testimony included allegations of severe misconduct by the father. I would suggest that in disputed family law cases, it would be a rare situation in which it would be appropriate to permit a minor child (who has the mental capacity to understand common speech) to be present during the testimony of one of the child's parents.



Daniel G. SIEGEL, Simon B. Siegel,
Beverly Siegel, Randy T. Siegel and
Nancy S. Nasto, Appellants,

v.

JP MORGAN CHASE BANK, Judith S.
Novak, and J.P. Morgan Trust
Company, N.A., Appellees.

No. 4D09-699.

District Court of Appeal of Florida,
Fourth District.

Oct. 19, 2011.

Background: Trustee of revocable trust filed complaint for a judicial accounting and a discharge from liability for all actions during accounting period. The trial

court awarded summary judgment to trustee. Beneficiaries appealed. The Court of Appeals, 920 So.2d 89, affirmed in part, reversed in part, and remanded. Thereafter, trustee filed an amended complaint and beneficiaries filed a counterclaim for breach of fiduciary duty, as well as a cross-claim against settlor's attorney-in-fact for an accounting, breach of fiduciary duty, and for interference with an expectancy. The Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, John L. Phillips, J., found that beneficiaries did not have standing to challenge certain distributions and expenditures made prior to settlor's death. Beneficiaries appealed.

Holdings: On rehearing, the District Court of Appeal, Warner, J., held that:

- (1) trial court incorrectly treated question of propriety of particular pre-death distributions and expenditures as a question of standing;
- (2) beneficiaries had standing;
- (3) trustee had no power under trust agreement to make gifts; and
- (4) evidentiary hearing was required to determine whether pre-death expenditures and distributions were a breach of fiduciary duty.

Affirmed in part, reversed in part, and remanded.

1. Trusts ⇐265

Trial court improperly went beyond the issues that parties agreed to submit as a preliminary issue of beneficiaries' standing to challenge certain pre-death distributions and expenditures from revocable trust, with those issues being whether trust agreement and the power of authority authorized trustee and settlor's attorney-in-fact to make gifts from trust, where court not only decided that gifts generally were authorized by the terms of trust and power of attorney, but also decided that

each of the particular gifts made was authorized, as were all of the various other challenged expenses.

2. Trusts ⇨247

Under New York law, beneficiaries of a revocable trust had standing to challenge pre-death withdrawals from trust which were outside purposes authorized by trust and which were not approved or ratified by settlor personally or through a method contemplated through the trust instrument; beneficiaries had a direct interest in the corpus of trust after settlor's death.

3. Appeal and Error ⇨893(1)

Under New York law, the interpretation of the various documents is a question of law that is reviewed de novo.

4. Trusts ⇨223

Under New York law, provisions of revocable trust, giving trustee the power to disburse income and principal for the support, maintenance, health, comfort, or general welfare of settlor, did not give trustee the power to make gifts, even if the power of attorney gave the settlor's attorney-in-fact the power to make gifts and there had been a long history of generosity on behalf of settlor.

5. Appeal and Error ⇨1178(1)

A remand for an evidentiary hearing was required to determine if, under New York law, trustee and settlor's attorney-in-fact breached their fiduciary duties in making certain gifts and other withdrawals from revocable trust prior to settlor's death, upon appellate court's determination that trial court improperly went beyond the issues that the parties agreed to submit as a preliminary issue of beneficiaries' standing and determined the propriety of each gift in particular.

6. Principal and Agent ⇨51

Under New York law, a power of attorney is clearly given with the intent that

the attorney-in-fact will utilize that power for the benefit of the principal.

7. Principal and Agent ⇨48

Under New York law, because the relationship of an attorney-in-fact to his principal is that of agent and principal, the attorney-in-fact must act in the utmost good faith and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty, and fair dealing.

8. Trusts ⇨112

Under New York law, the trust instrument is to be construed as written and the settlor's intention determined solely from the unambiguous language of the instrument itself.

9. Trusts ⇨225

Under New York law, even though the trustee has the sole discretion to determine the appropriateness of expenditures, it does not foreclose all inquiry by a court of the proper use of such discretion.

10. Trusts ⇨177

Under New York law, the court has the responsibility to ensure that the trustees do not abuse their discretion; accordingly, the court has the authority to correct abuses in the exercise of absolute discretion that are arbitrary or the result of bad faith.

11. Trusts ⇨225

Under New York law, where distributions fall within a class of expenditures authorized by the trust, a trustee must still act reasonably and with good faith in carrying out the terms of the trust.

John R. Hargrove of Hargrove Pierson & Brown, P.A., Boca Raton, and Bernard A. Jackvony of Pannone, Lopes, Dever-

eaux & West LLC, Providence, Rhode Island, for appellants.

Matthew Triggs and Jonathan Galler of Proskauer Rose LLP, Boca Raton, for appellee JP Morgan Chase Bank and J.P. Morgan Trust Company, N.A.

Peter A. Sachs, Theodore S. Kypreos and Jennifer G. Ashton of Jones, Foster, Johnston & Stubbs, P.A., West Palm Beach, for appellee Judith S. Novak.

WARNER, J.

We grant appellees' motions for rehearing, withdraw our previously issued opinion and substitute the following in its place.

This is an appeal of a final judgment determining that the beneficiaries of a trust did not have standing to challenge certain pre-death distributions and expenditures from the trust by the trustee and the settlor/decedent's attorney-in-fact, because the expenditures and distributions were within the discretion allowed to the trustee under the terms of the trust. We reverse, because the beneficiaries did have standing, and an evidentiary hearing was required to determine whether the expenditures and distributions were a breach of fiduciary duty.

This is the second appearance of this case in this court. The underlying facts may be read in *Siegel v. Novak* ("*Siegel I*"), 920 So.2d 89 (Fla. 4th DCA 2006). Briefly, Dorothy H. Rautbord established a trust to benefit her for her life, with the remainder to be distributed to her children who survived her, including her sons, Daniel and Simon Siegel. The trust permitted the trustee to pay from income and principal, so much "as the Trustee, in its sole discretion, shall deem appropriate or advisable for the support, maintenance, health, comfort or general welfare of the Settlor [Rautbord]." It reserved to the settlor alone the power of amendment, modification and revocation, in whole or in

part, specifically excluding an attorney-in-fact from exercising those powers. That is important, because Rautbord also executed a power of attorney to her daughter, Novak, giving her multiple powers, including the power to make gifts to individuals or charitable organizations "provided that such gift either (i) shall be reasonably consistent with any pattern of my giving or with my estate plan or (ii) shall not exceed the annual exclusion available from time to time for federal gift tax purpose." The power of attorney specifically excluded any power to revoke or amend or withdraw principal from any trust where Rautbord had reserved the power to amend or revoke.

Rautbord appointed JP Morgan Chase Bank as her trustee in 1995, at which time the trust was also amended to provide that New York law would govern the trust. In addition, another trust amendment provided that the trustee could relocate the trust corpus, which JP Morgan did in 2003, transferring the assets to Florida. At some point after the execution of the 1995 amendment, Rautbord developed severe dementia.

As noted in *Siegel I*, during Rautbord's lifetime Novak made large withdrawals of principal from the trust by signing revocation letters, which the trustee approved. In addition, the trust issued checks for many gifts, and the trustee spent considerable amounts for what is termed Rautbord's general welfare.

