

CROSS-RES REPLY

No. 35504-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

JAMES JOHANNES, JANE DOE JOHANNES,  
and the marital community composed thereof,

Appellants,

ESTATE OF EVELYN C. JOHANNES,  
GERALD JOHANNES, Personal Representative,

Respondents,

SHERRY KAY FERRANTE, KATHLEEN D.  
YORMARK, JEFFREY W. JOHANNES,  
MATTHEW S. JOHANNES and TIM F. JOHANNES,

Cross Appellants,

ESTATE OF EVELYN C. JOHANNES,  
GERALD JOHANNES, Personal Representative,

Cross Respondents.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

BRIEF OF RESPONDENT IN RESPONSE TO THE BRIEF OF CROSS  
APPELLANT

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ORIGINAL

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**A. COUNTERSTATEMENT OF THE ISSUES**

1. Does substantial evidence support the trial court's finding that the Estate could not be closed prior to 1995 without a loss to the beneficiaries?
2. Does a remainder beneficiary's interest in a trust that has a lifetime income beneficiary who is entitled to all of the trust's income and to invade trust principal to an ascertainable standard have a present value?
3. Did the trial court properly admit into evidence both Estate accountings?
4. Who has the burden of proof of damages in an action for breach of fiduciary duty and what is the proper measure of damages?

**B. COUNTER-STATEMENT OF THE CASE**

This case began as a collection action by the Estate of Evelyn Johannes (the "Estate") against James Johannes ("James") for an unpaid \$188,000 loan he took from the Estate in 1998. RP 29:23 - 30:18; EX.6. This was the second loan James or an affiliate had taken from the Estate, the first being in the amount of \$300,000 in 1995, which had been timely re-paid. EX. 72; RP 701-704. Subsequent to the filing of the Estate's

collection action James filed an action against his brother for failure to make the Estate productive. CP 59-60.

The children of James are the cross appellants in this action (“James Children”), they intervened in this action on August 26, 2005. CP 8-13. Under the last will and testament of Evelyn Johannes, James Children are entitled to the portion of the James Trust that remains, if any, at the death of James. EX 7. All of the income of the James Trust must be paid to James during his lifetime; the trustee is directed to invade the principal of the James Trust to maintain James standard of living. EX 7. James Children have no right to income or principal of the James Trust while James is living. EX 7. They will not be entitled to any distribution from the James Trust until the death of James, an event that has yet to occur. EX 7.

#### C. **ARGUMENT**

##### (1) **Standard of Review.**

Findings of fact are reviewed under the clearly erroneous standard to determine whether they are supported by substantial evidence. Miller v. City of Tacoma, 138 Wn.2d 318, 323, 979 P.2d 429 (1999). Unchallenged findings of fact are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). The court reviews the conclusions of law de novo. Bishop v. Miche, 137 Wn.2d 518, 523 973 P.2d 465 (1999). Trial court

rulings on decisions to admit evidence are reviewed under the manifest abuse of discretion standard. Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997).

**(2) The Estate would have Suffered a Loss if it were Closed Prior to 1995.**

The determination of a hypothetical date on which the Estate could have been closed is fundamentally a question of fact. There is no disagreement amongst the litigants as to the applicable standard of law. The question at issue in establishing the hypothetical date by which the Estate could have been closed is whether a loss would result to the Estate by closing at any particular time. In this case, the Estate would have experienced a loss had it been closed prior to 1995. The trial court acknowledged the evidence of this loss in its determination that the Estate could not be closed prior to 1995.

Substantial evidence supports the court's factual determination that the Estate could not close prior to 1995. Contrary legal conclusions put forth by James' expert were properly disregarded by the court. ER 704(b). While Estate realty had been an issue up until 1993, when it finally could be sold without a loss there were additional issues to resolve before the Estate could be closed. The most significant of those issues was a bond transfer error made by the Estate's broker, closing the Estate at the end of

1994 would have resulted in at least a \$20,000 loss to the Estate. EX 62. The bond payment discrepancies described in exhibit 62 were not fully resolved until January, 1995.

Putting aside the potential loss to the Estate by closing in 1993 or 1994, the Estate was not fully liquid until the end of 1994. This fact is supported by the distributions to James and Jerry that were made in January 1995 and further bolstered by the \$300,000.00 loan to James in July of 1995. RP 701 – 704. In light of this evidence of liquidity, the absence of earlier evidence of liquidity and the potential loss to the Estate that would have been created by closing prior to 1995 (EX. 62) the court was justified in making the factual determination that 1995 was a reasonable date by which the Estate could have been closed.

