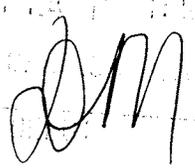


STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
CASE NO. 36339-9-II
STATE OF WASHINGTON
BY: 

No. 36339-9-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

In Re ESTATES OF ALFRED S. PALMER AND SARAH L. PALMER

DAWN PALMER GOLDEN,

Appellant

v.

DONALD A. PALMER

Respondent

BRIEF OF RESPONDENT DONALD A. PALMER

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ORIGINAL

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I. Introduction

Alfred and Sarah Palmer both executed wills leaving all of their assets to a trust, in which the primary beneficiaries were religious charities. Upon the disability of her parents, appellant Dawn Palmer Golden undertook to handle all of their financial affairs under a power of attorney. Utilizing this power of attorney, she transferred all of their financial assets into accounts in which she was named as joint tenant with right of survivorship. Upon the death of both parents, she transferred those funds to herself, effectively cutting off her parents' intent to leave the bulk of their estate to charities. She also used her control of her parents' funds to make gifts to herself and family, to make loans to her family and friends, and to give away her parents' personal possession to her family and friends.

Respondent Donald Palmer (brother of Ms. Golden) was named in the wills and trust as personal representative and trustee. After the deaths of Alfred and Sarah Palmer, he was appointed personal representative of their Estate. After several years of investigation, he discovered that Ms. Golden had misappropriated and mishandled their parents' financial assets, and filed the TEDRA petition in the case at bar to recover those funds for the Estate and Trust.

After several days of trial, the trial court determined that Ms. Golden's action in creating a joint account with right of survivorship using her parents' funds, and naming herself as joint tenant, violated Washington law and was ineffective. Thus her transfer of those funds to herself after the death of her mother was a conversion of the assets of the Estate and Trust. The trial court imposed a constructive trust on the funds held in Ms. Golden's personal account at Edward Jones, and directed those funds be paid over to the respondent Donald Palmer.

The trial court also held that Ms. Golden breached her fiduciary duty as attorney in fact by making loans to her family and friends, by making gifts to herself and her family, by failing to account for substantial assets of her parents, and by giving away most of her parents' personal possessions. The trial court entered judgment against her for the value of those items, and awarded attorney fees and costs to the respondent.

Ms. Golden flagrantly violates the Rules of Appellate Procedure, failing to properly assign error to any of the trial court's Findings of Fact, to set out any Findings of Fact verbatim in her brief, and to present any argument why any Finding of Fact is not supported by substantial evidence. As a result, it is extremely difficult to make sense of her brief,

or determine what issues she is raising. However, it is clear that the trial court was correct in its resolution of all issues.

II. Statement of the Case

RAP 10.3(a)(5) states that the statement of the case should set forth a fair statement of the facts and procedure relevant to the issues presented for review, without argument, and with a reference to the record for each factual statement. The statement of the case in appellant's brief blatantly violates that rule by setting forth a one-sided recitation with few facts, even fewer references to the record, and mostly argument. The following are the facts as found by the trial court.

On April 3, 1997, Alfred S. Palmer and Sarah L. Palmer executed a Revocable Living Trust Agreement ("Agreement") establishing the Alfred S. Palmer and Sarah L. Palmer Trust ("Trust"). (Exhibit 5) Alfred S. Palmer and Sarah L. Palmer were the initial co-trustees of the Trust. Upon certain contingencies, including the death of Alfred and Sarah Palmer, the Agreement provides that Respondent Donald A. Palmer becomes the successor trustee.

Also on April 3, 1997, Alfred S. Palmer and Sarah L. Palmer each executed a Last Will and Testament. (Exhibits 1 and 2) Those wills each

appointed Respondent Donald A. Palmer as personal representative, and bequeathed all of their property to the Trust.

Alfred S. Palmer suffered a stroke on October 8, 1999. (RP 63, 105; Ex. 11) That stroke left him totally incapacitated and unable to communicate verbally or in writing until his death on June 27, 2001. (RP 63-64, 200) His wife Sarah L. Palmer suffered from Alzheimer's disease. She was first diagnosed with moderate to severe Alzheimer's disease by her neurologist in early 1999. (Exhibit 8) The neurologist found that she had a fairly profound loss of memory, and since the disease is progressive, in most cases her condition would continue to deteriorate over time.

From the time of Alfred Palmer's stroke until the death of Sarah Palmer, Appellant Dawn Palmer Golden managed all of their financial affairs, acting under a power of attorney from each of them. (RP 199) As demonstrated by her own statements in Exhibit 11, Ms. Golden was well aware of Alfred and Sarah Palmer's incompetence to handle any financial affairs. Both appellant and respondent acted in accordance with an assumption that Sarah Palmer was unable to handle her own financial affairs, that Ms. Golden would handle those financial affairs under her power of attorney, and that Donald A. Palmer did not have authority to

manage her assets as successor trustee until the death of Sarah Palmer. (RP 67-68, 89, 199-200)

While managing the financial affairs of her parents under the power of attorney, Ms. Golden closed various accounts in their names and transferred the funds into accounts at Edward Jones, Key Bank, and Puyallup Valley Bank. (EX 14, 16, 17) On each of those accounts, she was named as joint tenant with right of survivorship. Upon the death of Sarah Palmer, she transferred all remaining funds in those accounts to herself. (Ex 23, 24)

In December, 2000, Ms. Golden opened account number 870-08459-1-3 at Edward Jones in the names of Sarah Palmer and Dawn L. Golden as joint tenants with right of survivorship. (Ex 17, 18) The initial deposit into that account was a check containing funds from certificates of deposit held at Key Bank in the name of Alfred and Sarah Palmer. (RP 271-273) On December 22, 2000, Ms. Golden signed a "Mutual Funds Non Retirement Transfer In Account Form" (Exhibit 17) for herself and for Sarah Palmer using her power of attorney, which transferred securities into that account.

Brian Duffy, the investment advisor for Edward Jones, testified in his deposition that this account number 870-08459-1-3 was opened by Ms.

Golden for Sarah Palmer using her power of attorney. (Duffy deposition, pp. 14, 19, 23-25)¹ That fact is supported by Exhibit 17. The trial court found that his testimony at trial that Ms. Golden did not open the account using the power of attorney is inconsistent with his earlier testimony and not credible. (Finding of Fact 7; CP 342)

Ms. Golden testified in her deposition that she handled all of the financial affairs for Alfred and Sarah Palmer under the powers of attorney from the time of Alfred's stroke, because they were not capable of handling those financial affairs. (Golden deposition, p. 37) She testified in her deposition that as of December, 2000, Sarah Palmer was not capable of handling her own financial affairs. (Golden deposition, pp. 41-42) The trial court found that her testimony at trial that she did not use the power of attorney to set up the joint account with Ms. Golden at Edward Jones, and that Sarah Palmer participated in the decision to create that account, is inconsistent with that prior testimony and her own letter (Exhibit 11), and is not credible. (Finding of Fact 8; CP 342)

The trial court found that Ms. Golden placed her name on account number 870-08459-1-3 at Edward Jones as a joint tenant with right of

