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No. 89788-3

SUPREME COURT OF THE STATE OF WASHINGTON

No. 43280-3 II

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

RACHEL MARGUERITE ANDERSON (formerly RACHEL M. RODGERS), an individual,

Petitioner,

v.

WILLIAM L.E. DUSSAULT, et al.,

Respondents.

ANSWER TO PETITION FOR REVIEW BY RESPONDENTS RICHARD MICHAEL MCMENAMIN, SHARI L. MCMENAMIN AND MCMENAMIN & MCMENAMIN PS

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I. IDENTITY OF RESPONDENTS

Respondents Richard Michael McMenamin, Shari L. McMenamin and McMenamin & McMenamin PS (collectively, "McMenamin"), by and through their counsel, Betts Patterson & Mines, P.S., answer the Petition for Review.[1]

McMenamin also joins in the Answers filed by Respondents William E. Dussault and Jane Doe Dussault ("Dussault") and Wells Fargo Bank, N.A. ("Wells Fargo").

II. COURT OF APPEALS DECISION

In *Anderson v. Dussault et al.*, ______ Wn. App. __, 310 P.3d 854 (2013), filed on October 1, 2013, the Court of Appeals correctly affirmed summary judgment in favor of McMenamin because the Trustees' Accounting Act ("TAA"), RCW 11.106 et al., bars the Petitioner's claims.

III. ISSUES PRESENTED FOR REVIEW

Whether this Court should deny the Petition for Review when the Petitioner has failed to satisfy the standards of review under RAP 13.4(b) and when the Petitioner improperly seeks review by this Court of issues that were not raised in the trial court.

---

[1] McMenamin was served with a hard copy of the Petition for Review on December 31, 2013.

If this Court accepts the Petition for Review, McMenamin respectfully requests this Court consider the following issues that were raised, but not decided, by the Court of Appeals: (1) whether the Petitioner's claims against McMenamin are barred by the express terms of the Trust and (2) whether the Petitioner failed to establish that McMenamin breached any fiduciary duties he owed to her as the beneficiary of the Trust.

IV. STATEMENT OF THE CASE

On August 25, 2007, a special needs trust ("the Trust") was created for the Petitioner in conjunction with a minor settlement of her tort claims that arose out of the injuries she sustained when she was kicked in the face by a horse at six years old. CP 476-496. The Trust appointed McMenamin and the Petitioner's mother, Andrea Davey ("Davey"), as the Trust Advisory Committee ("TAC") and Wells Fargo as the Trustee. CP 482.

The purpose of the Trust was to provide the Petitioner with extra and supplemental financial and service benefits in addition to the benefits she received as a result of her disabilities and in addition to the basic support provided by her parents. CP 481-82. In order to achieve this purpose, the Trust expressly provided the TAC with absolute and

unfettered discretion to determine when and if the Petitioner needed regular and extra supportive services. *Id.*

The Trust was reviewed and approved by the Clallam County Superior Court. CP 345. All of the annual reports related to the Trust were also approved by the Court, including the final report and petition for approval that was sent to the Petitioner when she reached the age of majority. *Id.* The Petitioner raised no objection as to any of the matters contained in the report, and she did not object to, or appeal, the trial court's order approving the report in December 2009. *Id.*

On July 22, 2011, nearly two years after the final report was approved by the trial court without any objection, the Petitioner filed the present action against McMenamin and the other defendants alleging, among other things, that they breached their fiduciary duties in the administration of her Trust and distribution of her Trust funds. CP 470-504. McMenamin and the other defendants moved for summary judgment arguing, in part, that the Petitioner's claims were barred by the TAA. CP 143-166. McMenamim also argued that the Petitioner's claims were barred as a matter of law by the express terms of the Trust Agreement, res judicata, judicial estoppel and the doctrine of judicial immunity. *Id.* Alternatively, McMenamim argued that, if the Petitioner's claims were not

barred as a matter of law, the Petitioner failed to establish a *prima facie* case against McMenamin for breach of fiduciary duty. *Id.*

On May 4, 2012, the trial court properly granted summary judgment in favor of McMenamin and the other defendants, stating that the Petitioner's "claims are dismissed in their entirety with prejudice." CP 512. The Petitioner appealed the trial court's order to Division II of the Court of Appeals, arguing that: (1) the TAA does not apply the Trust; (2) res judicata and judicial estoppel do not bar her claims; (3) the terms of the Trust do not bar her claims; and (4) that she presented questions of fact regarding disbursements made from her Trust to survive summary judgment. *Anderson*856-57 (2013).

