

N0: 66814-5 I

COURT OF APPEALS
DIVISION ONE
OF THE STATE OF WASHINGTON

JAMES R. ESTEP, Appellant,

Vs.

SANDRA BURLINGAME—ESTEP, Respondent

RESPONSE BRIEF OF APPELLANT

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STATE OF WASHINGTON
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I. INTRODUCTION

The Respondent's Brief argues the wrong standard of review. Appellant's Opening Brief raised two questions of law which, as such, are reviewed *de novo*, not under an abuse of discretion standard. These two legal questions, which are not addressed at all in the Respondent's Brief are:

1. Where a trust was not sued in this dissolution action, and where neither co-trustees were served with discovery in their representative capacity as co-trustees, does the Superior Court have the legal authority to order Mr. Estep, sued only in his individual capacity, to respond to discovery directed at the financial records of the trust?
2. Did the trial court err, as a matter of law, in considering the assets of the Estep Sr. Family Trust as the property of Mr. Estep in dividing the community property and/or in awarding maintenance in this case?

Under the case law cited below, this Court should resolve these issues of law based upon a *de novo* standard of review because none of the facts related to the trust are in dispute, only the legal effect of those facts.

Rather than contesting the legal authority cited by the Appellant on pp. 4 through 7 of his Opening Brief, which state the black letter law on both of the legal issues in this case, Respondent attempts to convince this Court that a different standard of review (abuse of discretion) applies. The trial court's "discretion," if any, cannot be exercised upon a fundamental misunderstanding of controlling law. Because it was reversal is warranted with directions to the trial court to not consider the trust assets in any division of property or maintenance award.

II. LEGAL ARGUMENT

A. Respondent's Brief Misstates the Standard of Review on All Issues.

Respondent's Brief argues throughout that the trial court "did not abuse its discretion" by ordering Mr. Estep to produce trust fund financial records, in dividing community and separate property and in awarded substantial maintenance to her. As such, Respondent mischaracterizes the applicable standard of review and fails to address the legal arguments raised by Appellant on those legal issues. In *State v. Corona*, the Court of Appeals Div. III underscored the importance of the distinction between a

de novo review and a review based upon an abuse of discretion standard.

See *State v. Corona*, 164 Wn. App. 76, 80, 261 P.3d 680 (2011):

The distinctions in our standard of review cannot be overstated. Under an abuse of discretion standard, we defer to the decision of the trial court and will reverse only when the trial court's decision rests on untenable grounds. But we review *de novo* the trial court's choice of law, its interpretation, and its application to the facts of the case. *Whelchel*, 97 Wn. App. at 817. Thus, to determine whether the trial court committed an error of law, which is included in the abuse of discretion standard, we review the alleged error of law itself *de novo*.

Id. at p.80.

State v. Whelchel, 97 Wn. App. 813, 817, 988 P.3d 20 (1999), cited

by the *Corona* court, held:

The choice of law applicable to facts, its interpretation, and its application to the facts are matters of law reviewed *de novo*. *State v. McIntyre*, 92 Wn.2d 620, 622, 600 P.2d 1009 (1979); *State v. Johnson*, 96 Wn. App. 813, 981 P.2d 25, 26 (1999); *State v. Carlyle*, 84 Wn. App. 33, 35-36, 925 P.2d 635 (1996).

And see *State v. Osman*, 168 Wn.2d 632, 637, 229 P.3d 729 (2010) ("This court reviews the interpretation of court rules *de novo*."); *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003) ("Construction of a statute is a question of law that we review *de novo*. . . ."); *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004) ("Constitutional challenges are questions of law and are also reviewed *de novo*.").

Here the questions of law upon which the trial court based all of the ruling appealed from must be resolved by this Court *de novo*. By misapplying the law, the trial court erred.

B. The Trial Court Erred in Holding that a Co-Trustee of a Trust Who is Not Sued in His Representative Capacity Can Be Ordered to Provide Trust Documents in Discovery.