¹ Portions of the depositions of Brian Duffy and Dawn Palmer Golden were offered and admitted as testimony under CR 32(a)(2) and (3). Those portions were marked as Exhibit 54. (RP 45-46, 158-159, 169-170)

survivorship, using her power of attorney for Sarah Palmer. (Finding of Fact 7, CP 342; Exhibit 17) The trial court found that there is no credible evidence that Sarah Palmer intended to give Ms. Golden all of her remaining funds upon her death. (Finding of Fact 9; CP 342)

Also on December 22, 2000, a second account was opened at Edward Jones (account number 870-08458-1-4) in the name of Alfred and Sarah Palmer as joint tenants with right of survivorship. Ms. Golden signed the "Transfer In Account Form" on behalf of both Alfred and Sarah Palmer using her power of attorney. (Exhibit 16) On September 10, 2001, after the death of Alfred Palmer, all of the assets in that second account number 870-08458-1-4 in the name of Alfred and Sarah Palmer were transferred to the account number 870-08459-1-3 in the names of Sarah Palmer and Dawn L. Golden. (Exhibit 20, 21) The trial court found that this use of the powers of attorney for Alfred and Sarah Palmer further demonstrates that both accounts were opened by Ms. Golden as attorney in fact. (Finding of Fact 10; CP 343)

After the death of Sarah Palmer, the cash and securities in account number 870-08459-1-3 in the names of Sarah Palmer and Dawn L. Golden were transferred by Ms. Golden to account number 870-10364-1-3 at Edward Jones held in her own name, and she has maintained control of

those funds. (Exhibits 23, 24) As shown on Exhibit 25, she transferred \$405,490.82 and \$1,499.90 on August 4, 2003, \$223.88 on September 26, 2003, and \$55.82 on February 5, 2004. The trial court found that interest on those funds at 12% per annum to date of judgment totals \$190,380.00. (Finding of Fact 11; CP 343)

While acting as attorney in fact, Ms. Golden made loans to several of her friends and relatives from funds of Alfred and Sarah Palmer. (Golden deposition, pp. 53-94; Exhibits 27-32) She made those loans to persons that she knew had no apparent ability to repay, in most cases without a promissory note, collateral, or interest. *Id.* Ms. Golden reimbursed the personal representative for the loans to Pat Canell, Dustin Carling, and Adrienne Kelly (except \$200). (Exhibits 29, 33) At trial, the loans to Tom Golden in the amount of \$26,400 (Exhibit 27), Pat Tanner in the amount of \$4,600 (Exhibit 28), and Adrienne Kelly in the amount of \$200 (Exhibit 32, p. 1) remained unpaid. *Id.*

At the time of Sarah Palmer's death, she had personal property in her home and at her Warm Beach cabin. Ms. Golden admitted that she and her husband removed or allowed others to remove personal property and fixtures from the family home, and that Exhibit 34 is a list of those items. (RP 197-199) Ms. Golden admitted that she and her husband

removed or allowed others to remove personal property from the Warm Beach cabin, and that Exhibit 35 is a list of those items. (RP 195) The trial court did not find credible her testimony that those items were loaned to the Palmers. (Finding of Fact 13; CP 344) The trial court found that the value of the items removed from the family home is \$10,000.00, and that the value of the items removed from the Warm Beach cabin is \$1,500.00. (Finding of Fact 13; CP 344)

The powers of attorney used by Ms. Golden authorized her to make gifts to any lawful descendent of Alfred and Sarah Palmer. (Exhibits 6 and 7, paragraph 11) In making a gift, Ms. Golden was directed to consider a pattern of giving established by Alfred and Sarah Palmer. It also provided that Ms. Golden would not breach any fiduciary duty by reason of gifts made or withheld in good faith.

Dawn Palmer Golden made gifts to the persons, for the reasons, and in the amounts set forth in exhibits 37-42, as summarized on exhibit 36. (Golden deposition, pp. 99-110) One of the donees, Dustin Carling, was not a lawful descendant of the decedents. (Golden deposition, p. 63) Alfred and Sarah Palmer did not have any history of making gifts to Ms. Golden and her family and friends on a regular basis. (RP 79)

The trial court found that the following gifts were not made in good faith or consistent with a pattern of giving by Alfred and Sarah

Palmer:

12/2/2000	KB check 8657	Dawn trip	1,500.00
3/22/2001	KB check 8763	Purple Cross for Kelly's kids	1,000.00
5/22/2001	KB check 8742	maint fees for Ocean Shores	440.00
5/22/2001	KB check 8745	maint fees for Ocean Shores	116.55
7/3/2001	KB check 8832	gift to Tom Golden	3,000.00
4/26/2002	KB check 9182	half gift, half loan to Golden	3,400.00
11/5/2002	KB check 9145	gift to Adrienne Kelly	2,000.00
11/12/2002	KB check 9140	paid bill for Dustin Carling	661.80

The trial court found that the remaining gifts listed on Exhibit 36 were made in good faith. (Finding of Fact 16; CP 344) The trial court's rationale was that gifts by Ms. Golden to herself to take a vacation, to herself to pay maintenance fees on her Ocean Shores camping property, and to her children were not made in good faith, but that expenditures to buy herself a car and computer that were used at least in part for caring for her Sarah Palmer were made in good faith. (RP 330-331)

Ms. Golden cannot account for the following assets of the decedents and/or Trust:

- a) Proceeds of the sale of the Admiral Annuity held at Morgan Stanley Dean Witter on December 3, 1999 in the amount of \$33,328.35. (Exhibit 43)

b) Final distribution from the Pioneer Vision Variable Annuity on December 19, 2001 in the amount of \$5,162.17. (Exhibit 44)

c) Proceeds of the sale of the Financial Data Services account held at Merrill Lynch on April 2, 2002 in the amount of \$5,094.00. (Exhibit 45)

d) Funds withdrawn from Pacific Northwest Conference Note No. 899 on May 14, 2001, in the amount of \$16,000.00. (Exhibit 46)

e) Funds withdrawn from Puyallup Bank account number 1020021869 on May 15, 2000 in the amount of \$358.00, on June 26, 2000 in the amount of \$350.00, on October 5, 2000 in the amount of \$400.00, on December 19, 2000 in the amount of \$1,197.00, on May 25, 2001 in the amount of \$100.00, on July 2, 2001 in the amount of \$2,000.00, on October 19, 2001 in the amount of \$150.00, and on April 25, 2002 in the amount of \$3,500. (Exhibit 47)

Ms. Golden testified that she has no idea what happened to these assets. (Golden deposition pp. 119-126) The total of these missing funds is \$67,639.52. The trial court found that the interest on those funds at 12% per annum to date of judgment is \$62,237.23. (Finding of Fact 17; CP 344-345)

At the initial hearing on the petition filed in this case, Commissioner Marshall entered an order determining that the Key Bank account and a truck were assets of the Trust free and clear of any interest of Ms. Golden, and directed her to turn over the proceeds of those assets. (CP 241) Ms. Golden moved for reconsideration. She did not challenge the finding that the Key Bank account and truck were assets of the Trust, but only the Commissioner's denial of her request for an offset against said funds. On August 18, 2006, Judge Beverly Grant denied that motion to revise. On August 23, 2006, Ms. Golden paid petitioner \$7,166.40, the amount awarded for the Key Bank account and the truck that were determined to be assets of the Trust. (Exhibit 33) However, she failed to pay interest on that amount at 12% per annum from July 10, 2003, as directed in the order. The trial court found that the unpaid interest totals \$2,685.93. (Finding of Fact 18; CP 345-346)