Rautbord died in 2002. After her death, JP Morgan Chase Bank filed a complaint for a judicial accounting pursuant to chapter 737, Florida Statutes, seeking a discharge from liability for its actions as trustee. The Siegels—Daniel and Simon Siegel, along with Simon's wife Beverly and two children, Randy and Nancy—filed an answer and affirmative defenses, alleging that some of the trustee

expenditures may not have been made for purposes specified in the trust, namely the support, maintenance and general welfare of Rautbord. The trial court granted JP Morgan's motion for summary judgment, finding that the Siegels lacked standing to challenge any distributions made prior to Rautbord's death, because the trust was revocable, and the brothers had no present interest in the trust assets during their mother's life.

In *Siegel I*, Judge Gross detailed New York law and concluded that the brothers did have standing to challenge the trust distributions. Specifically, the opinion held:

[U]nder New York law, after the death of the settlor, the beneficiaries of a revocable trust have standing to challenge pre-death withdrawals from the trust which are outside of the purposes authorized by the trust and which were not approved or ratified by the settlor personally or through a method contemplated through the trust instrument. By outside the purposes of the trust we mean any expenditures that were not "appropriate or advisable for the support, maintenance, health, comfort or general welfare of" Mrs. Rautbord.

Id. at 95-96 (emphasis in original). Explaining this holding, Judge Gross relied on New York law, which governs the trust:

The court in *Estate of Morse*, 177 Misc.2d 43, 676 N.Y.S.2d 407, 409 (N.Y.Sur.1998), described the broad reach of New York's concept of standing:

In that light, it has been noted that "anyone who would be deprived of property in the broad sense of the word . . . is authorized to appear and be heard upon the subject", of whether a will that would thus affect him adversely should be admitted to probate (*Matter of Davis*, 182 N.Y. [468, 472, 75 N.E. 530 (N.Y.1905)]). Accord-

ingly, standing to object to probate does not require an interest that is "absolute"; a contingent interest will be enough (see *Matter of Silverman*, 91 Misc.2d 125, 397 N.Y.S.2d 319). In other words, the uncertainty of an interest should not preclude its holder from seeking to protect it, i.e., she should have standing to object to a propounded instrument that makes the possibility of benefit even more remote or eliminates such possibility entirely.

Id. at 95-96. Judge Gross noted, "With an interest in the corpus of the trust after the death of their mother, the Siegels *have standing to challenge the disbursements*; they have alleged a concrete and immediate injury, caused by Novak and the Bank, which could be redressed by the circuit court. Without this remedy, wrongdoing concealed from a settlor during her lifetime would be rewarded." *Id.* at 96 (emphasis added).

Following remand, JP Morgan filed an amended complaint, and the Siegels filed a counterclaim for breach of fiduciary duty, as well as a cross-claim against Novak for an accounting, breach of fiduciary duty, and for interference with an expectancy. The central issue involved the propriety of distributions authorized by the trustee prior to the death of Rautbord. The Siegels alleged that although Novak, as attorney-in-fact, had the power to make gifts, she did not have the power to revoke the trust. Despite this, she signed letters of partial revocation of substantial portions of the trust assets, which JP Morgan routinely approved, contrary to the practice of the predecessor trustee, who refused to make distributions as gifts because Rautbord had been taken advantage of because of her generosity.

The Siegels challenged four categories of distributions. First, JP Morgan had

issued 111 checks for gifts to friends and family from 1995 to 2002. Some of the recipients were employees of Novak and the JP Morgan employee in charge of administering the trust. In addition, some of those gifts incurred gift tax liability, contrary to the specific provisions of the power of attorney. Second, Novak, as attorney-in-fact, forgave substantial debts owed to Rautbord, claiming that these were in fact gifts. Third, the trust agreement provided that, upon Rautbord's death, a trust for the benefit of her sister-in-law, Ruth Haas, would be established. Despite the trust's terms, Novak established the trust, and the trustee distributed funds to create it prior to Rautbord's death, causing a substantial gift tax liability. Fourth, the Siegels challenged the excessive expenditures for the "welfare" of Rautbord.

In an effort to streamline the trial of the action, JP Morgan moved for a preliminary determination "as to whether the Siegels have standing with respect to each distribution that they seek to challenge." In its motion, it pointed to *Siegel I* and argued that the Siegels had standing to challenge *only* "those trust distributions that were outside of the purposes authorized by the discretionary invasion standard set forth in the trust." Noting that the Siegels had identified approximately 75 distinct trust expenditures that they intended to challenge at trial, JP Morgan suggested that the court first hear evidence and make a determination as to whether those expenditures were "appropriate or advisable for the support, maintenance, health, comfort or general welfare of" Mrs. Rautbord.

At the commencement of the trial, JP Morgan again suggested that the court first determine the "standing" issue. The Siegels' attorney agreed that issues regarding the interpretation of the documents were questions of law and that whether the documents allowed disburse-

ment of trust funds to third parties as gifts could be determined first by the court. The court then granted the motion and directed that it first make the determination of the Siegels' standing to make objections.

The parties proceeded to give argument to the court both on the law and the facts as to why the trust instrument did or did not permit gifts by the trustee or the attorney-in-fact. At the end of the argument, the parties agreed that the court could decide whether the trust instrument authorized the making of gifts. The court stated, "You would like me to come back with a decision as to whether the language of the trust authorized the trustee to invade the principal of the trust to make gifts." The Siegels' attorney added, "Principal and income and as to Judy Novak, whether or not the paragraph 3, subsection 6, in the durable power of attorney prohibited her from modifying or revoking or withdrawing principal from the 1990 trust." Novak's attorney objected and instead requested the court to determine "whether the gifts authorized by Judy Novak were appropriate" under the power of attorney. He urged the court to determine whether the gifts were approved or ratified by the settlor, to which the Siegels' attorney stated that this would require the presentation of additional evidence. They objected to the court making these determinations.

The next day the court delivered its order on the preliminary issue of standing. In it, the court stated the question as follows:

More specifically, the Court is to decide whether the challenged withdrawals from the Trust are outside the purposes authorized by the Trust (that is, not appropriate or advisable for the support, maintenance, health, comfort or general welfare of Ms. Rautbord), and were not

approved or ratified by the settlor personally or through a method contemplated through the Trust instrument. By consent, the parties also tried the issue of the propriety of the actions of Ms. Novak, Ms. Rautbord's attorney-in-fact, with respect to these transactions.

The court then made specific findings with respect to each category of challenged expenditures. The first category "deals with expenditures for birthday parties, health expense, pets, etc. On their face, they seem appropriate or advisable for the support, maintenance, health, comfort, or general welfare of the settlor, Mrs. Rautbord. Accordingly, the Siegels have NO STANDING to challenge these expenditures from the Trust." The second category included the forgiveness of debts, owed to Ms. Rautbord, by the attorney-in-fact. The court noted that no details were presented in the arguments. "However, assuming the debts were forgiven by Ms. Rautbord's attorney-in-fact, Ms. Novak, such forgiveness is an appropriate and valid exercise of Novak's broad powers set forth in Section II of the Florida Durable Power of Attorney (JPM—9). The provisions of section III of that Power of Attorney do not prohibit the forgiveness of the debts set forth in List B." The court equated the power to make gifts with the power to forgive debts. As to the third category, which included the expenses incurred by the trust in making gifts that exceeded the gift tax exclusion for federal income tax purposes, as well as the premature funding of the Ruth Hass trust, the court concluded that these too were within the broad power of gifting, as they were consistent with a long history of gifting by Mrs. Rautbord. Likewise, the court concluded that the final category of gifts to employees, friends and relatives also continued Mrs. Rautbord's history of gift giving. The court supported its conclusions with a finding that no showing of lack of good faith on the part of the attorney-in-fact

had been made. The court essentially found that all gifts in each category were permitted. Thus, the court found that the Siegels had no standing to challenge them. From this order, the Siegels appeal.