On October 1, 2013, the Court of Appeals affirmed the trial court's order, holding that the TAA barred the Petitioner's claims against McMenamin and the other defendants. *Id.* at 856. In so holding, the Court of Appeals concluded that the Petitioner's claims were precluded under the TAA because a court decree approving an accounting under the statute is "final, conclusive, and binding upon all the parties interested including all incompetent, unborn, and unascertained beneficiaries of the trust." *Id.* at 860. The Petitioner now seeks review of that decision by this Court.

V. ARGUMENT

A. This Court Should Deny the Petition for Review.

1. The Petitioner Fails to Meet the Standards of Review Under RAP 13.4(b).

RAP 13.4(b) provides that the Supreme Court will accept a petition for review only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The Petitioner seeks review under RAP 13.4(b)(1), (3) and (4). Pet. Br. at 7-19. The Petition does not satisfy the standards for review under any of those sections.

a. The Court of Appeals' Decision is Consistent with this Court's Prior Rulings.

The Court of Appeals' decision does not conflict with a decision of this Court under RAP 13.4(b)(1). Contrary to the Petitioner's assertion,

the Court of Appeals' decision is consistent with this Court's rulings in *Gilbert v. Sacred Heart Medical Center*, 127 Wn.2d 370, 900 P.2d 552 (1995) and *Merrigan v. Epstein*, 112 Wn.2d 709, 773 P.2d 78 (1989). Like the Court of Appeals' decision in this case, the decisions in *Gilbert* and *Merrigan* set forth a well-reasoned analysis and application of the plain language of the TAA. For instance, in *Gilbert*, this Court determined that courts will not read into a statute any language that is not explicitly there, especially when the statute, as written, is unambiguous and can be harmonized with other statutory provisions. 127 Wn.3d at 375.

Similarly, the Court of Appeals' decision in this case determined that "[a] reasonable interpretation of a statute 'must, at a minimum, account for all the words in [the] statute." *Anderson*, at 861. In this regard, the Court of Appeals noted that a reasonable interpretation of the TAA also required interpreting what RCW 11.96A.160 provides since the TAA explicitly states that, when a trustee seeks approval of an intermediate accounting, "[t]he court shall appoint a guardian ad litem as provided in RCW 11.96A.160." *Id.* RCW 11.96A.160 provides that the court *may* appoint a guardian ad litem to represent the interests of a minor. (Emphasis added.) Thus, when the Court of Appeals read the TAA and RCW 11.96A.160 in harmony, which is consistent with the proposition set forth in *Gilbert*, it correctly held that nothing under the plain language of

TAA requires the mandatory appointment of a guardian ad litem. *Id* at 862.

Notwithstanding, the Petitioner argues that the TAA mandates the appointment of a guardian ad litem to "ensure that a beneficiary under a legal disability has a representative with the authority and responsibility to challenge its accounts." Pet. Br. at 7. As stated *supra*, the TAA contains no such mandatory language.

In addition, the Petitioner's reliance on *Gilbert* and *Merrigan* is misplaced. The seminal issue in those cases involved the statute of limitations. The issue in this case, however, involves the finality of a judicial determination under the TAA. The TAA specifically bars any relief over trust decisions once they are approved by the court. In other words, the TAA provides specific procedures for a Trustee to avoid liability for decisions made during the administration of a trust. Under the TAA, the Trustee must submit routine reports to the court for approval, and when the court approves the report, the decree is final and binding on all interested parties, including those who are incapacitated or otherwise not *sui juris*. RCW 11.106.060-.080.