At the conclusion of trial, the trial court found that Ms. Golden violated RCW 11.94.050(1) by designating herself as joint tenant with right of survivorship on the Edward Jones account containing virtually the bulk of her parents' assets. Since that joint tenancy designation was ineffective, her receipt of those funds upon the death of her mother was a conversion of the funds. (Conclusion of Law 2; CP 347) The trial court

entered judgment against Ms. Golden for the amount of those funds plus interest, imposed a constructive trust on those funds in Ms. Golden's account at Edward Jones, and ordered Ms. Golden and Edward Jones to immediately transfer those funds to the personal representative. (Conclusion of Law 3; CP 348)

The trial court also found that Ms. Golden breached her fiduciary duty in making loans and gifts of her parents' money, in giving their personal property in their house and cabin to her family and friends, and in failing to account for various assets. The trial court awarded judgment against Ms. Golden for the amount of those items, plus interest on some of them. (Conclusion of Law 4, 5, 6 and 7; CP 348-349) Ms. Golden has not assigned error to that portion of the award relating to the personal property in the house and cabin, or otherwise mentioned that portion of the award in her appellate brief.

The trial court also awarded judgment for the unpaid interest on the Key Bank account and truck proceeds. Ms. Golden has not assigned error to that award or otherwise mentioned the award in her appellate brief.

The trial court also awarded reasonable attorney fees and costs to the personal representative. (Conclusions of Law 16, 17; CP 351) Ms.

Golden has not assigned error to that award or otherwise mentioned the award in her appellate brief.

Ms. Golden made several claims for relief at trial. The trial court denied her claim for reimbursement of expenses, for creation of an educational trust, and for breach of fiduciary duty by the personal representative. (Conclusions of Law 9, 10, and 11; CP 349-350) Ms. Golden has not assigned error to any of those rulings, or otherwise mentioned those issues in her appellate brief.

III. Argument

A. The trial court's findings of fact are verities on appeal because appellant failed to assign error or support an argument related to any specific finding of fact.

A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. RAP 10.3(g). Further, when a party challenges findings of fact, he or she must include them verbatim in the brief or attach a copy of them in an appendix to the brief. RAP 10.4(c). Here, Ms. Golden has not complied with either rule. She has not assigned error to any specific finding of fact, nor has she appended a copy of the findings to

her brief. From her brief, there is no way to tell which findings are challenged.

Since Ms. Golden has not assigned error to specific findings of fact, the findings are treated as verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). The Court may waive technical violations of the rules where the briefing makes the nature of the challenge perfectly clear, particularly where the challenged finding can be found in the text of the brief. *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 709-10, 592 P.2d 631 (1979). That would not apply here because it is impossible to discern from Ms. Golden's brief any specific challenge to a finding of fact, and she does not include any challenged findings in the text of her brief. This Court should treat the trial court's findings of fact as unchallenged, and thus verities on appeal. *State v. Neeley*, 113 Wn. App. 100, 105, 52 P.3d 539 (2002).

Even if the respondent and the Court could guess which findings are challenged, appellant makes no argument why those findings are not supported by substantial evidence. As stated in *Inland Foundry Co., Inc. v. Department of Labor and Industries*, 106 Wn. App. 333, 340, 24 P.3d 424 (2001):

Inland asserts that 10 of the Board's 42 findings of fact are not supported by substantial evidence. But the company

does nothing more than make a mere assertion that these findings are unsupported. The appellant must present argument to the court why specific findings of fact are not supported by the evidence and must cite to the record to support that argument. [citations omitted] Because Inland has failed to do so, the findings will be treated as verities.

This case comes squarely within the rules stated in *In re Estate of Lint*, 135 Wn.2d 518, 531-533, 957 P.2d 755 (1998):

As a general principle, an appellant's brief is insufficient if it merely contains a recitation of the facts in the light most favorable to the appellant even if it contains a sprinkling of citations to the record throughout the factual recitation. It is incumbent on counsel to present the court with argument as to why specific findings of the trial court are not supported by the evidence and to cite to the record to support that argument. See RAP 10.3. For the most part counsel has not done this.

Strict adherence to the aforementioned rule is not merely a technical nicety. Rather, the rule recognizes that in most cases, like the instant, there is more than one version of the facts. If we were to ignore the rule requiring counsel to direct argument to specific findings of fact which are assailed and to cite to relevant parts of the record as support for that argument, we would be assuming an obligation to comb the record with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings. This we will not and should not do.

Because appellant has made no effort to comply with the rules for identifying the challenged findings of fact, or supporting such challenge with appropriate argument, this Court must find that the findings of fact are verities on appeal.

Ms. Golden may try to remedy this violation of the rules by identifying the challenged findings of fact in her reply brief. That is too late. In *State v. Moses*, 70 Wn.2d 282, 284-285, 422 P.2d 775 (1967), respondents in their brief called attention to the fact that no error had been assigned by the appellants to any of the findings of fact by the trial court. The appellants filed a reply brief setting out verbatim findings of fact to which error was assigned. The Court rejected that late attempt to comply with the rule, and held that the findings of fact by the trial court must be accepted as the established facts of the case. The Court cited several previous cases in support of that rule, including *Paulson v. Higgins*, 43 Wn.2d 81, 83, 260 P.2d 318 (1953), where the Court stated:

If there is to be a rule, there must be a point at which failure to comply therewith can no longer be corrected. That point is the filing of respondent's brief.

B. The time limits stated in RCW 11.11.070(3) do not apply to this case.

Ms. Golden alleges that the personal representative's claims were untimely under RCW 11.11.070(3), which states:

A testamentary beneficiary claiming a nonprobate asset who has not filed such a petition within the earlier of: (a) Six months from the date of admission of the will to probate; and (b) one year from the date of the owner's death, shall be forever barred from making such a claim or commencing such an action.

The trial court correctly ruled that statute does not apply to this case, and even if applicable it has been waived in this case. (CP 331)

RCW Chapter 11.11 sets up a procedure for overriding the designation of a beneficiary of a nonprobate asset by naming a testamentary beneficiary in a will. RCW 11.11.020 states in material part:

(1) Subject to community property rights, upon the death of an owner the owner's interest in any nonprobate asset specifically referred to in the owner's will belongs to the testamentary beneficiary named to receive the nonprobate asset, notwithstanding the rights of any beneficiary designated before the date of the will.

(2) A general residuary gift in an owner's will, or a will making general disposition of all of the owner's property, does not entitle the devisees or legatees to receive nonprobate assets of the owner.

(3) A disposition in a will of the owner's interest in "all nonprobate assets" or of all of a category of nonprobate asset under RCW 11.11.010(7), such as "all of my payable on death bank accounts" or similar language, is deemed to be a disposition of all the nonprobate assets the beneficiaries of which are designated before the date of the will.

“Testamentary beneficiary” is defined in RCW 11.11.010(10) as “a person named under the owner's will to receive a nonprobate asset under this chapter, including but not limited to the trustee of a testamentary trust.”

Reading these provisions together, it is apparent that only a person named to receive a nonprobate asset specifically referred to in the owner’s

will must file suit within the time limits of RCW 11.11.070(3). A general residuary gift is not enough. This is fair, since the specific reference to the nonprobate asset in the will puts the person on notice of its existence. This interpretation avoids the obvious injustice of putting a short time limit on filing an action to recover a nonprobate asset that is not disclosed or known until long after the death of the decedent, as in the case at bar.