Whether the Estate would have been funded with long term high risk assets is also a question of fact. The argument that Puget Sound National Bank would have invested the James Trust in long term, high risk investments is not supported by any fact in this case. When pressed on the issue, James witness conceded that a 60% stock and 40% bond allocation would likely be inappropriate for the James Trust as the lifetime beneficiary has the rights to income and invasion of principal. RP 276-278. An allocation more favorable to income than growth would have been likely for the James Trust. There is no evidence of any damage to

James Children by a delay in funding. The amount that they are entitled to receive from the James Trust will not be fixed until the death of James, an event which has yet to occur.

The bare assumption that the James Trust would have been invested in a long term high risk manner is further evidence of why the permutation of the “total return approach” argued by James Children cannot be applied to the James Trust. James had the right to all of the income during the time period that Jerry was administering the Estate. He also had the right to invade principal to maintain his standard of living. It was argued by James that for a number of years starting in the late 1990s through 2002 he had very low income, in several years he had no income at all. EX. 121.

Given the evidence presented by James of his low income, it was a reasonable inference that principal invasions would have been necessary to maintain his standard of living. It was shown at trial that investing the James Trust in a 60% equity 40% bond allocation would be more likely to have resulted in a loss should the need arise to invade trust principal. RP 616:22 – 617:14; 598:15 – 599:12. It is unlikely that an commercial trustee would have considered James proposed long term high risk allocation reasonable or prudent given James right to income and potential need to invade principal. RP 616:22 – 617:14. In spite of presenting

evidence of a need for funds from the James Trust, there was no attempt by James or James Children to substantiate how much of the trust would have been invaded for the support of James. As the proponents of a breach of fiduciary duty case, they have the obligation to prove damages.

As James had the full and unfettered right to the income of the James Trust, the most that the remainder beneficiaries would ever likely receive is the amount that would have been placed in the trust on the funding date. James Children were not damaged by the trial court's decision to divide the trust principal based on the instructions provided in the will.

**(3) Substantial Evidence Supports the Trial Court's Calculation of Damages.**

During James' lifetime James Children have no right to income or principal<sup>1</sup> from the James Trust. The property interest of James Children in the James Trust is not presently capable of valuation. The nature of their property interest is so tenuous that in a number of states James Children would not have standing to bring this action. *See, Regan v. Uebelhor*, 690 N.E.2d 1222 (1998), (*testator's granddaughter, as a contingent remainderman of a testamentary trust, lacked standing to bring an action against the trustee because granddaughter's interest was*

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<sup>1</sup> Paragraph III(B)(2) of Evelyn Johannes' Will provides that distributions could be made for the children of James only if they were his dependents.

*indirect, contingent, and derivative of the beneficiaries' interest in the trust*); Estate of Gardiner, 144 Misc. 2d. 797, 545 N.Y.S.2d 466 (1989) (*possible contingent remainderman of trust did not have standing to challenge contemplated adoption by life tenant of trust, where contingent remainderman did not have vested interest in trust during lives of tenants*). While James Children do appear to have standing, the uncertainty of the economic value of such a remainder interest has been recognized by Washington cases.

Though James Children have an interest in the James Trust, that interest has no particular value until the termination of the measuring life. See, Estate of Ivy, 4 Wn.2d 1, 101 P.2d 1074 (1940) (*noting that although the remainder beneficiary had a vested interest in the trust, the value of that interest was inherently uncertain up to the expiration of the life tenant's interest*); See also, Nelson v. Griffiths, 21 Wn.App. 489, 585 P.2d 840 (1978) (*highlighting the uncertainty of measuring how much, if any, money will be left in the trust until the death of the income beneficiary*). The interests of James Children are vested now, but could be divested by future events (such as the death of one of James Children) and are ultimately subject to defeat by the lifetime needs of James. The value of James Children's interest in the James Trust cannot be determined prior to James date of death. A substantial number of variables prevent a present

value calculation from being performed with any degree of certainty. James Children have no damages because the breach which they alleged occurred during a time when their interests in the James Trust had no ascertainable economic value.