This Court affirmed the adoption of this rule in *Feature Realty, Inc. v. Kirkpatrick & Lockhart Preston Gates Ellis, LLP*, 161 Wn.2d 214, 224, 164 P.3d 500, 505 (2007).

> Having held against appellant's contention that the court had no jurisdiction of the action, the only question remaining is: Was the order approving the first triennial accounting an appealable order or, in other words, a final judgment as to the matters therein contained? An affirmative answer appears in the Uniform Trustees' Accounting Act. Rem.Supp.1941, § 11548-11, provides, inter alia: '* * * Court approvals or disapprovals of intermediate or final accounts shall be deemed final judgments in so far as the right of appeal is concerned. * *

In re Cooper's Estate, 39 Wn. 2d 407, 411, 235 P.2d 469, 471 (1951). Almost identical language appears in the statute today. "The decree rendered under RCW 11.106.070 shall be deemed final, conclusive, and binding upon all the parties interested including all incompetent, unborn, and unascertained beneficiaries of the trust subject only to the right of appeal under RCW 11.106.090. RCW11.106.080. This is consistent with the RESTATEMENT (SECOND) OF JUDGMENTS § 35 (1982) ("The lack of legal capacity of a person or organization named a party to an action does not prevent application of the rules of *res judicata* to the judgment therein unless the incapacity of the named party had a substantial adverse effect on the adequacy of the protection afforded his interests or the interests of others whom he represents.").

In this case, the Trustee submitted annual reports which were then approved by the trial court. Because the TAA clearly provides that the

reports "shall be deemed final, conclusive, and binding upon all the parties interested including all incompetent, unborn, and unascertained beneficiaries" the Petitioner is precluded from contesting the trial court's prior determination. RCW 11.106.080. And because neither the Petitioner nor any other interested party appealed the Trustee's annual reports that were approved by the trial court, those reports are binding and conclusive. *See Barovic v. Pemberton*, 128 Wn. App. 196, 201-02, 114 P.3d 1230, 1233 (2005) (stating that "the decrees were not just 'final, conclusive, and binding' as to the propriety of Pemberton's actions and disposition of trust funds.")

b. The Court of Appeals' Decision Does Not Raise Significant Constitutional Issues and Does Not Involve an Issue of Substantial Public Interest.

The Court of Appeals' decision does not raise significant constitutional questions or issues of substantial public interest under RAP 13.4(b)(3)-(4). First, the Petitioner argues that the Court of Appeals' decision, "violates the fundamental requirement of due process." Pet. Br. at 12. In support of this argument, the Petitioner relies on the recent case of *Schroeder v. Weighall,* P.3d --, 2014 WL 172665 (2014). That case is inapposite. In *Schroeder*, this Court struck down RCW 4.16.190(2), which excludes medical malpractice

claims by minors from otherwise generally applicable claims tolling provisions for violating Article I, Section 12 of the Washington State Constitution

In this case, the Petitioner does not contend that RCW 11.106.060 and .080 offend Article 1, Section 12. Additionally, the Court of Appeals' decision does not conflict with *Schroeder* because the TAA's claims bar at issue in this case does not single out any class of persons for disparate treatment. Rather, the claims bar of RCW 11.106.080 is all-inclusive, applying to "all the parties interested including all incompetent, unborn, and unascertained beneficiaries." RCW 11.106.080 (emphasis added.) Again, the statute at issue in *Schroeder* affected only minors and failed "to eliminate tolling for other incompetent plaintiffs." *Schroeder* at *5. This Court found no reasonable ground for the statute's singling out of minors, and struck down the statute on that basis. *Id.* at *4-5.

In addition, this Court noted in *Schroeder* that "minors generally do not constitute a semisuspect class" for equal protection purposes, and RCW 11.106.060 does not have a disparate impact on any subclass of minors because the court's power to appoint a guardian ad litem extends to all minors equally. *Id.* The court's

oversight of the trust accounting approval process affords ample protection to all trust beneficiaries, including all minors.