There is no beneficiary designation for any specified nonprobate asset or category of assets in Sarah Palmer's will. Exhibit 2. There is only a general residuary gift to the Trust. Thus, there is no "testamentary beneficiary" to whom the time limits of RCW 11.11.070(3) apply.

Furthermore, the time limits in RCW 11.11.070(3) do not apply to a personal representative. This is apparent from reading that subsection in context with RCW 11.11.070(2), which states:

A testamentary beneficiary entitled to a nonprobate asset otherwise transferred to a beneficiary not so entitled, and a personal representative of the owner's estate on behalf of the testamentary beneficiary, may petition the superior court having jurisdiction over the owner's estate for an order declaring that the testamentary beneficiary is so entitled, ...

Under this subsection (2), either a testamentary beneficiary or a personal representative may file a petition to determine the owner of a nonprobate asset, but under subsection (3) only a testamentary beneficiary

must file a petition within certain time limits. If the time limits were intended to apply to a personal representative, the legislature would have added “personal representative” to subsection (3), as it did in subsection (2). It is fundamental rule of statutory construction that where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent. *City of Kent v. Beigh*, 145 Wn.2d 33, 45, 32 P.3d 258 (2001). Since the petition in this case is brought by the personal representative, the time limits of RCW 11.11.070(3) do not apply.

Finally, even if this statute applied to this case, it was been waived by Ms. Golden’s failure to plead it as an affirmative defense. CR 8(c) says that any matter constituting an avoidance or affirmative defense, including statutes of limitation, must be affirmatively pled. As stated in *Harting v. Barton*, 101 Wn. App. 954, 962, 6 P.3d 91 (2000):

A party shall affirmatively plead any matter constituting an avoidance or affirmative defense. CR 8(c). Thus, “[a]ny matter that does not tend to controvert the opposing party's prima facie case as determined by applicable substantive law should be pleaded[.]”

Generally, affirmative defenses are waived unless they are (1) affirmatively pleaded, (2) asserted in a motion under CR 12(b), or (3) tried by the express or implied consent of the parties.

[citations omitted]

Clearly, the bar in RCW 11.11.070(3) is an affirmative defense. Ms. Golden did not affirmatively plead this statute. Instead, she pled limitations under RCW 11.96A.070 and 4.16.080, and the personal representative responded to those statutes in his trial brief. Ms. Golden did not bring a motion under CR 12(b), which must be made before a responsive pleading. Finally, the issue of RCW 11.11.070(3) was not tried by the express or implied consent of the parties, not having been mentioned until the last day of trial. (RP 218) Therefore, the defense was waived by Ms. Golden.

Ms. Golden tries to avoid waiver by denominating RCW 11.11.070 as a “statute of repose” rather than a statute of limitations. The personal representative disputes Ms. Golden’s assertion that this statute is a statute of repose rather than a statute of limitation. However, the distinction is immaterial. The Supreme Court has specifically held that a statute of repose is an affirmative defense that is waived if it is not pled. *1000 Virginia Ltd. Partnership v. Vertecs Corp.*, 158 Wn.2d 566, 582, 146 P.3d 423, 432 (2006).

C. The trial court's finding that Ms. Golden illegally used her power of attorney to open the Edward Jones account with herself as joint tenant is supported by substantial evidence.

The primary issue in this case is Ms. Golden's creation of a securities account at Edward Jones naming herself and Sarah Palmer as joint tenants with right of survivorship, into which she transferred all of her parents' assets so that she received them upon their death. An attorney in fact acting under her power of attorney is not allowed to make any designation of persons as joint tenants with right of survivorship with her principal in respect to the principal's property. RCW 11.94.050(1) states:

Although a designated attorney in fact or agent has all powers of absolute ownership of the principal, or the document has language to indicate that the attorney in fact or agent shall have all the powers the principal would have if alive and competent, the attorney in fact or agent . . . shall not have the power, unless specifically provided otherwise in the document: To make, amend, alter, or revoke any . . . designation of persons as joint tenants with right of survivorship with the principal with respect to any of the principal's property. . .

Nothing in the power of attorney allows Ms. Golden to create a joint account with right of survivorship with herself as joint owner. Thus, Ms. Golden is prohibited from designating herself as a joint tenant with right of survivorship with respect to her father and mother's securities accounts.

Ms. Golden's defense was to deny that she created the securities account using her power of attorney. The trial court made a specific finding that Ms. Golden used her power of attorney to put her name on the account as a joint tenant with right of survivorship.² Ms. Golden did not assign error to this Finding. This Finding is supported by substantial evidence recited in separate specific findings by the trial court.

In Finding of Fact 6, the trial court found:

In December, 2000, Dawn Palmer Golden opened account number 870-08459-1-3 at Edward Jones in the names of Sarah Palmer and Dawn L. Golden as joint tenants with right of survivorship. The initial deposit into that account was a check containing funds from certificates of deposit held at Key Bank in the name of Alfred and Sarah Palmer. On December 22, 2000, Dawn Palmer Golden signed a "Mutual Funds Non Retirement Transfer In Account Form" (Exhibit 17) for herself and for Sarah Palmer using her power of attorney.

The second sentence refers to Ms. Golden's testimony at RP 271-273. The referenced Exhibit 17, by which securities were transferred into that account, was signed by Ms. Golden for Sarah Palmer with the language, "Dawn L. Palmer Golden POA."

² Finding of Fact 9: "Dawn Golden placed her name on account number 870-08459-1-3 at Edward Jones as a joint tenant with right of survivorship, using her power of attorney for Sarah Palmer. There is no credible evidence that Sarah Palmer intended to give Dawn Palmer Golden all of her remaining funds upon her death."

In Finding of Fact 7, the trial court found:

Brian Duffy, the investment advisor for Edward Jones, testified in his deposition that this account number 870-08459-1-3 was opened by Ms. Golden for Sarah Palmer using her power of attorney. That fact is supported by Exhibit 17. His testimony at trial that Ms. Golden did not open the account using the power of attorney is inconsistent with his earlier testimony and not credible.

The finding references Mr. Duffy's deposition testimony at page 14, lines 18-25; page 19, lines 22-24; page 23, line 5 to page 25, line 2. Mr. Duffy clearly testified that Ms. Golden had set up the accounts using her power of attorney. The trial court found Mr. Duffy's testimony at trial inconsistent and not credible.

Ms. Golden argues in her appeal brief that the trial court cannot find Mr. Duffy's deposition testimony credible and his trial testimony not credible. She cites no authority for that assertion, and it flies in the face of common sense. Mr. Duffy's deposition was taken before the personal representative argued in response to a motion for summary judgment and in his trial brief that the creation of the account using the power of attorney was a violation of statute. After understanding the implication of his testimony, Mr. Duffy chose to change it. He clearly was motivated by his personal financial stake in retaining Ms. Golden's account. (RP 232-236)

The trial court was well within its discretion in making this determination of his credibility. It has long been the law in this state that an appellate court may not weigh the evidence or the credibility of witnesses, even if it may disagree with the trial court, since the trial court is able to observe the witnesses and their demeanor. *In re Sego*, 82 Wn.2d 736, 513 P.2d 831 (1973).