[1] From a reading of the transcript of the trial, it is clear to us that no agreement actually existed as to what would constitute this "preliminary" determination of standing. The Siegels suggested that the court interpret the documents and decide whether the trustee and attorney-in-fact had the *power* to gift from the trust. JP Morgan appeared to agree with this limited determination. Novak expanded it to ask the court to determine whether the particular gifts were appropriate and not outside the purposes authorized in the trust. The court decided the latter as well as the former questions. In other words, not only did it decide that gifts generally were authorized by the terms of the trust and power of attorney, it also decided that each of the gifts made was authorized, as were all of the various other challenged expenses. We think the trial court went beyond the issues which all parties agreed to submit as a preliminary issue of standing.

[2] In any event, the trial court and parties did not interpret *Siegel I* correctly. Our opinion in *Siegel I* determined that the Siegels *did* have standing to challenge the trustee's actions, because they had a direct interest in the corpus of the trust after their mother's death. The issue of whether the withdrawals and expenses were appropriate and authorized was not a preliminary standing question but the entire substance of the proceeding, i.e., whether the trustee and attorney-in-fact breached their fiduciary duties. The trial court incorrectly treated the question of whether the withdrawals were appropriate and authorized as a question of standing. We do not conclude that the Siegels con-

sented to this interpretation or waived their right to challenge specific expenses as unauthorized. The Siegels agreed that the court could make a legal determination as to whether the trust agreement and power of attorney authorized gifts. They did not agree that the court could simply determine from that legal issue that each of the gifts given was authorized, as we shall explain.

[3] In *Siegel I* we noted that New York law should be applied to the substantive matters in this case. This included both a determination of standing and the construction of the trust instrument. The interpretation of the various documents is a question of law. See *Gitelson v. Du Pont*, 17 N.Y.2d 46, 268 N.Y.S.2d 11, 215 N.E.2d 336 (1966). We review questions of law *de novo*. See, e.g., *Davis v. Rex*, 876 So.2d 609, 613 (Fla. 4th DCA 2004).

[4] The trial court found that the trustee had the power to pay gifts from the trust, because the power of attorney contained a specific power of the attorney-in-fact to make gifts. Because the gifts were within that broad power, the trustee acted appropriately in making expenditures for such gifts as requested or directed by Novak. The gifts were part of a long history of generosity on behalf of the settlor, and they were “appropriate or advisable for the support, maintenance, health, comfort, or general welfare of Ms. Rautbord.” The court was incorrect in its interpretation of the trust instrument.

The trust agreement gives no power to the trustee to make gifts. The trustee does have the power to invade the principal for the welfare of the settlor. Specifically, the trustee had the power to disburse income and principal “for the support, maintenance, health, comfort, or general welfare of the Settlor.” The power of attorney, on the other hand, gives the attorney the power to gift as follows:

To make any gift, either outright or in trust, to any individual (including my Attorney-in-Fact) or any charitable organization, *provided that any such gift either (i) shall be reasonably consistent with any pattern of my giving or with my estate plan or (ii) shall not exceed the annual exclusion available from time to time for federal gift tax purposes.*

(Emphasis added). Significantly, the power of attorney also prohibited the attorney-in-fact from invading the principal of the trust by stating that the attorney in fact was *not* granted the power “[t]o amend, modify or revoke, in whole or in part, or withdraw any of the principal of, any trust over which I have reserved or have been granted such power...”. The trust agreement specifically provided that the power of amendment, modification, and revocation were personal to the settlor and could not be exercised by her attorney-in-fact. Thus, the power of attorney specifically prohibited the attorney-in-fact from exercising the power Mrs. Rautbord reserved to herself to revoke the trust. The Siegels claim that the attorney-in-fact attempted to do just that by signing letters of partial revocation to the Trustee to withdraw principal. The trial court’s ruling on standing prevented this issue from being litigated.

Despite the lack of power of the trustee to make gifts, the trustee made gifts and permitted Novak to withdraw principal to pay other gifts. The trustee had no authority to make gifts itself. We can find no legal support which holds that gifts to others can constitute payments for the “comfort or general welfare” of the beneficiary of a trust. Nevertheless, such a finding must be based upon a factual record, which the trial court did not have in concluding otherwise.

The Siegels cite *Kemp v. Paterson*, 4 A.D.2d 153, 163 N.Y.S.2d 245 (1957), which provides some support for the proposition that the clause does not include giving away principal to others. In *Kemp*, a settlor created a trust providing for the payment of income during the life of the settlor to the settlor's mother. However, should the settlor die before her mother, then the income would continue to be paid to the mother and then to the settlor's daughter. Upon the daughter's death the corpus would be distributed to the daughter's issue, or if none, to other designated persons. The mother died and the daughter became the recipient of the income of the trust. Pursuant to a term of the trust which permitted the trustees to pay over so much of the principal of the trust from time to time as the trustees deemed in the "best interest" of the daughter, the trustees distributed the entire principal to the daughter. The trustees argued that giving the entire amount to the daughter would permit her to utilize the funds to support her children and would permit her to transfer some of the property to her own children, free of estate taxes.

When brought before the trial court for approval, the court concluded that the termination of the trust was within the trustees' discretion, so long as they were acting in good faith. The appellate court disagreed. In concluding that termination of the trust was in the "best interest" of the beneficiary, the court noted:

While undoubtedly, in a sense, these purposes will serve the beneficiary's "best interest", the latter words must be interpreted not in the broadest meaning but in a manner which is consistent with the trust deed. Her "best interest" must be judged within the framework of the status bestowed upon her by the settlor, the status of a life beneficiary, not of a recipient of the entire trust *res*.

In creating a trust, the settlor was not merely designating trustees as conduits through whom a gift could be made to the daughter whenever it would be to her advantage. The trust represented a plan of the settlor that included not only the beneficiary Margaret, but also remaindermen. In adding a flexible provision for the invasion of principal for the "best interest" of the beneficiary, the settlor was not injecting a facile means for destroying the trust.

By limiting the invasion of principal to those instances where it will be for the "best interest" of the beneficiary, the settlor was, in effect, restricting the power of the trustees, and imposing a duty on them to limit such invasion for such objects and purposes as, in their judgment, would be beneficial to the *cestui que trust*.

Kemp, 4 A.D.2d at 156, 163 N.Y.S.2d 245. Applying that reasoning to the facts of this case, the trust *restricted* the power of the trustees and imposed a duty to invade principal only for the "support, maintenance, health, comfort or general welfare of the Settlor." Furthermore, the trust had significant provisions to dispose of the trust property on her death to specific persons. Thus, the settlor had a purpose not only to benefit herself during her lifetime but to benefit specific other persons. Permitting the trustee to deplete the trust principal by lavishing gifts on others does not provide for the support or welfare of the settlor and disregards the duty to the remainderman. The trial court erred in its preliminary legal determination that the trust instrument permitted the trustee to make gifts.