James Children have consistently confused the distinct obligations between Personal Representative of the Estate and the Trustee of the James Trust. In fact, the authority they cite in support of their theory of liability relates not to Personal Representatives of Estates, but to the claims of trust beneficiaries against the trustee. Jerry, as Personal Representative of the Estate had an obligation to facilitate administration of the Estate. He was never the trustee of the James Trust, nor is he obligated as trustee of the James Trust. A non-intervention executor is not subject to the same requirements as the trustee of a trust. Estate of Jones, 116 Wn.App. 353, 365, 67 P.3d 1113 (2003), *reversed on other grounds by*, Estate of Jones, 152 Wn.2d 1, 93 P.3d 147 (2004). The court in Jones recognized the distinct roles of the trustee and the personal representative. While a trustee may have a long investment time horizon suitable to higher risk investments, the role of the personal representative necessarily requires investment in short term, safe investments. As the trial court noted in this case, it was not a breach of fiduciary duty for Jerry to invest

estate assets in short term, safe investments, even though the yield and appreciation of those investments was low.

The distinction between the roles of the personal representative and the trustee have significant implications in this case because the trial court expressly stated that the income beneficiary James would not be awarded any damages or attorneys' fees. Any damages from failure to fund the James Trust inure to James as income beneficiary. James Children are not entitled to anything until after James dies. There is no proof to show that *all* of the principal would not have been invaded for James during his lifetime. The uncertainty of whether any principal will remain at James death is indicative of why the "total return" approach cannot be used for the split trust interests in this case.

The "total return" cases such as Baker Boyer Bank v. Garver, 43 Wn.App. 673, 719 P.2d 583 (1986) are distinguishable from the instant action. In Baker there was no distinction between the income needs of the lifetime beneficiaries and the remainder beneficiaries. The proper application of a total return investment model has been addressed in the restatement of trusts:

"only when beneficial rights do not turn on a distinction between income and principal is the trustee allowed to focus on total return ... without regards to the income component of that return"

Restatement (Third) of Trusts, § 227, comment (i), p. 35 (2003).

Even assuming a trust had been established, there is no evidence to show how the trustee would have invested and managed the trust, without such evidence there can be no claim for damages by the remainder beneficiaries.

In spite of the failure of proof regarding the investment that would have been made by Puget Sound National Bank in this case, the legal standards applicable to investment of split interest trusts are known. Trusts with successive interests such as the trust in this case require the trustee to balance those successive interests in light of the testator's intent. Section 232 of the Restatement (Third) of Trusts provides:

If a trust is created for beneficiaries in succession, the trustee is under a duty to the successive beneficiaries to act with due regard to their respective interests.

Restatement (Third) of Trusts, § 232 (1992). The trustee must consider and both the production of income and the preservation of principal. Comment (c) of Restatement, § 232 describes the trustee's balancing requirement:

“c. *Duty to each of successive beneficiaries.* If by the terms of a trust the trustee is directed to pay the income to a beneficiary during a designated period and on the expiration of the period to pay the principal to other beneficiaries, the trustee is under a duty to the income beneficiary to exercise care not merely to preserve the trust property but to make it productive of trust income so that a

reasonable amount of income will be available for that beneficiary. The trustee is also under a duty to the remainder beneficiaries to exercise reasonable care in an effort to preserve the trust property, and this duty ordinarily includes a goal of protecting the property's purchasing power. **In some trust situations** the trustee may invest with a goal of increasing the real value of the principal.”

Id. at § 232, comment (c) [emphasis added].

Thus, the objective of the trustee with an income-only lifetime beneficiary is to produce income and *preserve* the trust principal. There is no obligation of the trustee to increase the trust principal.

In cases such as these where the income beneficiary is also entitled to principal invasions for his lifetime, the interests of the remainder beneficiaries are even more uncertain and left to the discretion of the trustee. Section 50 of the Restatement (Third) of Trusts provides:

(1) A discretionary power conferred upon the trustee to determine the benefits of a trust beneficiary is subject to judicial control only to prevent misinterpretation or abuse of the discretion of the trustee.

(2) The benefits to which a beneficiary of a discretionary interest is entitled, and what may constitute an abuse of discretion by the trustee, depend on the terms of the discretion, including the proper construction of any accompanying standards, and on the settlor's purpose in granting the discretionary power and in creating the trust.

Restatement (Third) of Trusts, § 50 (2003).