Ms. Golden alleges that the trial court denied her motion to publish Mr. Duffy's deposition, citing RP 153.³ Ms. Golden did not move to publish Mr. Duffy's deposition. The personal representative did that. RP 45-46. The personal representative also asked the trial court to review specific portions of that deposition. *Id.* The colloquy cited by Ms. Golden beginning at RP 153 was the personal representative's objection to certain testimony by Ms. Golden based on the dead man statute. Ms. Golden's counsel did not ask the trial court to review any additional testimony by Mr. Duffy.

Finally, in Finding of Fact 8, the trial court stated:

Dawn Palmer Golden testified in her deposition that she handled all of the financial affairs for Alfred and Sarah Palmer under the powers of attorney from the time of Alfred's stroke, because they were not capable of handling those financial affairs. She testified in her deposition that as of December, 2000, Sarah Palmer was not capable of

³ Appellant's Brief, p. 17.

handling her own financial affairs. Her testimony at trial that she did not use the power of attorney to set up the joint account with Ms. Golden at Edward Jones, and that Sarah Palmer participated in the decision to create that account, is inconsistent with that prior testimony and her own letter (Exhibit 11), and is not credible.

The first two sentences of this Finding references Ms. Golden's deposition testimony at page 37, lines 11-23 and page 41, line 18 to page 42, line 13, as well as trial exhibit 11, which Ms. Golden acknowledged writing at page 11 of her deposition.⁴ Ms. Golden reaffirmed this testimony under cross-examination at trial. (RP 199-200) Again, the trial court's determination of credibility is not subject to review.

Ms. Golden does not assign error to any of these findings, nor argue that they are not supported by substantial evidence. Further, it is clear that they are supported by substantial evidence, and support the trial court's Conclusion of Law 2 that Ms. Golden acted in violation of the statute by creating this joint tenant account in her favor, that the joint tenancy designation was ineffective, and that she converted the funds in that account by transferring them to herself upon her mother's death.

⁴ Trial exhibit 11 is the same as deposition exhibit 1.

D. Ms. Golden had the burden of proving that Sarah Palmer intended to give all of her assets to Ms. Golden.

Ms. Golden has asserted that the personal representative as petitioner has the burden of proving by clear, cogent and convincing evidence that Sarah Palmer did not intend to give all of her funds to Ms. Golden. In support of that argument, she cites RCW 11.24 and RCW 30.22.100. Chapter 11.24, RCW deals with will contests. No will contest is involved in this case.

RCW 30.22.100 states as follows:

Subject to community property rights and subject to the terms and provisions of any community property agreement, upon the death of a depositor:

...

(3) Funds belonging to a deceased depositor which remain on deposit in a joint account with right of survivorship belong to the surviving depositors unless there is clear and convincing evidence of a contrary intent at the time the account was created.

RCW 30.22.040 defines an "account" as a contract of deposit between a depositor and a financial institution, and defines "financial institution" as "a bank, trust company, mutual savings bank, savings and loan association, or credit union authorized to do business and accept deposits in this state under state or federal law."⁵ Since the account at issue in this

⁵ Ms. Golden asserts that RCW 11.11.010(6) states that firms such as Edward Jones are financial institutions under the probate code. That is false. RCW 11.11.010 begins with

case is a securities account with a stock brokerage firm, the trial court correctly ruled that this statute does not apply. (RP 327)

Creation of joint tenancies for property other than accounts at financial institutions is authorized by RCW 64.28.010, which states:

Whereas joint tenancy with right of survivorship permits property to pass to the survivor without the cost or delay of probate proceedings, there shall be a form of co-ownership of property, real and personal, known as joint tenancy. A joint tenancy shall have the incidents of survivorship and severability as at common law, including the unilateral right of each tenant to sever the joint tenancy. Joint tenancy shall be created only by written instrument, which instrument shall expressly declare the interest created to be a joint tenancy. It may be created by a single agreement, transfer, deed, will, or other instrument of conveyance, or by agreement, transfer, deed or other instrument from a sole owner to himself and others, or from tenants in common or joint tenants to themselves or some of them, or to themselves or any of them and others, or from husband and wife, when holding title as community property, or otherwise, to themselves or to themselves and others, or to one of them and to another or others, or when granted or devised to executors or trustees as joint tenants: PROVIDED, That such transfer shall not derogate from the rights of creditors.

This statute restored the common law form of joint tenancy with right of survivorship which had been abolished in Washington by former RCW

the statement, "The definitions in this section apply throughout this chapter..." Thus they are limited to Chap. 11.11, which does not apply to this case (see section B herein). If the definitions were intended to apply to the entire probate code, they would have used the word "title." In any event, they cannot override the specific definition of financial institutions contained in RCW 30.22.040, which apply to the chapter at issue.

11.04.070. *In re Estate of Olson*, 87 Wn.2d 855, 857, 557 P.2d 302 (1976); *See also*, 17 Washington Practice, Real Estate: Property Law, §1.29.

The requirements of this statute for the creation of a joint tenancy with right of survivorship will be met if there is an express written document indicating that the owner or owners of the property involved intend to create a joint tenancy. *In re Estate of Olson, supra*, at 858. It is not sufficient if the only writing comes from a third party, such as the issuer of securities. *Lambert v. Peoples National Bank of Washington*, 89 Wn.2d 646, 650, 547 P.2d 738 (1978).

There is no evidence of a written document signed by Sarah Palmer evidencing her intent to create a joint account with Ms. Golden. Brian Duffy, the investment advisor at Edward Jones who set up the disputed accounts, testified under oath that the account transfer forms were signed by Dawn Golden using her power of attorney, not by Sarah Palmer. (Deposition page 14, lines 18-21; page 23, lines 10-21) Since it was illegal for Ms. Golden to set up a joint account using her power of attorney, there was no creation of a valid joint tenancy.

Ms. Golden also misstates who has the burden of proving Sarah Palmer's intent. In the absence of statutory presumptions (which only

apply to certain bank accounts), the effect of the creation of a joint account is subject to the common law of gifts. *Doty v. Anderson*, 17 Wn. App. 464, 471, 563 P.2d 1307 (1977). Where there was a confidential relationship, the recipient has the burden of proving by clear, cogent and convincing evidence that she did not exert undue influence upon the donor, and that the transaction was actually a gift. *Id.* Factors to be considered include the nature of the confidential or fiduciary relationship, whether the beneficiary actively participated in the preparation or procurement of the change of ownership, whether the money was an unusually large amount, the age or mental condition of the donor, the opportunity for exerting an undue influence, and the naturalness of the gift. *Id.*

There was abundant medical evidence that Sarah Palmer was suffering from moderate to severe Alzheimer's disease, and was not competent to make a gift. The trial court correctly ruled that there is no clear evidence that Sarah Palmer intended to give most of her assets to Ms. Golden as a gift. (RP 327)

Ms. Golden's appellant brief makes several references to "testamentary capacity" and the standard for challenging such capacity. Testamentary capacity refers to the capacity to make a will. *See, Dean v.*

Jordan, 194 Wash. 661, 668, 79 P.2d 331 (1938) (one must have testamentary capacity to dispose of one's property by will). No such issue is present in this case.