[5] The trial court should not have relied on the attorney-in-fact's authority to gift as indirect support for its granting of gifts. First, the power of attorney limited such gifts to those which were consistent

with Ms. Rautbord's pattern of giving or her estate plan. That is a fact question, requiring proof of the pattern of giving. That Ms. Rautbord was a generous person does not establish that her pattern of giving would include the gifts made in this case, particularly when some of the gifts went to employees of the attorney-in-fact and to the trustee, as well as persons whom she did not know. Secondly, and more importantly, the attorney-in-fact was prohibited from revoking the trust. Only Ms. Rautbord had that power. The durable power of attorney prohibited the attorney-in-fact from exercising the power "to revoke, in whole or in part" any trust where the settlor reserved that power to herself. At least some authority refuses to recognize a distinction between a partial revocation and a withdrawal of principal. See *In re Shapley's Deed of Trust*, 353 Pa. 499, 46 A.2d 227 (1946) ("We are not prepared to recognize a distinction between settlor's right to withdraw principal from the trust and his right to revoke the trust in whole or in part. Both cause an amendment or partial revocation, and with the same legal effect. For example: If a settlor placed \$100,000 in an inter vivos trust, with all the reservations hereinbefore discussed, and subsequently concluded to reduce the trust to \$50,000, there would seem to be no difference in principle if settlor by written instrument revoked or modified the trust by reducing it by one-half, or exercised his right to withdraw one-half from the operation of the trust."). A determination of whether these withdrawals of principal constitute partial revocations of the trust should await the full development of the evidentiary record on each transaction.

[6, 7] While not directly on point, *In re Mueller*, 19 Misc.3d 536, 853 N.Y.S.2d 245 (N.Y.Sur.2008), is an example of the misuse of a power to gift by an attorney-in-fact. There, a 98-year-old woman gave a power of attorney to her neighbor. The

instrument included a broad power to make gifts, including gifts to the attorney-in-fact. The neighbor then used this power, transferring all of the woman's accounts and property to himself. After her death, when her heirs sued to set aside the transfers, the attorney-in-fact defended based upon the provision of the power of attorney absolving the attorney-in-fact of all liability to her estate or heirs for any act done under the power of attorney. The court rejected this claim. In doing so it noted:

Respondent's use of the POA is a classic example of how such an instrument may be abused by an attorney-in-fact for his personal benefit. At his deposition respondent admitted that he transferred to himself or his mother virtually all of decedent's liquid assets and secured a life tenancy in the real property.

19 Misc.3d at 541, 853 N.Y.S.2d 245. The court concluded that a clause which seeks to exonerate an attorney-in-fact from any and all liability runs afoul of the spirit of New York's public policy and the duty of an attorney-in-fact as established under *Ferrara* [*Matter of Ferrara*, 7 N.Y.3d 244, 819 N.Y.S.2d 215, 852 N.E.2d 138 (2006)]. *Ferrara*, in turn, held that an attorney-in-fact must act in the best interests of the principal, which is consistent with the fiduciary duties that the courts have imposed on the attorney-in-fact.

"[A] power of attorney . . . is clearly given with the intent that the attorney-in-fact will utilize that power for the benefit of the principal" (*Mantella v. Mantella*, 268 A.D.2d 852, 852, [701 N.Y.S.2d 715] [3d Dept.2000] [internal quotation marks and citation omitted]). Because "[t]he relationship of an attorney-in-fact to his principal is that of agent and principal . . . , the attorney-in-fact must act in the utmost good faith

and undivided loyalty toward the principal, and must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing" (*Semmler v. Naples*, 166 A.D.2d 751, 752, [563 N.Y.S.2d 116] [3d Dept.1990] [internal quotation marks and citations omitted]). *Ferrara*, 7 N.Y.3d at 254, 819 N.Y.S.2d 215, 852 N.E.2d at 144. Although the power of attorney in this case was a Florida durable power of attorney, Florida law states that an attorney-in-fact must exercise the powers conferred as a fiduciary. *See, e.g., In re Estate of Schriver*; 441 So.2d 1105 (Fla. 5th DCA 1983); § 709.08(8), Fla. Stat. (2011). Therefore, the principles of the foregoing case are applicable as they also consider an attorney-in-fact a fiduciary.

We do not mean to suggest that the attorney-in-fact has exercised her power to gift to enrich herself. In fact, it does not appear that she made any substantial gifts to herself, even though the terms of the power of attorney permitted them. However, the fact that substantial gifts were given to so many people suggests that the power to gift was not exercised with Mrs. Rautbord's best interests in mind. Whether the gifts that she made as attorney-in-fact were in the best interest of Mrs. Rautbord is an issue of fact for determination by the court. Nevertheless, where the gifts were made from substantial invasion of principal, which if tantamount to a partial revocation was beyond the powers assigned to the attorney-in-fact, that alone at least suggests that she breached her fiduciary duty and did not act in the best interest of her principal. A trial on this issue is required.

[8] Because we conclude that the trustee did not have the power to gift, the trial court's justification for the pre-death funding of the trust for Carl and Ruth Haas also fails. Here, however, a specific provision of the trust provided that the trust be

funded at the settlor's death, undoubtedly to avoid the substantial gift taxes that the trust ended up paying to set up the trust during the settlor's lifetime. "[T]he trust instrument is to be construed as written and the settlor's intention determined solely from the unambiguous language of the instrument itself." *See Matter of Chase Manhattan Bank*, 6 N.Y.3d 456, 460, 813 N.Y.S.2d 361, 846 N.E.2d 806 (2006) (citation omitted). The settlor unmistakably directed the creation of the trust on her death. The premature funding of the trust violated its terms, and the trial court erred in concluding otherwise. We remand this issue for an evidentiary hearing, because the trustee raised various affirmative defenses to this claim including waiver.

As to the forgiveness of debts, which the trial court also justified by the power to gift, we must remand for further consideration. First, as noted above, a determination must be made as to whether those gifts were consistent with the settlor's pattern of giving and in her best interests. Second, we do not know whether the forgiven notes were an asset of the trust. If so, the attorney-in-fact has no power over the principal of the trust. She had no specific power to essentially dispose of a trust asset.

Finally, the Siegels objected to expenditures for Mrs. Rautbord such as for lavish birthday parties, airline tickets for friends, health expenses, pets, and similar items. The trial court, without any evidence whatsoever, found that "on their face, they seem appropriate or advisable for the support, maintenance, health, comfort, or general welfare of the settlor, Ms. Rautbord."

[9-11] The trust instrument gives the trustee authority to "pay to or apply for the benefit of the Settlor, at any time or from time to time, so much or all of the net income and principal thereof as the trus-

tee, *in its sole discretion*, shall deem appropriate or advisable for the support, maintenance, health, comfort or general welfare of the Settlor.” Under New York law, even though the trustee has the sole discretion to determine the appropriateness of expenditures, it does not foreclose all inquiry by a court of the proper use of such discretion. See *In re Lyons’ Estate*, 13 Misc.2d 287, 176 N.Y.S.2d 769 (N.Y.Sur. 1958). “[T]he court has the responsibility to ensure that the trustees do not abuse their discretion. Accordingly, the court has the authority to correct abuses in the exercise of absolute discretion that are arbitrary or the result of bad faith.” *In re Goodman*, 7 Misc.3d 893, 901, 790 N.Y.S.2d 837 (N.Y.Sur.2005). Where distributions fall within a class of expenditures authorized by the trust, a trustee must still act reasonably and with good faith in carrying out the terms of the trust. See *In re Estate of Wallens*, 9 N.Y.3d 117, 122, 847 N.Y.S.2d 156, 877 N.E.2d 960 (2007). In *Wallens*, the court required a hearing to determine whether the expenditures were authorized and in the best interests of the beneficiary. Similarly, in this case, the trial court had no evidence before it to determine whether some of the expenses fall within the trustee’s duty to provide for Mrs. Rautbord’s support, care, comfort, and general welfare. We likewise remand for a hearing to make this determination.