In other words, if the trustee used its discretion to invade the trust principal for James, that decision would be largely left to the trustee, subject only to abuse of discretion by the trustee.

Numerous cases illustrate these standards. For instance, in Estate of Feinstein, 527 A.2d 1034 (Pa.Super 1987), the decedent left \$200,000 in trust to be paid as follows: five percent (5%) of the net value of the trust was to be paid annually to the decedent's sister and brother-in-law for their lifetime, with the remainder to be paid to a charity. The trustees bought \$200,000 of tax-exempt municipal bonds, which were intended to produce a regular, tax-free income for the income beneficiaries. Over the next 13 years, the bonds decreased in value by approximately \$47,000. After the death of the lifetime beneficiaries, the charity (through the Pennsylvania Attorney General) objected to the final trust accounting, arguing that the trustees favored the lifetime beneficiary over the interests of the charitable remainder. The court rejected the charity's objection, noting the difficult task of a fiduciary in balancing the income and principal beneficiaries, and highlighting the income needs of the lifetime beneficiary, evidence of which had been provided to the court. In its ruling, the court stated:

“Absolute evenhandedness [between income and remainder beneficiaries] is impracticable and, in most cases, impossible. We can only expect our fiduciaries to act with

sound judgment and proper motives under the particular circumstances of each case.... In balancing the benefits and burdens of their investment decision, [the trustees] exercised the discretion that [the decedent] bestowed upon them... and ... the court cannot second-guess a judgment that properly belongs in other hands.”

Id. at 1038.

Feinstein highlights two points relevant to this case: (1) damages to a remainder beneficiary are not ripe until the death of the lifetime beneficiary; and (2) a trustee may in its discretion advantage the income beneficiary over the interests of the remainder beneficiary, even if the original principal balance is actually reduced.

Likewise in In Re Bissinger’s Estate, 28 Cal. Rptr. 217 (1963), the remainder beneficiary of a testamentary trust objected to the accounting of the trustee on the grounds that the trustee made investments too favorable to the lifetime beneficiary, who was to receive all of the income and discretionary need-based invasions of principal. At the time of the decedent’s death, the Estate consisted of \$800,000 in equities. A year after the decedent’s death, the Trustee sold \$240,000 of the equities, paid \$64,000 in capital gains and bought \$173,000 in tax-free bonds with the balance. At the time of the accounting, the equities that had been sold had a value of \$450,000 (and thus would have been worth an additional \$210,000 from the date they were sold). The court held that the trustee

was right in its decision to convert non-income producing, potentially-appreciating equities into income-producing, non-appreciating bonds, because the income beneficiary had demanded assets that produced income, even when hindsight showed a significant loss in value to the trust by the sale of those equities at that time. Id.

Washington courts have also recognized that the balancing of the interests between the income beneficiary and remainder beneficiaries does not look to the results, but instead to the trustee's conduct and rationale. Estate of Cooper, 81 Wn.App. 79, 913 P.2d 393 (1996). In Estate of Cooper the court recognized that the trustee of a trust that provided for income to lifetime beneficiary with remainder to others was required to consider income as well as the safety of the capital. It also noted that the important analysis was not the actual investment results (which were subject ultimately to market whims), but to the trustee's thought-process in weighing the needs of the beneficiaries. The court stated: "the focus is on the trustee's performance, not simply on the net gain or loss to the trust or corpus."

Evelyn granted the trustee discretion to invade principal for James health and support in reasonable comfort. Comment (d)(2) to the Restatement (Third), § 50 states that "support" and "maintenance" are

synonyms and refer to the beneficiary's accustomed standard of living or station in life as of the testatrix's death.

The distributions appropriate to that lifestyle not only increase to compensate for inflation but also may increase to meet subsequent increases in the beneficiary's needs resulting, for example, from deteriorating health or from added burdens.... Also, if a beneficiary becomes accustomed over time to a higher standard of living, that standard may become the appropriate standard of support if consistent with the trust's level of productivity and not inconsistent with an apparent priority among beneficiaries or other purposes of the settlor....

Restatement (Third) of Trusts, § 50, comment (d)(2) (2003).

Also important is the ascertainment by the Trustee of the beneficiaries other resources. "Specifically... the presumption is that the trustee is to take the beneficiary's other resources into account in determining whether and in what amounts distributions are to be made...." Id., comment (e).