E. The court properly excluded untimely documents offered by Ms. Golden.

Pierce County Local Rule 3(b)(2) requires the parties to exchange lists of witnesses and exhibits that each party expects to offer at trial. It then provides that, "Any witness or exhibit not listed may not be used at trial, unless the court orders otherwise for good cause and subject to such conditions as justice requires."

This case was originally assigned to Judge Beverly Grant. On August 18, 2006, the trial court issued a case schedule setting a discovery cutoff of January 1, 2007, requiring an exchange of witness and exhibit lists on January 8, requiring the filing of a joint statement of evidence on January 15, and setting a trial date of February 12. On January 23, 2007, after the exchange of witness and exhibit lists and the filing of the joint statement of evidence, Ms. Golden filed a motion to add to her list of exhibits certain documents she obtained from Edward Jones.

Judge Grant denied the motion to add these documents. The Court agreed with the objection of the personal representative that these

documents were obtained by Ms. Golden in blatant violation of applicable court rules. Her counsel 1) issued a subpoena duces tecum on Edward Jones after the discovery cutoff, 2) scheduling a deposition after the discovery cutoff, 3) without issuing a notice of deposition or 4) serving the subpoena on the personal representative. (RP-Grant 12)

The appellate court reviews a trial court's evidentiary rulings for an abuse of discretion. *Eagle Group, Inc. v. Pullen*, 114 Wn. 409, 416, 58 P.3d 292 (2002). A trial court has broad discretion under CR 26 to manage the discovery process and, if necessary, to limit the scope of discovery. *Id.* The trial court abuses its discretion when its decision is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.' *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The appellant bears the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *reversed on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983).

PCLR 3(b)(2) is self-executing. If a document is not listed in a party's exhibit list, it may not be used at trial unless the court orders otherwise for good cause. The burden was on Ms. Golden to establish good cause, and the trial court found that good cause for adding these documents did not exist where Ms. Golden had violated four different

court rules in obtaining them. This was not an abuse of discretion by Judge Grant.

Further, Ms. Golden failed to preserve this issue by making a motion to admit these documents at trial. During Ms. Golden's opening statement, Judge Worswick asked counsel for Ms. Golden if he was asking her to reconsider Judge Grant's ruling on these documents. (RP38) Counsel said he was going to do that at a later time (RP 37-39), but never did. In giving her oral decision, Judge Worswick noted that Ms. Golden never made any motion to admit the documents denied by Judge Grant. (RP 322)

A pretrial ruling is subject to revision at any time before final judgment. *Adcox v. Children's Orthopedic Hosp. and Medical Center*, 123 Wn.2d 15, 37, 864 P.2d 921 (1993). The trial judge is not bound by evidentiary rulings made by a different judge prior to trial. *State v. Kinard*, 39 Wn. App. 871, 873, 696 P.2d 603 (1985). Ms. Golden's counsel clearly indicated his understanding that the ruling was subject to revision by stating that he would be asking the court to reconsider at a later time. Apparently for tactical reasons, counsel for Ms. Golden chose not to make that request. Ms. Golden waived any error by Judge Grant by failing to move for admission of the documents at trial.

Further, Ms. Golden has made no showing of prejudice from the exclusion of the documents. They consist of three computer printouts dated 12/22/00, 12/26/00, and 01/29/01. The first two indicate that the account is not being operated by power of attorney, the third says that it is. All three appear to be signed by Brian Duffy.

Brian Duffy, the account representative from Edward Jones that set up the accounts in question, was present and testified at deposition and trial. Ms. Golden's counsel never asked him about these documents. Mr. Duffy testified in his deposition that both accounts were set up by Ms. Golden using her power of attorney. He acknowledged sending the powers of attorney to the head office of Edward Jones, along with the documents transferring assets into the accounts. He identified Ms. Golden's signature as attorney in fact on the documents that transferred assets into the accounts. He tried to change his testimony at trial, but the trial court found that testimony not credible.

Ms. Golden testified that from the time of her father's stroke, she was taking care of her mother and father's financial affairs because they were not capable of doing that. (RP 200). She also testified that as of December of 2000 (when the Edward Jones accounts were set up), her mother was not capable of handling her own financial affairs. (RP 200).

The evidence clearly established that she set up the Edward Jones accounts using her power of attorney. She had no other authority to open the accounts. Ms. Golden has not shown how the three documents excluded by the court would change that outcome.

Counsel for Ms. Golden descends to personal attack against opposing counsel by citing to RPC 3.3 regarding candor toward a tribunal, and alleging that counsel for the personal representative “hid” certain documents from the Court. (Appellant’s Brief, pp. 23-25) The first set of documents that Mr. Rorem claims were hidden were the subject of his own pretrial motion to add documents to the joint statement of evidence, and attached to that motion. The remaining four documents he claims were hidden were exhibits 12, 8, 7, and 6 to the deposition of Brian Duffy, which he attended (and which was published at trial).⁶ Mr. Rorem failed to include them in his witness and exhibit list or the joint statement of evidence. He then tries to cover up his own incompetence by accusing opposing counsel of hiding documents. He acknowledges at page 23 and again at page 25 that, “All these records are in the court file.” Documents are not hidden from the Court when they are in the possession of both parties, are placed in the record as the subject of a motion to add

⁶ Exhibits 8 and 12 to this deposition were actually admitted at trial by request of the personal representative. See Exhibit 54.

documents to the joint statement of evidence, and their admission is denied by the Court.

F. The trial court correctly held that the gifts and loans by Ms. Golden to her friends and family violated her fiduciary duty.

The trial court held that Ms. Golden breached her fiduciary duty as attorney in fact by loaning her parents' money to her children and friends that she knew had no apparent ability to repay, without a promissory note, collateral, or in most cases even interest. (CP 343, 348) The trial court entered judgment against Ms. Golden for the amount of these loans. Ms. Golden makes little effort to challenge this determination.

The trial court also held that Ms. Golden breached her fiduciary duty as attorney in fact in making gifts to herself and her family. Ms. Golden was authorized under the power of attorney to make gifts to any lawful descendent of her parents, considering the pattern of giving established by her parents. (CP 344, 348-349) The power of attorney provided that Ms. Golden would not breach any fiduciary duty by reason of gifts made in good faith. The trial court found that Ms. Golden made one gift to a person who was not a lawful descendent of her parents, in violation of the power of attorney. The trial court also found that Ms. Golden made other gifts to herself and her children that were not made in

good faith or consistent with a pattern of giving by her parents. The trial court entered judgment against Ms. Golden for the amount of those unauthorized gifts.

Whether a person acts in good faith is an issue of fact.⁷ *Dunning v. Pacerelli*, 63 Wn. App. 232, 240, 818 P.2d 34 (1991). Ms. Golden has not assigned error to any of these Findings of Fact, nor has she argued why any of them are not supported by substantial evidence. The trial court's finding of fact that Ms. Golden was not acting in good faith in making these gifts is thus a verity on appeal. There was also substantial evidence that Alfred and Sarah Palmer did not have any history of making gifts to Ms. Golden and her family and friends on a regular basis. (RP 79)

Ms. Golden is apparently arguing that Sarah Palmer approved the gifts, but has not referenced any portion of the record to support that assertion. The trial court specifically found that Sarah Palmer was incapacitated or disabled to such a degree that she could not understand the nature of her financial affairs during the entire time that Ms. Golden

⁷ Ms. Golden cites *Ellwein v. Hartford Accident & Indemnity Co.*, 142 Wn.2d 766, 15 P.3d 640 (2001), for the proposition that bad faith must be proven as a matter of law. Not only was that case limited to bad faith in the context of insurance companies, but it was expressly overruled on this point in *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485-486, 78 P.3d 1274 (2003), where the Court said, "Whether an insurer acted in bad faith remains a question of fact."

was acting as her attorney in fact.⁸ (Finding of Fact 21; CP 346) This finding is supported by the testimony of her doctor and caregiver, as well as Ms. Golden's own written statements and testimony. (Exhibits 8, 11, 55) There is no evidence that Sarah Palmer knew of or approved any of the gifts or other actions of Ms. Golden.