Respondent claims, citing *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 582-83, 220 P. 3d 191, 197 (2009), and other cases (See Respondent's Brief at p. 4) that discovery orders entered by the trial court compelling Mr. Estep to disclose trust financial records should be reviewed on an abuse of discretion standard. These cases deal with discovery orders and sanctions where there is no dispute that the court had *in personam* jurisdiction over the party resisting discovery. They are therefore completely inapposite. Respondent fails to address, let alone refute, the black letter case law cited by Appellant which holds that:

1. A trust is a separate legal entity. *Edwards v. Edwards*, 1 Wn. App. 67, 70, 459 P.2d 422 (1969).
2. To be a party to a lawsuit a trustee must be served in his or her representative capacity as a trustee. *In re Marriage of McKean*, 110 Wn. App. 191, 195, 38 P.3d 1053 (2002).

3. If there is not *in personam* jurisdiction over an individual in his trustee's capacity, the trial court cannot adjudicate any matters regarding the trust. *Id.*

Here there is no dispute of fact that Mr. Estep, his co-Trustee Mr. Luckey, or the Estep Sr. Family Trust were not sued, were not served in this lawsuit in any official capacity as co-Trustees, or that the court had *in personam* jurisdiction over them in their representative capacity. An attorney for the Trust, Gary Gill, filed a notice of appearance and challenged the authority of the court to compel disclosure of trust records without first gaining *in personam* jurisdiction over the trust or co-trustees. The Respondent had every right and opportunity to bring suit against Mr. Estep in his representative capacity and/or to serve the Trust and/or Mr. Luckey with any discovery it sought. But she never did.

The important legal distinction between Mr. Estep as a husband and party to the dissolution proceeding and Mr. Estep as a co-trustee to a trust are clearly not mere technicalities that can be ignored at the whim of a party or the trial court. Otherwise the important fiduciary duties (including, here, to keep trust financial records confidential absent due process and *in personam* jurisdiction) which clearly are owed to the trust beneficiaries by Mr. Estep in his capacity as a trustee, could be interfered

with by a court or party who has jurisdiction over that person only in an individual capacity. Basic trust law abhors such a result.

Any order compelling discovery of the trust's financial records, to be valid, presumes that the Court has *in personam* jurisdiction over the legal entity who owns those records. Here the facts are not in dispute that the financial records for which discovery was sought were the bank records of the trust and that the Court had no *in personam* jurisdiction over either the trust or Mr. Estep in his capacity as a co-trustee.

Respondent's Brief engages in a slight of hand by arguing that "The wife acknowledges that any interest in the trust is separate property of the husband. She simply sought information about the husband's financial situation." (Brief at p.5.) This argument misses the point. The legal issue is not whether the Trust was the separate property of the husband, but whether the trust and its banking records were even before the Court's *in personam* jurisdiction.

Therefore as a matter of law, the trial court had no discretion whatsoever to order Trust documents produced by Mr. Estep. There was no discretion to abuse because the trial court had no discretion to exercise. This is the legal issue raised squarely by this appeal which the Respondent utterly failed to address in her brief, and accordingly she has waived any

objection or argument to. Because the facts are not disputed, the legal effects of those facts are a question of law to be resolved *de novo*. See *State v. McCormack*, 1171 Wn. 2d 141, 143, 812 P.2d 483 (1991). Respondent argues the wrong standard of review and her argument fails.

C. The Trial Court Erred in Ruling that the Estep Sr. Family Trust was "Property" Subject to Division and a Maintenance Award.

Respondent next argues that the trial court did not abuse its discretion in considering the Trust interest owned by the Appellant in its property division award and in the award of maintenance. Again, Respondent argues the wrong standard on review. It is quintessentially a legal issue whether the Estep Sr. Family Trust conferred any property interest on Mr. Estep as a contingent beneficiary which was subject to a property division or maintenance award. The facts as to the language, terms and operation of this trust are not in dispute. The trust agreement was admitted into evidence by the Respondent. Both co-trustees testified about its provisions. The Respondent concedes that the trial court found Mr. Estep had an interest in the substantial assets of the Estep Sr. Family Trust, and considered such asset both for purposes of a division of the

parties' assets and the maintenance award. *See* Brief at p.1. This was the error of law which must be reviewed *de novo*.