In this case, James Children provided no evidence as to what the income and principal needs of James were since 1989 nor what they are expected to be in the future. James Children also presented no evidence of how comparable trusts were managed by Puget Sound National Bank or Key Bank during this time period. They have also provided no evidence of James' other resources. However, we can piece together evidence from

the testimony and exhibits that strongly suggest that James, during his lifetime, would consume *the entire* James Trust principal.

For instance, in the Rick Wyman projections (Ex. 121), James income tax bracket is provided for all years since 1989. In 1994, which is the first year provided, Jim is in the 24% income tax bracket. However, in 2001 and 2002, Jim is in the 0% tax bracket, meaning he earned *no* income. In the years 2003-2005 he was in the 15% income tax bracket, meaning his income was significantly lower than when the Estate was first established and his need for outside sources of support would be greater.

Furthermore, James testified that the reason he could not pay the \$188,000 promissory note was because he did not have the money. RP 708, 709, 710, 712, 713. If that was true, in those years, based on the expressed intentions of the testatrix, principal invasions are inevitable. Not to mention that James also acknowledged that had the trust been funded he might have requested support payments in lieu of other forms of finance.

A prescience of future events would also be required to apply the “total return” approach advocated for by James Children. If, over the next decades of James’ life, medical conditions arise or if nursing home care is needed, not only could the trust principal be invaded, it *should be* invaded pursuant to the express terms of the trust.

In reality, the principal of the Estate allocable to the James Trust has increased. If the trust had been funded in December, 1989 (after payment of the state and federal estate taxes), \$251,000 would have been transferred to the James Trust. After adding back the contribution that the court required from James and Jerry the total Estate value today is approximately \$1,051,463.30, meaning the trust would be funded with \$420,585.32. EX 1. CP 28-44. This is equal to a 59% increase in the total principal value allocable to the James Trust share of the Estate since 1989.

(4) **The 1998 Loan from the Estate to James was not Self Dealing.**

As the trial court recognized, any argument that Jerry benefited from the loan to James is absurd. This loan was another transaction undertaken by Jerry for the benefit of James. The last will of Evelyn Johannes specifically allowed the personal representative to make loans to estate beneficiaries. EX 7. As was testified to by James, he requested a loan from the Estate because the bank had reduced his line of credit. RP 715. He had numerous trade creditors that were demanding payment. RP 714-715. Ignoring the inherent fungibility of cash, even assuming that a portion of the loan proceeds went to a business that was half owned by

Jerry and James, there is no evidence of a plan to engage in self dealing of Estate assets.

Self dealing is a form of the breach of the duty of loyalty. It requires that the fiduciary take actions that are detrimental to the interests of the beneficiaries, usually through the purchase or sale of estate assets at a price favorable to the fiduciary. The interests of James Children have not been prejudiced by this loan arrangement. In fact, it allowed a business in which some of them held a participating economic interest to continue operating. RP 741-742. Had James business ceased to operate his need for income from the trust would have expanded.

The self dealing argument also overlooks the fact that Jerry could have simply taken his 60% of the Estate, outright and free of trust at any time. This loan arrangement was purely for the benefit of James. The loan plan formulated by James' accountant Mr. Pagano involved a tax advantage to James by borrowing from the Estate. RP 111, EX 18. Pagano's plan required that Jerry loan Estate funds directly to James, who in turn would loan those proceeds to his company Valley Packers, Inc. This resulted in a tax advantage for James, and no particular advantage for Jerry. How the proceeds would be used by Valley Packers, Inc. was not at issue.

**(5) The Trial Court Did Not Err in its Calculation of Damages.**

The trial court made it explicitly clear that James would not benefit from his involvement in prolonging the administration of this Estate and otherwise taking actions that prevent probate from being closed. James Children, acting again as a proxy for James have attempted to subvert this intent by raising identical arguments, even though their interest in the trust is inherently adverse to James interest as the lifetime beneficiary.

The work of James accountant to show that Jerry took funds from the Estate in a breach of fiduciary duty was not believed by the trial court. James accountant made several significant errors that were revealed on cross examination and otherwise failed to properly track the flow of funds in the Estate records provided. RP 336, 341, 343, 345, 348, 358, 359, 361, 368, 374. James Children and James have failed to carry their burden of proof with respect to this allegation of breach of fiduciary duty.