Second, the Petitioner argues that the Court of Appeals' decision raises an issue of substantial public interest. This Court weighed what amounts to "public interest" as follows:

> When determining the requisite degree of public interest, courts should consider (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) 'the likelihood of future recurrence of the question.

In re Mines, 146 Wn.2d 279, 285, 45 P.3d 535 (2002) (internal quotation marks omitted). Where the Court has directly addressed the "substantial public interest" criterion of RAP 13.4(b)(4), it has used these principles. *E.g. State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). This case does not meet these criteria because the Petitioner failed to raise these issues properly in the trial court.

2. The Petitioner Improperly Asks this Court to Consider Issues that Were Not Decided in the Trial Court.

"On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12. Likewise, Washington courts "do not generally consider on appeal issues not briefed or argued in

the trial court." *Associated Gen. Contractors of Wash. v. King County*, 124 Wn.2d 855, 859, 881 P.2d 996 (1994); *Torres v. City of Anacortes*, 97 Wn. App. 64, 80, 981 P.2d 891 (1999).

The Petitioner raises the issue of immunity from liability in support of her argument that review should be accepted. Pet. Br. at 7. Specifically, the Petitioner argues that this Court should accept review of the Court of Appeals' decision because the published opinion "would allow a trustee to immunize itself from claim of breach of fiduciary duties under TEDRA by submitting accounts for trial court approval under the TAA." *Id.* This argument is misplaced. The Petitioner failed to address in the trial court either the issue of judicial imminity or McMenamin's argument that this case requires dismissal under the doctrine as all of the trust disbursements were judicially approved by the trial court. The Petitioner is therefore estopped from raising the argument at this juncture.

Should this Court consider the Petitioner's argument, however, the Petitioner misstates the applicability of the doctrine to this case. Contrary to the Petitioner's assertion, trustees will not become immune from liability by merely submitting accounts for trial court approval under the TAA. Pet. Br. at 7. Before immunity attaches under the doctrine, the trial court must approve the recommended disbursements. That is exactly what happened in this case. The trial court judicially approved all of the

disbursements that were recommended by the TAC and submitted in the annual reports. Once the trial court approved those reports, McMenamin and the other Trustees became immune from liability for carrying out the court's orders in disbursing the trust funds.

B. The Other Issues Raised By McMenamin at the Court of Appeals Also Support a Finding That Affirms Summary Judgment Dismissal of the Petitioner's Claims.

If this Court accepts the Petition for Review, it should consider the following issues that were raised by McMenamin, but not decided by the Court of Appeals, because they are additional bases for affirming summary judgment dismissal of the Petitioner's claims.

1. The Petitioner's Claims Are Barred by the Express Terms of the Trust.

Article IV(h) of the Trust states that:

> The assent to the Trustee's annual statement by the beneficiary or, if the beneficiary is not of full age and legal capacity, by a parent, legally appointed guardian, guardian ad litem, or other personal representative of the beneficiary, or the failure of such person to object to an account statement within 30 days of receipt thereof, shall operate as a full discharge of the Trustee by the beneficiary as to all transactions set for in such annual statement.

CP 493. The Petitioner never objected to any of the annual reports that were submitted within the 30 day time limitation proscribed by the express

terms of the Trust. CP 345. Notably, when the Petitioner reached the age of majority, she was sent a copy of an annual report and petition for approval and she raised no objections. *Id.* The trial court, therefore, approved that annual report as it had with all of the other annual reports. *Id.* Thus, the Petitioner waived her right to final any sort of action against McMenamin and her claim was properly dismissed by the trial court.