Counsel for Ms. Golden seems to be objecting to holding an attorney in fact to the standard of a fiduciary, as if that is a new concept. A power of attorney is simply a written agency appointment, and an attorney in fact is the agent with fiduciary duties toward the principal. As stated in *Bryant v. Bryant*, 125 Wn.2d 113, 118-119, 882 P.2d 169, 171-172 (1994):

A power of attorney is a written instrument by which one person, as principal, appoints another as agent and confers on the agent authority to act in the place and stead of the principal for the purposes set forth in the instrument. Powers of attorney are strictly construed. Accordingly, the instrument will be held to grant only those powers which are specified, and the agent may neither go beyond nor deviate from the express provisions.

...

The agent becomes a fiduciary upon acquiring dominion and control over the principal's property. In handling the principal's property, the fiduciary is bound to act with the utmost good faith and loyalty. Any use of the principal's property in a manner inconsistent with the principal's instruction is a breach of the fiduciary duty.

⁸ Again, testamentary capacity is not the issue. See section D above)

[citations omitted] The word “fiduciary” does not have to appear in the document, because it is inherent in the relationship.

This expression of the duty of an attorney in fact as set forth in *Bryant* amply demonstrates the misconduct by Ms. Golden relating to the gifts and loans which the trial court found to be a breach of her fiduciary duty. In making those gifts and loans, Ms. Golden was clearly acting for her own benefit, not with the utmost good faith and loyalty to her mother. As stated in *Moon v. Phipps*, 67 Wn.2d 948, 954-955, 411 P.2d 157, 161 (1966):

This loyalty demanded of an agent by the law creates a duty in the agent to deal with his principal's property solely for his principal's benefit in all matters connected with the agency.

If Ms. Golden were managing her mother’s property solely for her mother’s benefit, she would have conserved that property for her mother’s care and support, not to take a vacation for herself.

G. The trial court correctly held Ms. Golden liable for her failure to account for missing assets.

Inherent in the fiduciary relationship between principal and attorney in fact is the duty to account for the assets managed by the attorney in fact. A fiduciary has a duty to act in the utmost good faith, to fully disclose all facts relating to his interest in and his actions involving

the affected property, and to deliver all benefits derived from or inuring to the property from the breach to the principal. *Crisman v. Crisman*, 85 Wn. App. 15, 22, 931 P.2d 163 (1997). RCW 11.94.090(1)(b) authorizes the court to compel an accounting from the attorney in fact if he or she fails to provide a proper accounting.

The trial court found that Ms. Golden failed to account for assets under her control as attorney in fact. (Finding of Fact 17, CP 344-345) This finding is supported by Ms. Golden's own testimony that she has no idea where these assets went. (Golden deposition, pp. 118-126) The trial court held that her failure to account for these assets is a breach of her fiduciary duty, and awarded judgment against her in the amount of those assets. (Conclusion of Law 7, CP 349) Again, Ms. Golden does not assign error to that Finding of Fact, and does not even attempt to argue how that finding is not supported by substantial evidence, or that conclusion is not supported by applicable law.

Rather, Ms. Golden seems to argue that she should not have to keep records for the period of time she was acting as attorney in fact, based on her understanding of time limits required by the IRS or banks. The issue is not some arbitrary time limit. Ms. Golden kept and provided to respondent extensive records for the applicable period when she was

handling her parents' affairs under the powers of attorney. The issue is that those records, including bank statements and check registers, do not disclose what happened to the missing funds. If certain investments were liquidated and used for the benefit of the Palmers, the funds would have been deposited in their bank accounts and spent for their benefit. The missing assets were never so deposited, and there is no record of what happened to them. In light of Ms. Golden's other conduct, the trial court properly concluded that Ms. Golden had failed to account for those assets. The logical conclusion is that she used them for her own benefit, as she did with most of her parents' assets.

H. The statute of limitation in RCW 11.96A.070 is not applicable.

Ms. Golden also alleges that this case is barred by the three-year limitations period provided in RCW 96A.070. (Appellant's Brief, p. 29) This is apparently a typographical error, referring to RCW 11.96A.070, which she also argued to the trial court. (CP 314) On its face, that statute does not apply to this case. RCW 11.96A.070 establishes a three-year limitation period for actions against the trustee of an express trust, a personal representative, or a special representative appointed by a court. Ms. Golden's liability is not premised upon her actions as a trustee, a

personal representative, or a special representative; she was acting as an attorney in fact under a power of attorney.

Ms. Golden has apparently abandoned her claim that the limitation period in RCW 4.16.080 applies, since she does not mention that statute in her appellate brief. Even if not abandoned, that statute does not bar this action.

RCW 4.16.080 sets a three-year statute of limitation for an action for taking personal property. This includes conversion claims. *Crisman v. Crisman, supra*, at 19. Pleading the statute of limitations is an affirmative defense and each of its elements must be proved by the party asserting it. *Rivas v. Eastside Radiology Associates*, 134 Wn. App. 921, 925, 143 P.3d 330 (2006). Many of the claims in this case, including conversion of the funds in the Edward Jones account, did not occur until after the death of Sarah Palmer, when Ms. Golden transferred her mother's funds to herself.

Furthermore, RCW 4.16.190 tolls the statute of limitation in cases of personal disability:

If a person entitled to bring an action mentioned in this chapter ... be at the time the cause of action accrued ... incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings, such incompetency or disability as determined according to chapter 11.88 RCW, ... the time of such disability shall not be a part of the time limited for the commencement of action.

No prior adjudication of incapacity under chapter 11.88 RCW is necessary to invoke the tolling provision. *Rivas v. Eastside Radiology Associates, supra.*, at 927-928. Rather, the tolling statute refers to the process set forth in chapter 11.88 RCW. *Id.* The trial court should look back to determine whether, at the time the cause of action accrued, the plaintiff was incapacitated to the degree necessary to permit appointment of a guardian. *Id.* If so, then tolling is appropriate under RCW 4.16.190. *Id.*

Under Chapter 11.88, RCW, a person may be deemed incapacitated as to the person's estate when the superior court determines the individual is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs. RCW 11.88.010(1)(b). The trial court found that Alfred Palmer was incapacitated by his stroke until his death on June 27, 2001, and Sarah Palmer was incapacitated by moderate to severe Alzheimer's disease until her death on July 10, 2003. (Finding of Fact 3, CP 341) This was established by Ms. Golden's own statements in Exhibit 11 and her statements that she handled all of her parents' financial affairs under the powers of attorney because they were not capable of doing so. (Findings of Fact 3, 4, and 8, CP 341, 342) It was also established by the testimony of Dr. Mebust and Joyce Sigette. (Finding of Fact 21, CP 346; Exhibits 8,