**(6) Burden of Proof In Action for Breach of Fiduciary Duty.**

This is not an action for an accounting. This action started as a collection action, an action for breach of fiduciary duty was later filed and consolidated into this case. James Children petitioned the court to intervene on August 26, 2005 and were subsequently allowed to intervene in this consolidated cause, **but did not file a complaint.** An accounting was requested by James in 2003 in the probate cause prior to initiation of

the Estate's collection action. It was provided to James and filed with the court. EX 16. James raised no objection to the filed accounting.

Breach of a fiduciary duty imposes liability in tort, the proponent of a breach claim must prove (1) existence of a duty owed, (2) breach of that duty, (3) resulting injury, and (4) that the claimed breach proximately caused the injury. Micro Enhancement Intern., Inc., v. Coopers & Lybrand, 110 Wn.App. 412, 433-34, 40 P.3d 1206 (2002). The proponent of an action for breach of fiduciary duty has the burden of proof on each of these issues. Austin v. U.S. Bank of Washington, 73 Wn. App. 293, 869 P.2d 404 (1994). While James Children did not file a complaint in this action, they did advance arguments identical to those put forth by James and as such are bound by the same principals.

Frank Ault an accounting witness for James did not testify that any funds were taken by Jerry. His accounting work could not determine whether the differences in account values were due to fluctuations in asset values or missing funds, "[d]ifference may represent decline in value of an asset or funds not accounted for or both." EX. 115. Since his work did not consider the decline in account values, it wouldn't even be sufficient as an accounting under the definition of an accounting advanced by James and James Children. In addition to failing to consider asset value decline, Mr. Ault acknowledged that there were items in the financial statements

he had missed when alleging that funds might be missing. RP 368, 374. Frank Ault made a number of errors in his analysis as illustrated during his cross-examination, calling into question any conclusion regarding missing funds. RP 336, 341, 343, 345, 348, 358, 359, 361, 368, 374. The court was correct in finding no breach of fiduciary duty in failing to keep records.

#### **(7) Trial Court Damages Calculations**

Substantial evidence supports the damage award determined by the trial court. The fact finder determines the amount of damages. Mason v. Mortgage Am., Inc., 114 Wn.2d 842, 850, 792 P.2d 142 (1990). Accordingly, a damage verdict should not be disturbed unless it is not supported by substantial evidence, shocks the conscience, or resulted from passion or prejudice. Mason, 114 Wn.2d at 850. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004).

As was noted above, the “total return approach” argued by James and James Children is not appropriate for this situation. Their argument failed to take into account the effect of mandatory income distributions on trust growth and the need for invasions of principal to support the lifetime income beneficiary. Evidence presented by James at trial clearly showed

that his income declined during the period of administration. Failing to consider the effect of income payments on trust growth and the likely invasions of principal for benefit of the lifetime income beneficiary makes the “total return” model advanced by James and James Children inherently flawed. It fails to show the economic benefit that would have been received by the beneficiaries had the trust been invested by a commercial fiduciary over the period of administration.

Prejudgment interest is likewise inappropriate to award to James Children. Their interest in the James Trust is not yet choate, it has no determinable economic value until the death of James. They cannot be “made-whole” since their interest in the whole does not yet exist. As James is not entitled to damages due to his participation in the breach, there is no other party that would be entitled to an award of prejudgment interest.

**(8) The Estate’s Accountings were Properly Admitted into Evidence.**

Trial courts have broad discretion in ruling on evidentiary matters; trial court rulings on decisions to admit evidence are reviewed under the manifest abuse of discretion standard. Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997). The 2001 accounting (Ex. 17) was not admitted for the purpose of proving anything more than its

existence, delivery to and review by James. James had stated that he would pay back the Note after receiving an Estate accounting in 2001. RP 483:25 – 484:2, 485. When questioned on the issue, James acknowledged seeing this 2001 accounting. RP 686. The court was not asked to put the 2001 accounting to any use other than to acknowledge its existence, a fact relevant to show the continued reaffirmation by James of his unpaid debt to the Estate. As it was not offered to prove the truth of any matter asserted, it was not used for an impermissible hearsay purpose. ER 801.

The 2004 accounting (Ex. 16) was filed in the probate cause on March 18, 2004. There was never any objection to it. It was admitted for many non-hearsay purposes, such as to show that an accounting had been prepared and filed without any subsequent objection.