We affirm without further comment on the other issues raised on appeal. We dismiss the “cross-appeal” as untimely. The cross-appealed order was a final order entered in 2006 which should have been appealed within 30 days of its rendition. See *Pearson v. Cobb*, 701 So.2d 649, 650 (Fla. 5th DCA 1997). Even if it were not untimely, we would find no error in the court’s construction of the settlement agreement.

In conclusion, we reverse for a trial on the issues addressed in this opinion. We have determined that the trial court erred in disposing of the entire case on the issue of standing contrary to our prior opinion which determined that appellants did have standing to contest the various expenditures. They now must have the opportunity to present evidence to support their claims of breach of fiduciary duty by both the trustee and the attorney-in-fact. Likewise, the appellees have the right to defend and offer proof of their affirmative defenses.

Reversed in part; affirmed in part; and remanded for further proceedings consistent with this opinion.

POLEN and LEVINE, JJ., concur.



The STATE of Florida, Appellant,

v.

Guillermo MARTINEZ, Appellee.

Nos. 3D10-1007, 3D10-906.

District Court of Appeal of Florida,
Third District.

Oct. 19, 2011.

Background: State appealed from an order of the Circuit Court, Miami-Dade County, Dennis J. Murphy, J., granting defendant’s motion to suppress evidence.

Holding: On rehearing, the District Court of Appeal, Ramirez, J., held that search warrant for documents found in residence and its curtilage encompassed utility bills found in vehicle and mailbox that pointed to second residence.

Reversed and remanded.

Daniel G. SIEGEL, individually, and Simon B. Siegel, individually, and as Trustee of trusts created under Articles Fifth and Sixth u/a Dorothy H. Rautbord, deceased, Appellants,

v.

Judith S. NOVAK, as Co-Personal Representative of the Estate of Dorothy H. Rautbord, deceased, and individually; and JP Morgan Trust Company, N.A., as Co-Personal Representative of the Estate of Dorothy H. Rautbord, deceased, Appellees.

Nos. 4D04-3435, 4D05-430.

District Court of Appeal of Florida,
Fourth District.

Jan. 18, 2006.

Rehearing Denied Feb. 23, 2006.

Background: After settlor's death, trustee of revocable trust filed complaint for a judicial accounting and a discharge from liability for all actions during the accounting period. Settlor's sons, who became beneficiaries of trust upon settlor's death, answered and filed affirmative defenses, challenging certain transfers made before settlor's death. The Fifteenth Judicial Circuit Court, Palm Beach County, Gary L. Vonhof, J., awarded summary judgment to trustee and, subsequently, denied sons' petition to remove the personal representatives of settlor's estate. Sons appealed.

Holdings: The District Court of Appeal, Gross, J., held that:

- (1) New York law applied to issue of whether sons had standing to challenge distributions made before settlor's death, and
- (2) Under New York law, settlor's sons had standing to challenge such distributions.

Affirmed in part, reversed in part, and remanded.

1. Trusts ⇨113

New York law, rather than Florida law, applied to issue of whether settlor's sons, who became beneficiaries of revocable trust upon settlor's death, had standing to challenge distributions made by trustee before settlor's death; issue of standing was substantive, as it involved the right to bring an action, and New York had the more significant relationship with the issue, in that trust was a New York trust governed by New York law when the challenged distributions were made.

2. Action ⇨17, 66

In a choice of law context, Florida maintains the traditional distinction between substantive and procedural matters; generally, when confronted by a choice of law problem, a court will apply foreign law when it deals with the substance of the case and will apply the forum's law to matters of procedure.

3. Action ⇨17, 66

For choice of law purposes, substantive law generally relates to the rights and duties of a cause of action, while procedural law involves the machinery for carrying on the suit.

4. Action ⇨13

For choice of law purposes, the question of standing to assert a claim is a substantive matter analogous to a statute of limitations defense; both issues relate to whether a cause of action may proceed, and neither involves the machinery for carrying on the suit once the right to proceed has been determined.

5. Trusts ⇨247

Under New York law, settlor's sons, who became beneficiaries of revocable trust upon settlor's death, had standing to challenge distributions made by trustee

prior to settlor's death, even though sons had no present interest in the trust prior to settlor's death; trustee's distributions might have been made without settlor's knowledge and approval, New York's broad concept of standing included persons with contingent interests, such as sons had in trust prior to settlor's death, and denying sons standing would insulate trustee from liability for any misconduct not discovered by settlor before her death.

6. Trusts \S 34(1), 59(1)

The central characteristic of a "revocable trust" is that the settlor has the right to recall or end the trust at any time, and thereby regain absolute ownership of the trust property; in this way, a revocable trust is similar to a "Totten trust" under New York law, which is a bank account which the depositor holds "in trust for" or "as trustee for" the beneficiary.

See publication Words and Phrases for other judicial constructions and definitions.

7. Trusts \S 59(4)

Under New York law, a Totten trust may be revoked during the lifetime of the depositor by withdrawal of the funds; a depositor's withdrawal of funds from an account is a decisive and conclusive act of disaffirmance of the trust by the depositor so that a beneficiary may not later bring an action for an accounting seeking to recover the withdrawn funds.

8. Trusts \S 59(4)

Like a depositor's withdrawal of funds from a Totten trust bank account under New York law, a settlor/trustee's withdrawal of funds from a revocable trust is tantamount to a revocation or termination of the trust with respect to the funds withdrawn.

9. Trusts \S 59(4)

When a settlor/trustee withdraws funds from a revocable trust, the settlor is,

in essence, disposing of the settlor's own property; by making an expenditure from the trust, the settlor/trustee tacitly terminates the trust with respect to the expended funds.

10. Trusts \S 247

Under New York law, after the death of the settlor, the beneficiaries of a revocable trust have standing to challenge pre-death withdrawals from the trust which are outside of the purposes authorized by the trust and which were not approved or ratified by the settlor personally or through a method contemplated through the trust instrument.

11. Action \S 13

New York law's broad view of standing requires the showing of an injury in fact, that is an actual legal stake in the matter being adjudicated, which ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute in a form traditionally capable of judicial resolution.

Richard A. Goetz and Glenn M. Mednick of Hodgson Russ LLP, Boca Raton, for appellants.

James G. Pressly, Jr., of Pressly & Pressly, P.A., West Palm Beach, for appellee Judith S. Novak.

Arnold L. Berman, Stephen T. Maher, William D. McEachern, and Vincent E. Miller of Shutts & Bowen LLP, West Palm Beach, for appellee JP Morgan Trust Company, N.A.

GROSS, J.

This consolidated appeal involves two aspects of decedent Dorothy H. Rautbord's estate plan: 1) Case No. 4D04-3435 in-

volves the petition to remove the co-personal representatives of Rautbord's estate, and 2) Case No. 4D05-430 concerns a challenge to disbursements made by the trustee of a revocable trust established by Rautbord. We hold that under New York law and the facts of this case, the decedent's sons have standing to challenge disbursements made by the trustee prior to Mrs. Rautbord's death. Therefore, we reverse the final judgment approving the accounting sought with respect to the trust. We affirm the trial court's dismissal of the attempt to remove the co-personal representatives of the estate.