2. The Petitioner Failed to Establish a *Prima Facie* Case of Breach of Fiduciary Duty Against McMenamin.

Under Washington law, a trustee owes the highest degree of good faith, care, loyalty, and integrity to a trust beneficiary. *Allard v. Pacific Nat. Bank*, 99 Wn. 2d 394, 563 P.2d 203 (1983)(citing *Esmieu v. Schrag*, 88 Wn. 2d 490, 498, 563 P.2d 203 (1977) and *Monroe v. Winn,* 16 Wn. 2d 497, 508, 133 P.2d 952 (1943). The fiduciary duties of a Trustee to its *cestui que* are similar to those of an attorney to his client:

> A trustee is a fiduciary of the highest order and is required to exercise a high standard of conduct and loyalty in the administration of the trust. The requirement of loyalty and fair dealing in good faith are at the core of every trust instrument, whether specifically stated or not. Trustees must act with good faith, loyalty, fairness, candor and honesty toward the trust beneficiaries. Indeed, under some authority, trustees must act with the utmost good faith, scrupulous good faith, the highest degree of fidelity and good faith, absolute fidelity, or undivided or complete loyalty.

76 AM. JUR. 2d *Trusts* § 349.

In managing the trust assets, a trustee is required to adhere to the prudent investor rule. *In re Estate of Cooper*, 81 Wn. App. 79, 913 P.2d 393 (1996) ("Washington's prudent investor rule requires a trustee to 'exercise the judgment and care under the circumstances then prevailing, which persons of prudence, discretion and intelligence exercise in the management of their own affairs . . ." This exercise of judgment requires, among other things, "consideration to the role that the proposed investment or investment course of action plays within the overall portfolio of assets . . . A court's focus in applying the prudent investor rule is the trustee's conduct, not the end result.") (citing RCW 11.100.020).

Additionally, a trustee has the duty to administer the trust in the interest of the beneficiaries. *Tucker v. Brown*, 20 Wn. 2d 740, 768, 150 P.2d 604 (1944). The trustee further must diversify the trust's assets in order to minimize the risk of large losses. *In re Estate of Cooper*, 81 Wn. App. at 79. .

On appeal, the Petitioner argued that McMenamin breached his fiduciary duty to her as a beneficiary of the Trust because the TAC allowed various trust expenditures that indirectly benefited Anderson's mother, Davey. App. Br. at 8. According to the Petitioner, this amounted to a breach of fiduciary duty under the terms of the Trust which provided

that, "if any distribution from [the Petitioner's] trust fund would bring a direct or indirect benefit to a member of the Trust Advisory Committee, that member was not allowed to discuss or vote upon the proposed distribution." *Id.* Where a TAC member was disqualified from discussing or voting on a proposed distribution, "then trustee Wells Fargo expressly became a member of the Trust Advisory Committee for the purpose of casting the deciding vote." *Id.* What the Petitioner failed to recognize, however, is that is what implicitly occurred in this case. Through its annual reports and recommendations to the trial court, Wells Fargo was in essence the deciding vote on whether certain distributions were to be made from the Trust. In addition, when the TAC was dissolved on July 11, 2003, the Trustee's report was accepted and approved by the trial court. CP 345.

The Petitioner failed to provide any evidence, expert or otherwise, that McMenamin breached the duty of care in managing her Trust, or any evidence, expert or otherwise, that McMenamin's alleged acts or omissions caused her any damages. The Petitioner only provided a letter from R. Duane Wolfe who is a CPA, not an attorney and not a standard of care expert, and that letter did not opine on the breach of any fiduciary duties or any damages caused therefrom. CP 497-504.

McMenamin's decisions with respect to the Trust were discretionary per its express terms.

VI. CONCLUSION

For the aforementioned reasons, this Court should deny the Petition for Review.

RESPECTFULLY SUBMITTED this 28th day of January, 2014.

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Attached for filing with the Clerk's Office, please find Respondents Richard Michael McMenamin, Shari L. McMenamin and McMenamin & McMenamin P.S.' Response to Petition for Review and Certificate of Service.

Case Name: Rachel Marguerite Anderson, Petitioner v. William L.E. Dussault, et al., Respondents
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