In any event, Exhibit 16 as admitted would otherwise qualify under the business records exception to the hearsay rule. RCW 5.45.050. There was substantial testimony that the 2004 accounting was a compilation of the voluminous records of the Estate. RP 501 – 502. Jerry gathered the Estate records and provided them to the Estate's accountant Frank Johnson. RP 485. Testimony was also introduced that Mr. Johnson compiled these records into the accounting that was filed in 2004. RP 485. The records used by Mr. Johnson would otherwise be admissible and are in fact many of the same records that were admitted in this action.

While James and James Children complain that these accountings were little more than “balance sheets” the work of their accountant was hardly any better. His failure or refusal to even track asset values makes his work unreliable.

**(9). Attorneys’ Fees.**

The award of attorneys’ fees in this case was clearly within the discretion of the trial court. RCW 11.96A.150 permits a court to:

“order costs, including attorney’s 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 to be paid in such amount and in such manner as the court determines to be equitable”.

RCW 11.96A.150.

The trial court has substantial discretion when determining an allocation of attorneys’ fees; the trial court’s authority is much broader than the limits imposed by pre-TEDRA cases. *Cf.* Allard v. Pacific National Bank, 99 Wn. 2d, 394, 663 P.2d 104 (1983). The court required that Jerry and James equally reimburse James Children for all of their fees and costs. This award was entered as part of the equitable powers of the court in an estate matter, James and Jerry were participants in the prolonging of Estate administration, to the extent that this precipitated the intervention of the James Children they were both proper parties to pay

fees. RCW 11.96A.150. The trial court was correct in its award of fees because it preserved the common fund, though the interests of James Children in that common fund are not presently determinable.

The court heard a substantial amount of testimony regarding the joint venture between James and Jerry that prolonged estate administration. James' Children indicated that they were looking first to Jerry for a payment of fees but would also accept James as a proper payer of fees. RP 880:17-20. As both James and Jerry were participants in the prolonging of the administration of this Estate, it was appropriate for the trial court to require each of them to pay a share of the fees and costs of James Children. This requirement preserved the common fund from which James' children may one day benefit.

**11. Attorneys' Fees on Appeal.**

Jerry is entitled to his costs and attorneys' fees on appeal pursuant to RAP 18.1 and RCW 11.96A.150.

**D. CONCLUSION**

Using its equitable powers, the trial court properly allocated damages between two brothers who prolonged the administration of this Estate and otherwise prevented it from being closed expeditiously. As the trial court held, James was an active and substantial participant in the

delay of closing the Estate, and equity should not now permit him to profit from his wrongful conduct.

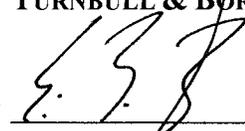
James Children were not damaged by the actions of James and Jerry. The interests of James Children in the James Trust cannot be determined until the death of James, an event that has yet to occur. Until the death of James it cannot be determined whether James Children will be entitled to anything at all from the James Trust.

This court should affirm the trial court's judgment and award Jerry his attorney's fees on appeal.

Dated this 8<sup>th</sup> day of June, 2007.

**TURNBULL & BORN, P.L.L.C.**

By



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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY                       
DEPUTY

No. 35504-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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JAMES JOHANNES, JANE DOE JOHANNES,  
and the marital community composed thereof,

Appellants,

ESTATE OF EVELYN C. JOHANNES,  
GERALD JOHANNES, Personal Representative,

Respondents,

SHERRY KAY FERRANTE, KATHLEEN D.  
YORMARK, JEFFREY W. JOHANNES,  
MATTHEW S. JOHANNES and TIM F. JOHANNES,

Cross Appellants,

ESTATE OF EVELYN C. JOHANNES,  
GERALD JOHANNES, Personal Representative,

Cross Respondents.

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CERTIFICATE OF SERVICE  
OF  
BRIEF OF RESPONDENT IN RESPONSE TO THE BRIEF OF CROSS  
APPELLANT

---

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CERTIFICATE OF SERVICE

I certify that on the 8<sup>th</sup> day of June, 2007, I caused a true and correct copy of the Brief of Respondent in Response to the Brief of Cross Appellant to be served on the following by the method indicated below:

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Dated this 8<sup>th</sup> day of June, 2007 at Tacoma, Washington.

  
\_\_\_\_\_  
Zakiya Shaw