Rautbord died on February 28, 2002. She was survived by three children: appellants Daniel and Simon Siegel and appellee Judith Novak.

On May 30, 1990, Rautbord executed a will that was subsequently amended by a second codicil dated July 11, 1990. The second codicil made her daughter, Judith, and appellee, JP Morgan Trust Company, co-personal representatives of her estate.¹

Prior to the execution of her will, in March, 1990, Rautbord executed an Amended and Restated (Revocable) Agreement of Trust with JP Morgan Chase Bank as trustee. The trust directed that upon Mrs. Rautbord's death "[a]ll property which is directed to be disposed of pursuant to this Article shall be divided into and set aside in a sufficient number of equal shares to provide one (1) such share for each of the settlor's children [the Siegels and Novak], who survives the settlor, and one (1) such share for the issue of each of [the Siegels and Novak] who predeceases the settlor." A March, 1991 amendment to the trust described the disposition of trust property during Mrs. Rautbord's lifetime:

1. The second codicil actually appointed Chemical Bank FSB as personal representa-

During the life of the Settlor [Mrs. Rautbord], the Trustee shall hold, manage, invest and reinvest the trust property, collect the income therefrom, and pay to or apply for the benefit of the Settlor, at any time or from time to time, so much or all of the net income and principal thereof as the Trustee, in its sole discretion, shall deem appropriate or advisable for the support, maintenance, health, comfort or general welfare of the Settlor. Any net income not so paid or applied shall be added to principal annually.

The trust was amended five times. Originally, the trust situs was Florida and the trust was to be construed under Florida law. A July 11, 1995 amendment provided that the trust was to be governed by the laws of the State of New York and gave the trustee the power to transfer the situs and assets of the trust to any other state, at the trustee's discretion. The trust also provided in pertinent part:

This Agreement shall be binding upon the personal representatives, successor, and assigns of the parties hereto. The settlor may from time to time, by duly acknowledged, written instrument delivered to the corporate Trustee during the Settlor's lifetime, amend, modify, or revoke, in whole or in part, this Agreement and any trust created hereunder; **provided, however, that the foregoing powers of amendment, modification and revocation shall be personal to the Settlor and shall not vest in or be exercisable by any person or corporation acting in any fiduciary or like relationship to the Settlor (including, without limitation, the Settlor's attorney-in-fact, the Settlor's guardian (or like representative)), or any trustee in bankruptcy or receiver for the Set-**

tive. After bank mergers, this entity has evolved into JP Morgan Trust Company.

tlor. . . . Except as otherwise provided in this Agreement, this Agreement and all trusts created hereunder shall upon the Settlor's death become irrevocable and not subject to amendment, modification, or revocation thereafter.

(Emphasis added). JP Morgan Chase Bank transferred the assets and situs of the trust from New York back to Florida on March 6, 2003. Thus, during the time period at issue in the trust appeal, case number 4D05-430, the situs of the trust was New York pursuant to the July 11, 1995 amendment.

After creating the March, 1990 trust, Rautbord executed a durable power of attorney making her daughter, Judith Novak, her attorney-in-fact and giving her authority to, *inter alia*:

(13) make any gift, either outright or in trust, to any individual (including my Attorney-in-fact) or any charitable organization, provided that such gift either (i) shall be reasonably consistent with any pattern of my giving or with my estate plan or (ii) shall not exceed the annual exclusion available from time to time for federal gift tax purpose. . . .

(18) [t]o create a revocable trust with such trustee or trustees (including my Attorney-in-Fact) as my Attorney-in-Fact may select which creates a trust requiring that (a) all income and principal shall be paid to me or any guardian (or like representative) for me or applied for my benefit in such amounts as I or my Attorney-in-Fact shall or as the trustee or trustees thereof shall determine, (b) on my death any remaining income shall be paid to my estate.

The document stated that the power of attorney did not include the authority "(6) [t]o amend, modify or revoke, in whole or in part, or withdraw any of the principal of, any trust over which I have reserved or have been granted such power [other than

a trust created pursuant to the authority granted in paragraph 18 above.]"

While Rautbord was still alive, Novak made large withdrawals from the trust through the power of attorney, by signing a series of revocation letters. As trustee, JP Morgan Chase Bank approved all of these withdrawals.

In a 2001 letter, JP Morgan Chase Bank recognized that there may have been a problem with some of Novak's withdrawals, and that "Mrs. Rautbord [was] in her nineties [and] quite frail [.]" The letter went on to note that after "Mrs. Rautbord became incapacitated," Novak, through her power of attorney status, requested principal funds from the trust by signing a series of revocation letters. The Bank observed that the trust instrument "specifically stated" that revocation powers "be personal to the settlor and shall not be vested in or be exercisable by any persons . . . including, without limitation, the settlor's attorney-in-fact." The Bank concluded that the revocation letters "on file to support the principal distributions made during the period November 16, 1995 through June 26, 2001" were "questionable" for the purpose of authorizing principal distributions. The Bank indicated its intention to "ratify the principal distributions."

In March, 2003, JP Morgan Chase Bank filed a two count complaint seeking, *inter alia*, a "judicial accounting pursuant to Chapter 737, Florida Statutes," whereby the Bank sought a discharge from liability "for any and all Trustee actions during the period of Accounting." The Bank attached an 89-page accounting to the complaint. The complaint identified the brothers Siegel as defendants who were "interested persons and beneficiaries under the Trust."

The Siegels filed an Answer and Affirmative Defenses. Their affirmative defenses complained that the accounting attached to the complaint did not “contain sufficient information detailing the various distributions” to allow them “to determine the propriety of such distributions.” Also, they alleged that some distributions may not have been made for the purposes specified in the trust—for the “support, maintenance, health, comfort or general welfare of” Mrs. Rautbord.

In November, 2003, the trial court granted the Bank’s motion for partial summary judgment. The court ruled that the Siegels had no standing to challenge any distributions made prior to their mother’s death on February 28, 2002. The court reasoned that before Mrs. Rautbord’s death, the trust was revocable, so that the brothers Siegel had “no present interest in the trust during the time that the decedent was alive.” After the court entered a final judgment approving the accounting, the Siegels filed this appeal.²

[1] The first issue we address is whether the Siegels’ standing to object to the trust accounting should be decided under New York or Florida law. We agree with JP Morgan Chase Bank that New York law applies.³