55) This action was brought less than three years after the death of Sarah Palmer. (Conclusion of Law 12, CP 350)

Even if the statute was not tolled by Sarah Palmer's disability, the statute of limitations would not bar this action. Where property is converted by a constructive trustee, the statute of limitations does not begin to run until the other parties are on notice that the trust had been repudiated. *Brougham v. Swarva*, 34 Wn. App. 68, 74, 661 P.2d 138 (1983). The same rule applies to breaches by fiduciaries. A fiduciary relationship arises between an agent and a principal when the agent, without the knowledge and consent of the principal, exercises dominion and control over the principal's property sufficient to alienate the principal's right to the property. *Crisman v. Crisman, supra*, at 22. Once a fiduciary relationship arises, the agent has a duty to act in the utmost good faith, to fully disclose all facts relating to his interest in and his actions involving the affected property, and to deliver all benefits derived from or inuring to the property from the breach to the principal. *Id.* A fiduciary's failure to disclose is fraudulent concealment, which tolls the limitation period until the injured party knows or reasonably should have known of the concealed facts. *Id.*

Clearly, Ms. Golden had a fiduciary relationship to her mother, and exercised dominion and control over her property. She concealed the nature and extent of the funds she diverted through illegal joint accounts until long after her mother's death. (RP 69-71) It took years for the personal representative to obtain the records from her to determine where the decedent's funds had gone. (Exhibit 50) The trial court found that Ms. Golden failed to disclose the joint accounts, gifts and loans, and that the personal representative had no knowledge of these facts until after Sarah Palmer's death. (Finding of Fact 22, CP 346) Ms. Golden failed to assign error to this Finding. The trial court found that any claims accruing prior to the death of Sarah Palmer were tolled by Ms. Golden's active concealment of these facts. (Conclusion of Law 13, CP 350).

I. Donald Palmer did not have authority to act as trustee until after the death of Sarah Palmer.

Ms. Golden's assignments of error 9 and 10 object to the trial court finding that the respondent did not become trustee of the Trust or have the duty to actively manage the Trust until the death of Sarah Palmer. Ms. Golden does not assign error to any Finding of Fact, nor state how any particular Finding of Fact is not supported by substantial evidence. Her only argument on this issue appears on page 30. Her only reference is to

Finding of Fact 4, appearing at CP 341, and RP 325. The only reference to the Trustee's authority in Finding of Fact 4 is that both appellant and respondent acted in accordance with the assumption that Donald Palmer did not have authority to manage Sarah Palmer's assets as successor trustee until the death of Sarah Palmer. Donald Palmer testified that he did not believe he was trustee until his parents both died. (RP 89, 92, 93) Ms. Golden has not cited to any evidence to the contrary.

Though she has not specifically mentioned it, Ms. Golden seems to be objecting to the trial court's Conclusion of Law 14, which held that Donald Palmer did not have authority to act as successor trustee until after the death of Sarah Palmer. This conclusion is clearly correct.

Article II of the Trust states:

The aforesaid Donald A. Palmer or Douglas H. Palmer shall serve as Successor Trustee upon the occurrence of any of the following events: (1) The adjudicated incompetency of the Grantors; (2) The inability, for whatever other reason, of the Grantors to serve as Trustee; or (3) The death of both of the Grantors.

The Palmers were never adjudicated incompetent. The second event refers to "whatever other reason," renders the Grantors unable to serve, indicating a reason other than incompetency. If the Palmers intended the Successor Trustee to take over for unadjudicated incompetency, there would be no reason for the requirement of adjudicated

incompetency. Therefore, the trial court was correct in ruling that Donald Palmer did not have authority to act as trustee until the death of both Alfred and Sarah Palmer.

Furthermore, Ms. Golden fails to show how this conclusion affects the outcome in this case. It does not change the fact that Ms. Golden used her authority as attorney in fact to try to divert most of her parents' assets to herself. Even if Donald Palmer could have exercised the power of a trustee prior to the death of Sarah Palmer, there is no evidence that any of the assets mishandled by Ms. Golden were ever transferred to the Trust.

J. Respondent is entitled to attorney fees and costs on appeal.

Respondent should be awarded a judgment against Ms. Golden for its costs and attorney fees incurred in this appeal. RCW 11.96A.150 states:

(1) Either the superior court or the court on 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 to be paid in such amount and in such manner as the court determines to be equitable.

(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. ...

The trial court awarded attorney fees and costs to the respondent against Ms. Golden on the basis of this statute, holding that she should bear the burden of those fees and costs rather than the Trust beneficiaries. The same rationale applies on appeal. Respondent had to bring this petition to recover assets converted or squandered by Ms. Golden. Respondent should be awarded his costs and reasonable attorney fees against Ms. Golden.

Ms. Golden makes a request for attorney fees in the final sentence in the Conclusion of her opening brief. Once again, Ms. Golden ignores the applicable rules. RAP 18.1(b) requires a party to devote a section of its opening brief to any request for fees. The same situation occurred in *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 710, 952 P.2d 590 (1998), where the respondent included a request for attorney fees and costs in the last line of the conclusion of its supplemental brief. The Court held that RAP 18.1(b) requires more than a bald request for attorney fees on appeal. The rule requires a separate section in the brief devoted to the fees issue, with argument and citation to authority. Failure to fulfill those requirements requires denial of attorney fees on

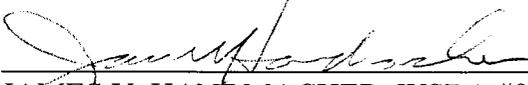
appeal. *See also, Hammack v. Hammack*, 114 Wn. App. 805, 812, 60 P.3d 663 (2003).

Once again, this is not a rule violation that can be cured by making an argument for attorney fees in the reply brief. Not only does the rule specifically require the argument in the opening brief, but the Supreme Court has ruled that the appellate courts will not consider a request for attorney fees raised for the first time in a reply brief. *Sacco v. Sacco*, 114 Wash.2d 1, 5, 784 P.2d 1266 (1990).

IV. Conclusion

The trial court correctly resolved all issues in this case. The respondent requests that this Court affirm the judgment of the trial court, and award respondent his attorney fees and costs incurred in this appeal.

RESPECTFULLY SUBMITTED this 24th day of September, 2007.



JAMES V. HANDMACHER, WSBA #8637
Morton McGoldrick, P.S.
Attorneys for Respondent Donald A. Palmer

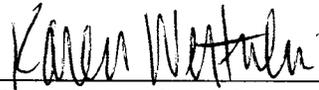
CERTIFICATE OF SERVICE

I certify that on the date set out below I mailed a true and correct copy of the foregoing BRIEF OF RESPONDENT DONALD A. PALMER, to:

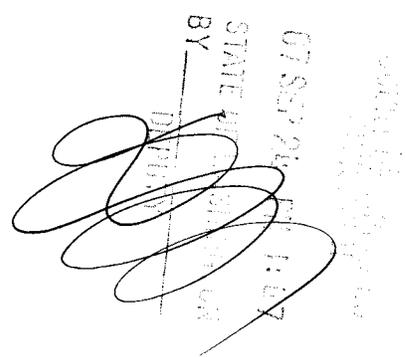
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DATED this 24th day of September, 2007.



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STATE OF WASHINGTON
BY _____
COUNTY OF PIERCE