Respondent does not cite or argue with any of the salient legal authorities Appellant cited in his Opening Brief. She merely argues that the trial court did not abuse its discretion in ruling the husband had a “vested” interest in the trust subject to division and maintenance awards. Again she misses the point. Under the case law cited by Appellant in his Opening Brief and not responded to by the Respondent in her Brief: "A mere expectancy is not a right and as such is not property." Washington State Bar Ass'n Washington Family Law Deskbook Section 38.2 (1989), cited with approval in *Marriage of Harrington*, 85 Wn. App. 613, 935 P.2d 1357 (1997) (holding that "for purposes of Washington dissolution actions, property can be tangible or intangible, but it must be something to which there is a right."). And *see Baltrusis v. Baltrusis*, 113 Wn. App. 1037 (2002). Certainly Mr. Estep has an expectation that he may receive trust assets IF, he survives long enough (to 2019) and no other children are born to either himself or Mr. Luckey which would deplete the rest of the trust. But an expectation is not enough under established property law principles.

Here the trial court itself recognized that Mr. Estep had a mere expectancy to receiving any funds in the future from the family trust:

"It is certainly possible that Mr. Luckey or even this Mr. Estep could have another child. I mean, **that's not far-fetched**...Again, **I'm not saying that he owns that property currently but assuming that he lives it is likely** that he would receive that...this is someplace between an **expectancy** and an asset to happen in the future."

See Estep v. Estep, IV-Vol. III (pp.51:14 to 52:1 and p.56:7 to 56:12; pp.60:23 to 61:3) (emphasis added).

It is clear that the trial court considered the trust assets to be a mere expectancy because (1) he would only recover any assets in 2019 at the very earliest (2) he would only get those assets if he lived that long. There is no property right in "an asset to happen in the future."

Respondent attempts to conflate the issue of "expectancy" in property by claiming the Appellant had a "vested" interest in the trust property because the settlor, Mr. Estep's father, has died. All this phrase means is that this trust was obviously irrevocable after his death, not that Mr. Estep had a current property interest in the trust assets for purposes of a property division at dissolution. As the Court held in *Edwards v. Edwards*, 1 Wn. App. 67, 459 P. 2d 422 (1969), cited by Respondent: the subject matter of a testamentary trust is not prevented from vesting

immediately upon the testator's death by the fact that possession and enjoyment of the trust property is delayed until the termination of an intermediate estate, where the dispositive scheme, e.g., to a life tenant and then to a remainderman as trustee, creates a life estate and a vested remainder, both of which come into being at the time of the testator's death.

Clearly the *Edwards* court used the term "vesting" to validate the testamentary trust at issue in that case. It held that a mere delay in the possession and enjoyment of trust property does not invalidate the trust itself. That holding has nothing to do with this case, where the validity of the trust is not in issue.

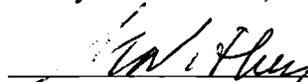
The proper legal framework for analyzing this issue in dissolution cases was utilized in *Marriage of Hurd*, 69 Wn. App. 38, 848 P.2d 185 (1993), where the court held that where the husband may retire at any time and has an unconditional right to immediate payment of his pension upon his retirement, his pension was "vested" and could be considered in a division of property. The two conditions which allowed the *Hurd* court to find that the interest in his retirement was "property" (i.e., not a mere expectancy) were that he could retire at any time and that the retirement was immediately payable. Here, Mr. Estep cannot do anything akin to

retiring to affect his interest in the trust assets and there is no immediate right to payment of those assets if he were to do so. In fact conditions could occur that would delay or defeat any recovery of his remainderman share of these assets: including his death before 2019.

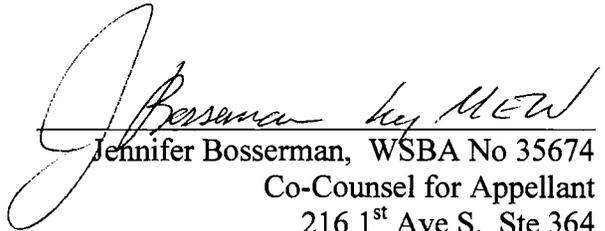
III. CONCLUSION

For all the foregoing reasons, the Respondent urges this Court to adopt the wrong standard for review of the legal issues at stake in this appeal. The trust assets were substantial (in the hundreds of thousands of dollars) and thus were far greater in value than any other unencumbered asset of the community. They were clearly considered by the trial court in dividing the property and awarding maintenance. They should not have been, as a matter of law. The trial court erred and should be reversed with directions to the trial judge to reenter findings and conclusions that did not take into account any trust assets in either a division of the property or in an award of maintenance.

Respectfully Submitted this 14th day of December, 2011.



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CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2011, I caused the
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I declare under penalty of perjury under the laws of the state of
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Dated this 14th day of December, 2011 in Seattle, Washington.

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