[2, 3] “In a choice of law context, Florida maintains the traditional distinction be-

tween substantive and procedural matters.” *BDO Seidman, LLP v. British Car Auctions, Inc.*, 802 So.2d 366, 371 (Fla. 4th DCA 2001) (Gross, J., concurring) (citing *Prestige Rent-A-Car, Inc. v. Advantage Car Rental & Sales, Inc.*, 656 So.2d 541, 544 n. 2 (Fla. 5th DCA 1995); *Aerovias Nacionales De Colombia, S.A. v. Tellez*, 596 So.2d 1193, 1195 (Fla. 3d DCA 1992); *Guirlinger v. Goldome Realty Credit Corp.*, 593 So.2d 1135, 1136 n. 1 (Fla. 1st DCA 1992)). “As the forum state in this case, Florida law determines whether [the issue of standing] is substantive or procedural for choice of law purposes.” See *BDO Seidman*, 802 So.2d at 371 (Gross, J., concurring) (citing *Fahs v. Martin*, 224 F.2d 387, 397, 401 n. 6 (5th Cir.1955); *Smithco Eng’g, Inc. v. Int’l Fabricators, Inc.*, 775 P.2d 1011, 1017–18 (Wyo.1989)). Generally, when confronted by a choice of law problem, a court will apply foreign law when it deals with the substance of the case and will apply the forum’s law to matters of procedure. See *id.* (citing *SCOLES & HAY, CONFLICT OF LAWS* § 3.8 (2d ed.1992) (footnotes omitted); see *Colhoun v. Greyhound Lines, Inc.*, 265 So.2d 18, 20 (Fla.1972)). Substantive law generally relates to the rights and duties of a cause of action, while procedural law involves the “‘machinery for carrying on the suit.’” *BDO Seidman*, 802 So.2d at

2. On June 14, 2004, after the entry of the final judgment against them in the trust case, the Siegels filed an amended petition to remove the personal representatives, appoint a successor personal representative, surcharge the personal representatives and determine compensation of the personal representatives. The Siegels contended that Novak and JP Morgan Trust should be removed as co-personal representatives because some of the \$3,373,629 that JP Morgan Chase Bank allowed Novak to divert during Mrs. Rautbord’s lifetime was in violation of the Rautbord Trust. The Siegels further asserted that neither of the co-personal representatives had

attempted to reclaim the money for the trust and should be removed based on this failure to act. The trial court dismissed the petition on August 6, 2004. The court accepted the trustee’s argument that the co-personal representatives of the estate did not have the duty to attempt recovery of assets of the trust “that could never be assets of the Rautbord Estate.” We affirm that order without further comment.

3. In the circuit court and in oral argument, both sides agreed that New York law applied to decide the issue of standing.

371 (quoting *Smithco Eng'g*, 775 P.2d at 1018) (internal citations omitted).

No Florida case has decided whether standing is a substantive or procedural matter for choice of law purposes. Recently, the eleventh circuit has indicated that “[u]nder Florida’s choice of law provisions, Florida law governs all substantive issues, including the question of whether an individual has standing and capacity to sue.” *Gonzalez–Jiminez De Ruiz v. U.S.*, 378 F.3d 1229, 1230 n. 1 (11th Cir.2004). In *Merkle v. Robinson*, 737 So.2d 540, 542 (Fla.1999), the Florida Supreme Court held that “statute of limitation choice of law questions [should be treated] the same as ‘substantive’ choice of law questions which, . . . Florida decides pursuant to the ‘significant relationship’ test.”

[4] In this area, the question of standing to assert a claim is analogous to a statute of limitations defense. Both issues relate to whether a cause of action may proceed; neither involves the “machinery for carrying on the suit” once the right to proceed has been determined. The ability to bring an action at law is a “most valuable attribute” of a legal right, a factor favoring the classification of standing as a substantive matter. See *Merkle*, 737 So.2d at 542–43 (citing *Bates v. Cook, Inc.*, 509 So.2d 1112, 1114 (Fla.1987)) (quoting Comment, *The Statute of Limitations and the Conflict of Laws*, 28 Yale L.J. 492, 496 (1919)).

Here, the right of the brothers to challenge the distributions from the trust should be decided under New York law. For the challenged distributions, New York bears the most significant relationship to the trust. From 1995 to February 28, 2002, the trust was a New York trust governed by New York law. Florida’s most recent connection to the trust commenced in 2003, when JP Morgan Chase

Bank filed an intent to transfer the trust situs and assets back to Florida.

[5] To argue that the brothers Siegel lack standing to object to any pre-death distribution, the Bank relies primarily upon *In re Malasky*, 290 A.D.2d 631, 736 N.Y.S.2d 151 (2002), and *Application of Cent. Hanover Bank & Trust Co. (Mormand)*, 176 Misc. 183, 26 N.Y.S.2d 924 (N.Y.Sup.Ct.1941), *aff’d*, 263 A.D. 801, 32 N.Y.S.2d 128 (1941), *aff’d*, 288 N.Y. 608, 42 N.E.2d 610 (1942). On their facts, both cases are distinguishable from this case.

In *Malasky*, a husband and wife created a revocable trust. 736 N.Y.S.2d at 152. The husband and wife were also trustees of the trust. *Id.* The husband died on November 3, 1995. A third party “succeeded him as cotrustee.” *Id.* The wife petitioned the court “seeking a judicial settlement of three accounting [periods].” *Id.* The first accounting period involved the administration of the trust “from its inception to the date of” the husband’s death. *Id.* The husband’s children from a prior marriage filed objections to these accounting periods. *Id.*

The appellate court held that the children lacked standing to object to the accounting for the first accounting period, which ended with their father’s death. *Id.* at 632, 736 N.Y.S.2d 151. The court observed that the husband and wife, as both the settlors and trustees of the trust, “received the income from the trust and explicitly retained the power to revoke or amend the trust at any time.” *Id.* Prior to their father’s death, the children had no right to receive anything from the trust. Without any pecuniary interest in the trust, they lacked “standing to object to the account for the first accounting period,” which ended with their father’s death. *Id.*

[6, 7] Crucial to *Malasky* is the fact that the settlors of the trust were also its trustees. The central characteristic of a revocable trust is that the settlor “has the right to recall or end the trust at any time, and thereby regain absolute ownership of the trust property.” *Fla. Nat’l Bank of Palm Beach County v. Genova*, 460 So.2d 895, 897 (Fla.1984). In this way, a revocable trust is similar to a Totten trust, a bank “account which the depositor holds ‘in trust for’ or ‘as trustee for’ another person, the beneficiary.” *Eredics v. Chase Manhattan Bank, N.A.*, 100 N.Y.2d 106, 760 N.Y.S.2d 737, 790 N.E.2d 1166, 1167 (2003). A Totten trust “may be revoked during the lifetime of the depositor by withdrawal of the funds.” *Id.*; *Hessen v. McKinley*, 155 A.D. 496, 140 N.Y.S. 724, 726 (1913). A depositor’s withdrawal of funds from an account is a “decisive and conclusive act of disaffirmance” so that a beneficiary may not later bring an action for an accounting seeking to recover the withdrawn funds. *Hessen*, 140 N.Y.S. at 726.

[8, 9] Like a depositor’s withdrawal of funds from a Totten trust bank account, a settlor/trustee’s withdrawal of funds from a revocable trust is tantamount to a revocation or termination of the trust with respect to the funds withdrawn. It is in this context that *Malasky* held that a prospective trust beneficiary has no standing to object to such a disposition of the property; the settlor retained the right to remove the property from the trust for any purpose and for any reason. In this situation, the settlor is, in essence, disposing of the settlor’s own property. By making an expenditure from the trust, the settlor/trustee tacitly terminates the trust with respect to the expended funds.

[10] A different situation arose in this case, where the settlor was not the trustee. When a person or entity different from the

settlor removes property or money from a revocable trust, those withdrawals could conceivably be made without the settlor’s knowledge or consent. In this situation, we hold that, under New York law, after the death of the settlor, the beneficiaries of a revocable trust have standing to challenge pre-death withdrawals from the trust which are outside of the purposes authorized by the trust *and* which were not approved or ratified by the settlor personally or through a method contemplated through the trust instrument. By outside the purposes of the trust we mean any expenditures that were not “appropriate or advisable for the support, maintenance, health, comfort or general welfare of” Mrs. Rautbord.

[11] This holding is consistent with a broad view of standing which requires the showing of “an injury in fact—an actual legal stake in the matter being adjudicated—[which] ensures that the party seeking review has some concrete interest in prosecuting the action which casts the dispute ‘in a form traditionally capable of judicial resolution.’” *Soc’y of the Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 570 N.Y.S.2d 778, 573 N.E.2d 1034, 1040 (1991) (quoting *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974)).

In the context of probate proceedings, New York courts have held that persons have standing to participate in the proceedings even with property interests as tentative as those of the brothers Siegel. Thus, in *In re Epstein*, 277 A.D.2d 452, 715 N.Y.S.2d 904 (2000), the court held that a contingent remainderman with an interest subject to a condition precedent had standing to object to the accountings filed by an executor and trustee. The court in *Estate of Morse*, 177 Misc.2d 43, 676 N.Y.S.2d 407, 409 (N.Y.Sur.1998), described the

broad reach of New York's concept of standing:

In that light, it has been noted that "anyone who would be deprived of property in the broad sense of the word . . . is authorized to appear and be heard upon the subject" of whether a will that would thus affect him adversely should be admitted to probate (*Matter of Davis*, 182 N.Y. [468, 472, 75 N.E. 530 (N.Y. 1905)]). Accordingly, standing to object to probate does not require an interest that is "absolute"; a contingent interest will be enough (*see Matter of Silverman*, 91 Misc.2d 125, 397 N.Y.S.2d 319). In other words, the uncertainty of an interest should not preclude its holder from seeking to protect it, i.e., she should have standing to object to a propounded instrument that makes the possibility of benefit even more remote or eliminates such possibility entirely.

The New York Surrogate's Court Procedure Act adopts a broad view of standing similar to the case law. A trustee who voluntarily requests judicial settlement of an account must notify all persons "entitled absolutely or contingently . . ." N.Y. Surr. Ct. Proc. Act Law § 2210(9) (McKinney 2005). In addition, section 2205(2)(b) of the Act provides that a court may compel the accounting of a fiduciary after the petition of "a person interested." Section 103(39) defines a "person interested" as "any person entitled or allegedly entitled to share as beneficiary in the estate . . ." "Estate" is broadly construed to include "[a]ll of the property of a decedent, trust, absentee, internee or person for whom a guardian has been appointed as originally constituted, and as it from time to time exists during administration." N.Y. Surr. Ct. Proc. Act Law § 103(19) (McKinney 2005).

4. We do not reach the issue of whether there has been any breach of fiduciary duty in this

We also distinguish *Momand*. That case involved a settlor's creation of an inter vivos trust that set up a bank as the trustee. A provision of the trust provided "that the trustee shall be excused from accounting to any one but the grantor for acts of the trustee performed during [the grantor's] lifetime." 26 N.Y.S.2d at 927. The court enforced the explicit language of the trust and held that certain remaindermen had no right to "call upon the trustee for an accounting" for acts the trustee performed during the settlor's lifetime. *Id.* The revocable trust in this case contains no language that so limited the class of persons who could subject the trustee to an accounting.

According to Novak and the Bank, the Siegels may not address their concerns in either the trust accounting or the probate proceeding. This result is contrary to our sense of justice—a trustee should not be able to violate its fiduciary duty and authorize withdrawals contrary to the provisions of the trust, and yet escape responsibility because the settlor did not discover the transgressions during her lifetime.⁴ With an interest in the corpus of the trust after the death of their mother, the Siegels have standing to challenge the disbursements; they have alleged a concrete and immediate injury, caused by Novak and the Bank, which could be redressed by the circuit court. Without this remedy, wrongdoing concealed from a settlor during her lifetime would be rewarded. One "should not be permitted to escape the duty to account for property which . . . [a] decedent put into [one's] possession and over which [one] exercised control both before and after the decedent's death." *La Vaud v. Reilly*, 295 N.Y. 280, 67 N.E.2d 242, 244 (1946).

case, which concerns only the standing to raise the issue.

Affirmed in part, reversed in part, and remanded.

POLEN and MAY, JJ., concur.



Edwin R. MOBLEY, Appellant,

v.

Pamela D. MOBLEY, Appellee.

No. 5D05-697.

District Court of Appeal of Florida,
Fifth District.

Jan. 20, 2006.

Background: Dissolution of marriage proceedings were brought. The Circuit Court entered final judgment of dissolution of marriage. Wife appealed, and the District Court of Appeal, 724 So.2d 697, affirmed and remanded with directions for the Circuit Court to distribute a deferred compensation plan and some corporate stock that were not addressed in the original judgment. On remand, the Circuit Court, Seminole County, Nancy F. Alley, J., entered amended judgment awarding wife half the value of the assets. Husband appealed.

Holdings: The District Court of Appeal, Pleus, C.J., held that:

- (1) trial court had jurisdiction to enter amended final judgment;
- (2) trial court could require husband to pay wife half the value of the assets;
- (3) trial court lacked jurisdiction to dismiss the action due to wife's alleged failure to prosecute;
- (4) trial court could adopt as its judgment a proposed order submitted by wife;

(5) trial court lacked jurisdiction to take additional evidence regarding disposition of the assets; and

(6) trial court could award wife prejudgment interest.

Affirmed and remanded with directions.

1. Divorce ⇨287

Trial court that issued final judgment of dissolution of marriage, which was affirmed by the District Court of Appeal and remanded with directions to distribute two marital assets that were not addressed in the original judgment, had jurisdiction on remand to enter amended final judgment, even though wife did not file motion to amend the judgment; District Court of Appeal's mandate imposed an affirmative obligation on the trial court to either award wife half the value of the assets or supplement the judgment with findings, reasons, and awards for some other disposition. West's F.S.A. RCP Rules 1.530, 1.540.

2. Appeal and Error ⇨1198

An unauthorized delay in carrying out an appellate mandate is treated as a failure to carry out the mandate, which should not be countenanced by the appellate court.

3. Divorce ⇨252.3(1)

Trial court in dissolution of marriage proceedings could require husband to pay wife half the value of two marital assets that were liquidated by husband shortly after petition for dissolution was filed, despite husband's contention that he used the proceeds from liquidation of the assets to pay temporary support to wife and to cover his own expenses; evidence in record did not support husband's contention but, rather, husband admitted he did not share the proceeds with wife. West's F.S.A. § 61.075(3).

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BEVERLY YOUNG, BLAKE
BOATMAN, BRADLEY
BOATMAN, BRENT
BOATMAN and WILLIAM
BOATMAN,

Appellants

v.

BRIAN BOATMAN,
individually and as Attorney-in-
Fact for Bojilina H. Boatman;
and THE ESTATE OF
BOJILINA H. BOATMAN.

Respondents

NO. 72643-9-1

(Superior Court
No. 13-4-00568-2)

**DECLARATION OF
SERVICE**

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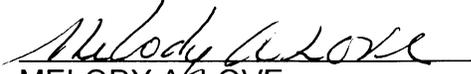
STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I
CLERK OF COURT


I, Melody A. Love, under penalty of perjury under the laws of the State of Washington, hereby certify and declare that on February 10, 2015 I sent by hand delivery via 4TH Corner Network, a true copy of Appellant's Opening Brief to:

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Signed this 10th day of February, 2015


MELODY A. LOVE

ORIGINAL